

The Meaning of Law in *The Concept of Law*

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Introduction

Herbert Hart, with his book *The Concept of Law*, has been credited with bringing about a renaissance in twentieth century legal philosophy.¹ The theory advanced in that book is generally believed to be an important continuation of the positivist tradition of legal theory, in that Hart asserts 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'.² Employing the methods of analytic philosophy to legal theory, Hart sets out to give us 'a sharpened awareness of words to sharpen our perception of the phenomena',³ but unlike many of his predecessors he is not concerned with a definition of 'law'.⁴ In his words he offers *The Concept of Law* 'as an elucidation of the *concept* of law, rather than a definition of 'law'',⁵ asserting that a single definition of law is impossible.⁶

While 'law' is a word that Hart does not define it is one that he uses and, accordingly, it is a word which must have some meaning within *The Concept of Law*. This meaning may exist only in a 'central set of elements'⁷ but, for his theory to be workable, the meaning of 'law' must, at least, be consistent with his concept of law. This essay examines the meaning of

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¹ P.M.S. Hacker, and J. Raz (eds) *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Clarendon Press, Oxford, 1977), v.

² H.L.A. Hart, *The Concept of Law* (2nd edn), (Clarendon Press, Oxford, 1994), 185-6.

³ J.L. Austin, quoted by Hart *Ibid*, v.

⁴ Hart reminds us of the definitions which have been provided by Llewellyn, Holmes, Gray, Austin and Kelsen, *Ibid*, 1-2.

⁵ Hart, *op. cit.*, 213, emphasis in original.

⁶ *Ibid*, 16.

⁷ *Ibid*, 16.

'law' in *The Concept of Law* by examining Hart's 'rule of recognition' and by developing his theory of interpretation with a focus on his assertion that law and morals are separable. It is argued that the meaning he attributes to the word 'law' must, by virtue of his own theory, include morality as a necessary element. That is, within his theory there exists a necessary connection between law and morality, despite the fact that he denies such a connection.

The Meaning of 'Law' in *The Concept of Law*

Hart, throughout *The Concept of Law*, consistently denies that he is providing a definition of 'law'. In his words, the purpose of *The Concept of Law* is,

not to provide a definition of law... [rather] it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena.⁸

However, a definition of sorts may be extracted from his writings. Sartorius, for example, proposes an oversimplified definition of 'law' in Hartian terms. He says:

I believe that it is fair to say that Professor Hart's one sentence answer to the question 'What is law?' is: 'Law is the union of primary and secondary rules'.⁹

However, Sartorius also observes that the question 'What is law?' admits of a variety of legitimate interpretations and the one for which the above answer is appropriate must be specified. Rather than following through on the suggested interpretations offered by Sartorius, I propose to pursue, not a 'definition' of law, but the 'meaning' of the word 'law' as used in *The Concept of Law*. A brief account of the central elements in Hart's concept will first be in order.

Hart begins *The Concept of Law* by characterising law as a type of rule which exists within a particular system of rules. That is, laws are those rules which come within the framework of primary and secondary rules.¹⁰

⁸ *Ibid*, 17. See also 213 where he states that 'this book is offered as an elucidation of the *concept* of law, rather than a definition of law' (emphasis in original).

⁹ R. Sartorius, "Hart's Concept of Law", in R.S. Summers (ed.) *More Essays in Legal Philosophy*, (University of California Press, Berkeley, 1971) at 138.

¹⁰ Hart does not, however, say what a rule is. Rather 'he gives a detailed and elaborate account of what it is for a rule to exist. ...the specification of

Primary rules are those which ‘impose duties’¹¹ while secondary rules are those which ‘specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined’.¹² The purpose of the secondary rules is to remedy the defects of uncertainty, staticity and inefficiency which are found in a system consisting only of primary rules.¹³ With the introduction of secondary rules the system moves from being a pre-legal to a legal system, and by this move ‘the contrast between legal and other rules hardens into something definite’.¹⁴ Of the secondary rules which are proposed by Hart¹⁵ it is the rule of recognition which has precedence, as it is the rule which enables laws of the system to be identified and applied, and thereby to be distinguished from other kinds of rules. Put another way, a rule is a law when it is ‘recognised’ by the rule of recognition and it is this recognition which grants a rule the status of law. However, his elucidation is richer than a simple union of primary and secondary rules. As he states:

‘The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate... elements of a different character’.¹⁶

The two ‘elements of a different character’ which Hart accommodates is a theory of interpretation and the question of law and morality and both of these elements must be taken in to account in order to assess the meaning that he attributes to law. However, a preliminary examination of the rule of recognition serves to highlight a potential difficulty where the rule of recognition is found to contain moral criteria. Following this examination, Hart’s position with respect to interpretation will be outlined and the element of morality will then be explored further. The basic contradiction that will appear is that Hart’s theory of interpretation must result in law having a moral dimension, and, accordingly, that there is a necessary connection between law and morality. If this can be proved then Hart

existence conditions of rules is in terms of complex social facts, of patterns of behaviour and response, critical attitudes and dispositions, characteristic reasons and justifications’ (Hacker and Raz *op. cit.*, 11).

¹¹ Hart, *op. cit.*, 81.

¹² *Ibid*, 94. Note, however, that earlier in his book Hart had explained secondary rules simply as those which ‘confer powers, public or private’, 81. This shift is explored by M. Martin, *The Legal Philosophy of H.L.A. Hart: A Critical Appraisal*, (Temple University Press, Philadelphia, 1987), 28-32, though it is not important for present purposes.

¹³ Hart, *op. cit.*, 91-98.

¹⁴ *Ibid*, 170.

¹⁵ These being rules of recognition, change and adjudication. *Ibid*, 94-97.

¹⁶ *Ibid*, 99.

cannot consistently maintain his claim to positivism.

Tensions within the Rule of Recognition

When Hart uses the word 'law' we can, at least at face value, take him to be excluding considerations of morality. Though he concedes that morality has profoundly influenced the development of law¹⁷ he denies a necessary connection. However, a tension that works against this separation of law and morality can be found by focussing on Hart's rule of recognition, the most important of his secondary rules. For Hart, the rule of recognition is intended to remedy uncertainty by 'specify[ing] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts'.¹⁸ That is, the rule of recognition allows us to be certain about which rules are included within the legal system and which are not and it does this 'by reference to some general characteristic possessed by the primary rules'.¹⁹ While Hart does suggest a possible English rule of recognition, he is reticent to specify the exact content of such a rule finding rather that 'the rule of recognition is [generally] not stated, but its existence is *shown* in the way in which particular rules are identified...'.²⁰ This existence must be sought in the 'normally concordant, practice of the courts, officials, and private persons [who] identify... law by reference to certain criteria'.²¹

The tension arises for Hart where morality is found to be an element of the rule of recognition. That is, where morality is an element of the rule of recognition, then morality will be subsumed as an integral and normative aspect of the legal system and this results in a fusion, not a separation, of law and morality. In determining the rule of recognition Hart obliges us to undertake an empirical examination by referring us to what is shown by practice and it seems reasonable to focus this examination on courts as, although subject to legislation in a Westminster system, courts retain a central role in the legal system. A case then that illustrates the tension for Hart's theory is that of *R v R* (*rape: marital exemption*).²²

R v R involved an appeal to the House of Lords on the legal question of whether a husband could be criminally liable for raping his wife. Following matrimonial difficulties the appellant's wife left the matrimonial

¹⁷ *Ibid*, 185-186.

¹⁸ *Ibid*, 94.

¹⁹ *Ibid*, 95.

²⁰ *Ibid*, 101, emphasis in original.

²¹ *Ibid*, 110.

²² [1991] 4 All ER 481.

home to live with her parents. Some weeks later, and before divorce proceedings had been commenced, the appellant entered his parents-in-law's home by force and proceeded to physically and sexually assault his wife. He admitted responsibility to the police and was charged with both rape and assault occasioning actual bodily harm.

After an historical survey of the law in issue the House of Lords determined that the rule that a husband could not be found guilty of raping his wife was an 'accurate statement of the common law of England'.²³ Lord Keith found it unnecessary to discuss the rationale of this rule in depth, but noted that the rule was based on the understanding that in marriage a wife could not retract her consent to sexual intercourse and that the rule 'reflected the state of affairs... at the time it was enunciated'.²⁴ While he found that some exceptions to this rule had been established in the more recent cases of this century, the real question for him was whether the rule was applicable at all as it did not reflect modern attitudes toward marriage. In his words, 'one of the most important changes [with respect to marriage] is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband'.²⁵ Having then clearly recognised an established rule of the common law, being that a husband cannot be criminally liable for 'raping' his wife, Lord Keith finds it wanting. He then proceeds on the basis that the 'common law is... capable of evolving in the light of changing social, economic and cultural developments'²⁶ and, after a review of the relevant cases, concludes that '[o]n grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times'.²⁷

The question for Hart is to ask what 'criterion' was used to determine that an established rule of the common law was no longer valid. Lord Keith's judgment does not deal explicitly with considerations of morality,²⁸ preferring instead to speak of 'modern times'. Yet it is clear from Lord Keith's judgment that morality is being discussed and that it was for moral reasons that the rule was rejected as forming part of the current law of England. If then, the rule of recognition allows us to 'identify... law by reference to certain criteria', it is difficult to conclude otherwise than that

²³ at 483 per Lord Keith of Kinkel. Lord Keith of Kinkel delivered the only judgement of the court. Lord Brandon of Oakbrook, Lord Griffiths, Lord Ackner, and Lord Lowry simply concurred with Lord Keith's judgement.

²⁴ at 483.

²⁵ at 484.

²⁶ at 483.

²⁷ at 488.

²⁸ Lord Keith's failure to draw clear attention to the moral nature of his considerations can, perhaps, be attributed to the modern tendency to marginalise moral concerns.

morality forms part of the English rule of recognition. Of course Hart would be entitled to respond that proof of morality in the English rule of recognition does not damage his argument. On the contrary, it may be seen as affirming one of the very points that he endeavoured to make. Hart is willing to acknowledge that morality exercises a strong influence over the development of law, but his point is that 'it does not follow... that the criteria of legal validity of particular laws used in a legal system *must* include, tacitly if not explicitly, a reference to morality or justice'.²⁹ Having drawn upon the distinction between is and ought, his response to *R v R* may, with all consistency, simply be that proof of the existence of morality in the English legal system does not establish that there is a necessary connection for legal systems in general. However, while he may be granted this, *R v R* seems equally to suggest that there most likely is a necessary connection. It is, after all, a little difficult to envisage a legal system that would not respond in a similar fashion in the same kind of circumstances. It is also difficult to see how the common law could develop satisfactorily without reference to notions of morality capable of reflecting 'modern times'. Some may prefer to see *R v R* as an example of judicial legislation, but this could only be maintained from an impoverished perspective of the legitimate role of the courts. And such a view, followed with consistency, would either confine the common law to the dungeons of history or increase the workload of an already burdened legislature. Perhaps both may even result. In any case, there exists a further issue with the rule of recognition that may be dealt with briefly.

The rule of recognition is affected by the penumbra of uncertainty (see below), so that when a court decides a penumbral case involving the rule of recognition, the court 'will have made determinate at [that] point the ultimate rule by which valid law is identified'.³⁰ A further problem that emerges for Hart with this concession is that if the rule of recognition has a penumbra of uncertainty which can then be made certain by reference to social aims and morality, then it is reasonable to conclude that social aims and morality will become part of the rule of recognition. And unless it is possible to envisage a rule of recognition with no possible penumbra, it seems likely that this will result in a necessary connection between law and morality.³¹ Moreover, if the rule of recognition has a penumbra of uncertainty in which social aims and morality may operate then social aims and morality, by definition, will permeate the entire legal system. While this

²⁹ Hart, *op. cit.*, 185, emphasis added.

³⁰ *Ibid.*, 152.

³¹ The alternative possibility would be to establish that morality is something that need not be used in penumbral cases at all. However, given the pervasive role of morality in society (even societies that tend to deny the legitimacy of moral consideration), this possibility is quite unlikely.

may merely be what Hart is willing to concede as a relationship between law and morals, it seems more likely that the consequence will be a *necessary* relationship.

Having then noted the tensions that arise as a result of the relationship between morality and the rule of recognition we need to continue with a more systematic appraisal of his theory taking into account the elements of interpretation and morality.

The Interpretation of Law and the Separation of Law and Morals

Hart in *The Concept of Law* outlines a theory of interpretation which, borrowing from Waismann,³² is based on the ‘open texture’ of language.³³ Despite a suggestion that this borrowing is inappropriate³⁴ (a suggestion which remains outside the scope of this essay), the ‘open texture’ of language remains central to Hart’s theory of interpretation. It is central as Hart employs the notion of ‘open texture’ in an attempt to plot the middle ground between formalism and rule-scepticism,³⁵ though in my view he fails in this attempt.

The basic idea involved in the open texture of rules is that all rules have a both a ‘core of settled meaning’ and a ‘penumbra of uncertainty’.³⁶ This duality arises from the fact that laws are necessarily expressed in language and it is compounded by the fact that generality is a necessary feature of rules. Thus for each law ‘there will be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable... but there will also be cases where it is not clear whether they apply or not’.³⁷ What makes plain cases plain is that they are ‘familiar ones... where there is general agreement in judgments as to the applicability

³² B. Bix, *Law, Language and Legal Determinacy*, (Clarendon Press, Oxford, 1993), 7.

³³ Hart, *op. cit.*, 124-136.

³⁴ G.P. Baker, “Defeasibility and Meaning”, in Hacker, and Raz, *op. cit.*, 26-57, 37 n 46. Baker states that ‘the notion of open texture makes sense only within a particular form of semantic theory... As a result it might well be impossible for Hart to incorporate it into his philosophy of law’ (*ibid.*). However, Baker does not expand on this suggestion to identify the exact incompatibility.

³⁵ Hart, *op. cit.*, 124-154. Speaking of formalism and rule-scepticism, he states that ‘the truth lies between them’, 147.

³⁶ H.L.A. Hart, “Positivism and the Separation of Law and Morals”, *Essays in Jurisprudence and Philosophy*, (Clarendon Press, Oxford, 1983), 49-87, 63-64. Also Hart, *The Concept of Law*, 124-136.

³⁷ *Ibid.*, 126.

of the classifying terms'.³⁸ Thus the distinction between the two is based on consensus regarding the use of language, a point we will come back to later.

The 'open texture' of rules becomes particularly relevant in the borderline cases, where either the particular facts have not been envisaged, or where the aim of the law is indeterminate. In these borderline cases the penumbra of uncertainty operates and it is up to the adjudicator to 'choos[e] between the competing interests in the way which best satisfies us'³⁹ and in making this decision the adjudicator may make 'reference to social aims' and morality.⁴⁰ In Hart's words;

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.⁴¹

By thus striking a balance in cases which are in the penumbra of uncertainty the courts fulfil a rule-producing, or a legislative, function. This penumbra of uncertainty affects even the rule of recognition. In brief, Hart's theory of interpretation is that in plain cases courts must decide in accordance with settled meaning, but in penumbral cases they may exercise a legislative function by having recourse to 'non-legal' material. The difficulty, however, involves the question of the line which separates the plain case and the penumbral case, and it is here that morality comes into the equation.

The clearest place in which Hart deals with this line drawing aspect of his theory of interpretation is in his essay titled "Positivism and the Separation of Law and Morals"⁴² and, as the title suggests, it is in the context of law and morality that he discusses this line drawing aspect of his theory. As to the question of who draws the line, he simply assumes that judges are the appropriate persons without arguing for the case or recognising that the answer to this question involves the allocation of power within a political system.⁴³

After considering the permissible use of social aims and morality in interpreting (or developing) law, he poses the critical question whether it

³⁸ *Ibid*, 126.

³⁹ *Ibid*, 129.

⁴⁰ Hart, "Positivism and the Separation of Law and Morals", 71.

⁴¹ Hart, *op. cit.*, 135.

⁴² Hart, *Essays in Jurisprudence and Philosophy*, 49-87. The essay was originally published as "Positivism and the Separation of Law and Morals", (1958) 71 (4) *Harvard Law Review*, 593-629.

⁴³ F. Schauer, "Formalism", (1988) 97 *Yale Law Journal* 509-548, 543. Also Bix, *op. cit.*, 4.

would be better simply to drop the ‘utilitarian distinction between what the law is and what it ought to be’,⁴⁴ that is, to incorporate morality as law. But, having posed the question, he quickly rejects the ‘invitation’ for two reasons. Firstly, to do so would introduce unnecessary mystery into the legal process. Secondly, without a ‘hard core of settled meaning’ being recognised as law ‘the notion of rules controlling court’s decisions would be senseless’.⁴⁵ Presumably he takes this position ward off the encroachment of rule scepticism.

Thus, within the framework of primary and secondary rules, morals or social aims may only be used in penumbral cases and what follows is that once a rule is ‘recognised’ as law, then no recourse may be had to moral principles for the purpose of interpreting that law. That is, the core meaning of a rule must be determined from the ‘plain’ meaning of the language of the rule itself and this must then be applied without recourse to any non-legal source of principle. Morality and social aims are simply excluded from the process of deriving plain meaning. Hart asserts this very strongly in the following rhetoric;

...to soften the distinction, to assert mysteriously that there is some fused identity between law as it is and as it ought to be, is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing inconsistent with *all* questions being open to reconsideration in the light of social policy.⁴⁶

Accordingly, in the context of his discussion of formalism and rule scepticism in *The Context of Law*, it appears reasonable to read him as saying that the plain meaning must first apply, but if a plain meaning is not present in the words themselves, then the judge may have recourse to non-legal principles (though of course moral principles may always be expressly included as part of the law⁴⁷). On this basis we can conclude that morality is never to be used in determining the ‘plain’ meaning of a rule. This conclusion, although consistent with Hart’s main thesis, gives rise to further difficulties which are explored later where it will be argued that morality must be a constitutive element of plain meaning. However, there exists, within *The Concept of Law*, hints of another possible approach to interpretation which is not consistent with the conclusion just reached and which is a source of ambiguity within his theory of interpretation.

⁴⁴ Hart, “Positivism and the Separation of Law and Morals”, 71.

⁴⁵ *Ibid*, 71.

⁴⁶ *Ibid*, 71-72, italics in original.

⁴⁷ *Ibid*, 54-55. Hart notes that this was also the position of Bentham and Bentham’s followers.

In a number of passages in *The Concept of Law* Hart appears to allow judges the scope for determining law with reference to morality. The following passage makes this suggestion quite clearly;

Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or 'mechanical' deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles.⁴⁸

Thus he appears to allow that a judge's choice between what is 'core' and what is 'penumbral' may be guided by notions of justice and morality. However, the reference to both justice and morality breaks down the method of interpretation outlined above by incorporating morality directly into the process of deriving the 'plain' meaning of law. If a judge determined the 'plain' meaning of laws by interpreting them so as not to offend 'settled moral principles' then morality automatically becomes an aspect of law (this will become more apparent in the consideration of *Riggs v Palmer* and *R v Registrar General, ex parte Smith* below). Thus the reference to morality breaks down the distinction between law and morality explicitly. The reference to justice does likewise, though in a more subtle way.

For Hart, justice constitutes one segment of morality, with morality performing an important function within justice.⁴⁹ While he notes a number of different types of justice, his core notion of justice is comprised of two different aspects. The principle of 'treat like cases alike' and 'a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different'.⁵⁰ It is in this second aspect that, according to Hart, the morality of a community has specific input. Speaking of a hypothetical community in which Greeks are allowed to assault Barbarians, but Barbarians are not allowed to assault Greeks, Hart states that 'the law would only be *just* if it reflected this difference...'.⁵¹ Thus for a law to be just it must reflect the morality of a given community, even though that

⁴⁸ Hart, *The Concept of Law*, 204.

⁴⁹ *Ibid*, 167.

⁵⁰ *Ibid*, 160.

⁵¹ *Ibid*, 165, emphasis added. Here we also have a further possible conflict between his statement that it is the morality of the community which is important, and his assumption, referred to above, that it is the judge's consensus regarding the use of language which is important. It is a common wisdom (which may not be true) that judges are not typically in touch with the community.

morality may be repugnant to a western liberal mind. By thus allowing judges to assess the justice of a law in the process of interpretation, Hart again breaks down the distinction between law and morality.

Thus this second approach to interpretation, though less explicit than the first, effectively allows judges recourse to moral principles when deciding what is core and penumbral. That is, it breaks down the distinction by allowing judges to interpret laws from a moral perspective and to consider valid and applicable only those laws which are morally justifiable.⁵² This, however, brings into question his positivist assertion that law and morals are separate and, more specifically, calls into question his rejection of the invitation to include as law moral principles (see above). If a case is penumbral then it is clear that Hart will allow a judge recourse to moral principles in order to reach a decision. However, if judges were also able to employ moral principles in determining whether a case was penumbral, then it would seem more reasonable to consider that morality (at least in some form) is part of the law to start with. To do otherwise is to say that while morality is not part of the law, it is permissible to allow the law to be interpreted from a moral viewpoint and if from that viewpoint the law is defective then morality may be used explicitly. This statement is nonsense as it confirms what it sets out negating. Surely it is the separation of law and morals, rather than the explicit inclusion of morality in law, that is more prone to the introduction of unnecessary mystification into the legal process. On this second approach to interpretation Hart ceases to be a positivist.

Of the two approaches, however, it is clearly the first that it is more consistent with the general tenor of Hart's writings and it is the first which we will follow through with greater rigour by demonstrating its application to the cases of *Riggs v Palmer*⁵³ and *R v Registrar General, ex parte Smith*.⁵⁴ An analysis of these cases, using Hart's theory of interpretation, will prove instructive of not only Hart's theory of interpretation, but also of the meaning which he attributes to 'law'.

***Riggs v Palmer* and *R v Registrar General, ex parte Smith*: Hard Cases?**

The basic facts of *Riggs v Palmer* are well known due to discussion of the case by Dworkin.⁵⁵ In brief, Elmer, who had murdered his grandfather, sought to enforce his grandfather's will which apparently left his

⁵² See the discussion of *R v R* above.

⁵³ 115 NY 506, 22 NE 188 (1889).

⁵⁴ [1991] 2 QB 393

⁵⁵ R. Dworkin, *Law's Empire*, (Fontana Press, London, 1986), 15-20.

grandfather's estate to Elmer. It was clear that all the formal requirements of the will were present and that the will was, *prima facie*, valid. In literal terms the Act had nothing to say about persons named as beneficiaries who had murdered the testator. The question for Hart is whether, on his stronger approach to interpretation outlined above, this is a clear case or whether it is a penumbral case.

On the stronger approach to interpretation, Hart asserts that there is a distinction between clear and penumbral cases and only in the latter instances can questions of morality be considered relevant. Questions of morality cannot be introduced in order to determine whether a case is penumbral or not as this would be akin to making 'all questions... open to reconsideration in the light of social policy'.⁵⁶ The applicable law must then either be absent or unclear in order for morality to become relevant. In this sense Bix, when discussing *Riggs v Palmer*, states;

There was no difficulty about what the words of the statute meant; there was only an unease about the outcome the words seemed to command in that particular case, which would have allowed someone to benefit from a murder he had committed.⁵⁷

What may make *Riggs v Palmer* appear to be a penumbral case in the Hartian sense is that the relevant wills act was silent on the question of whether murderers were able to inherit under a will. While, in this sense, the case may appear to be penumbral, silence does not, of itself, indicate a penumbral case. In addition to being silent about murderers inheriting, it is likely that, in a literal sense, the wills act was also silent on the question of whether or not persons who wear red jumpers should be allowed to inherit. Clearly the silence about murderers does not create a penumbral case for Hart. Murderers are still people (even though some of their social rights are legitimately curtailed) and the only difference between the silence on murderers and those wearing red jumpers is that the former involves a question of morality, whereas the latter does not. For Hart, then, the question of allowing a wrong doer to benefit from a wrong is, prior to the question being decided in a court of law, or prior to a relevant enactment by Parliament, clearly one that belongs to morality and is, accordingly, outside the realms of law. To consider the case penumbral on moral grounds would be to clearly introduce moral principles prior to the case being found to be penumbral and this, on the stronger interpretation of Hart's theory of interpretation, is impermissible.

What we then appear to have in *Riggs v Palmer* is a valid will which names Elmer as the beneficiary. Being thus named Elmer should be entitled

⁵⁶ Hart, "Positivism and the Separation of Law and Morals", 72.

⁵⁷ Bix, *op. cit.*, 5.

to inherit under the will and, as noted above, the only objection which can be presented arises from the realms of morality. For Hart, then, *Riggs v Palmer* is not a hard case. The law has a 'plain' meaning and, under that plain meaning, Elmer should inherit.

This, however, is not to say that Hart would have agreed with the result on moral grounds. Rather, I suspect that Hart would happily present this case as one of the great benefits of legal positivism, in that we can clearly see the distinction between what is and what ought to be law. For Hart this would be an area of law ripe for reform, but *Riggs v Palmer* would not be a difficult case to decide.

On the second approach to interpretation which is outlined above, it appears clear that in order to escape an injustice or to avoid offending settled moral principles, the judge would simply decide that the case was penumbral and accordingly would decide the case in accordance with the settled moral principle that a person should not benefit from a wrong committed by themselves. But Hart cannot allow this without offending his separation between law and morality, though, in fact, this second interpretation appears more consistent with what would, and what actually did, happen. That this second approach to interpretation is more realistic is also supported by Schauer.⁵⁸

In offering a qualified defence of formalism Schauer discusses a case which involved the clear application of a statute where that application would have offended ordinary notions of justice.⁵⁹ In that case the plaintiff was able to rely an obscure precedent. However, Schauer is confident that, even if the precedent had not existed, no American judge would have raised an objection to the injustice being averted simply by overriding the statute, even though the statute apparently had a very clear meaning and was clearly applicable.⁶⁰ And though English judges are commonly thought to be more formalistic than American judges, it is still difficult to accept that any English court would have allowed Elmer to inherit his grandfather's estate. Indeed in *Reg v Chief National Insurance Commissioner, ex parte Conner*⁶¹ it was held that Mrs Connor was unable to collect the widows pension on the ground that she had unlawfully killed her husband. An even better English example can be found in the case of *R v Registrar General, ex parte Smith*.⁶²

In *R v Registrar General, ex parte Smith* the English Court of Appeal denied the claimant, Charles Smith, what appeared to be a clear and

⁵⁸ Schauer, *op. cit.*

⁵⁹ *Ibid*, 515-517.

⁶⁰ *Ibid*, 518.

⁶¹ [1981] QB 758.

⁶² [1991] 2 QB 393

absolute statutory right to his adoption records. Charles Smith, while serving a life sentence for murder, stabbed and strangled his cell mate to death whilst under the illusion that his cell mate was his foster mother. Smith had been adopted at the age of nine weeks and from the age of 11 years had spent most of his time in institutions. After his second conviction he was held in detention under the English *Mental Health Act*. In March 1987, whilst still a resident of a psychiatric hospital, Smith, through his solicitors, made an application under s51 of the English *Adoption Act 1976* for information which would allow him to determine the identity of his birth mother. After obtaining independent medical reports the Registrar General refused to give Smith access to his adoption records, even though there was nothing to suggest that Smith had any particular ill intent against his birth mother. Smith sought judicial review. The Queens Bench Divisional Court supported the Registrar General's decision and Smith appealed to the Court of Appeal.

The basic thrust of the appeal was that a clear statutory right existed for access to the adoption records and that 'public policy is not a substitute for statutory interpretation'.⁶³ Section 51(1) of the *Adoption Act 1976* stated the following;

...the Registrar General shall on an application made in the prescribed manner by an adopted person a record of whose birth is kept by the Registrar General and who has attained the age of 18 years supply to that person on payment of the prescribed fee (if any) such information as is necessary to enable that person to obtain a certified copy of the record of his birth.

Prior to the case there did exist established grounds of public policy which disallowed a person from benefiting from a past wrong, but there were no precedents which were able to be cited in support of the Registrar General's refusal in this case. There had been no wrong committed in relation to s51(1) and there was no direct evidence to suggest that Smith intended to do wrong. This case was one of first instance.

It may be tempting to say, in Hartian terms, that a gap existed and that reference to morality or social policy is justified to fill this gap. However, this would be to judge the case penumbral using criteria other than the expressed words of the applicable law. Smith was an adopted person within the provisions of s51(1) (medical evidence and legal opinion was that he still possessed legal capacity), he was over the age of 18 years, and he had paid the prescribed fee. Using the 'plain' words of the statute Smith should have been granted access to his adoption records. The uneasiness which attaches itself to this result is one arising from the realms

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at 400.

of morality and public policy, neither of which had been previously recognised in a legal principle. The Court of Appeal, however, firmly rejected this approach to interpretation.

In words which reflected the judgments of the other two sitting judges, McCowan LJ stated that ‘the legislature must be presumed, unless the contrary intention appears, not to have intended to imperil the welfare of the state or its inhabitants’.⁶⁴ The court held that it was prepared to hold such a presumption even in situations where a statute is worded in apparently absolute terms. Further the court was quite prepared to hold that this presumption applied to statutes which were enacted before this presumption being recognised as a legal presumption. We will return to the significance of this approach later. For the present, however, it is sufficient to note that, despite evidence that Smith did not hold ill intentions, the court found a significant risk to the mother and very firmly rejected Smith’s application.⁶⁵

The Duty to Obey the Law and the Position of a Judge

If we follow the first approach to interpretation above then Hart’s position is reasonably clear, though, despite his protests, he does become formalistic. There is, however, yet a further strand in Hart which further complicates the above analysis. There are at least two places in Hart’s writings where this strand may be identified.

What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.⁶⁶

If with the Utilitarians we speak plainly, we say that

⁶⁴ at 405.

⁶⁵ The case of *Smith* may be contrasted with a recent Victorian freedom of information case that is noted by Justice P.W. Young in “Current Issues” (1999) 73(3) *ALJ* 160-161. In that case a person convicted of a triple murder was granted access to names of forty nurses who may have been able to support an alibi defence. Presumably this was because the relevant Act appeared to give an absolute right to applicants who fulfilled the requirements of the Act. Young, however, seems to consider the result to be a mistake and attributes it to the hospital’s poor legal representation.

⁶⁶ Hart, *The Concept of Law*, 210.

laws may be but too evil to be obeyed.⁶⁷

Apparently Hart intends this question of obedience to be one for ordinary citizens who are considering their civic duties. However, these quotes introduce a problem for Hart in the above cases (and, potentially, in many other cases). Where a matter is brought before a court for a determination, then the question which must be asked is whether the possibility of 'disobedience' exists for the judge as well the ordinary person. Perhaps it could be rightly said that in *Riggs v Palmer* the law requiring Elmer to inherit under the will would, on the particular facts, be 'too evil to be obeyed' or that s51(1) of the English *Adoption Act* in Smith's case would be 'too evil to be obeyed'. But if Hart's theory enables a judge to decide this, then a further anomaly appears in Hart's theory. The anomaly arises because, in a system which maintains a separation between law and morality, a judge would be given the power to disobey an evil law when the question of whether something is evil or not is intrinsically a moral question. Further complications also arise when it is considered that a judge's 'disobedience' may become law by operation of precedent.

Hart may respond that it does not matter if one judge deviates from the rule. What is important for Hart is that a majority of judges follow the rule. Thus he states that;

To say at any given time that there is a rule requiring judges to accept as law Acts of Parliament or Acts of Congress entails first, that there is general compliance with this requirement and that deviation or repudiation on the part of individual judges is rare; secondly, that when or if it occurs it is or would be treated by a preponderant majority as a subject of serious criticism and as wrong...⁶⁸

However, it is likely that, in cases like *Riggs v Palmer* and *R v Registrar General, ex parte Smith*, the preponderant majority of judges would not give unconditional allegiance to the 'clear' rule and neither would they give serious criticism or consider the cases to be wrongly decided. Thus allowing judges to disobey the 'immoral' laws challenges the distinction between law and morals which Hart wishes to maintain and creates a awkward tension for judges seeking to apply the law. That judges may even be criminally liable for failing to disobey immoral laws is recognised by Moens in his assessment of the East German borderguard cases.⁶⁹

⁶⁷ Hart, "Positivism and the Separation of Law and Morals", 77.

⁶⁸ Hart, *The Concept of Law*, 146.

⁶⁹ G. Moens, "The German Borderguard Cases: Natural Law and the Duty to Disobey Immoral Laws", in S. Ratnapala and G.A. Moens, *Jurisprudence of Liberty*, (Butterworths, Sydney, 1996), 146-164.

In the East German borderguard cases the German Bundesgerichtshof (BGH)⁷⁰ and the District Court of Berlin⁷¹ both rested their decisions on ‘the assumption that people possess a critical moral and legal vision which enables them to readily recognise the ‘immoral laws’ that higher law requires them to disobey’.⁷² The BGH also stated that ‘not every statute is law’.⁷³ These two cases both involved the prosecution of East German guards who were involved in the fatal shootings of people attempting to cross the border from East to West Germany. The guards were tried under East German law which, under the criminal code, provided a defence to soldiers acting under orders unless the ‘order constituted a blatant violation of international or criminal law or it was obvious that it was contrary to higher moral norms’.⁷⁴ The guards were expected by the court to have disobeyed the ‘shoot to kill’ order and, accordingly, the ones who did not were found guilty. In this context, Moens notes that even though the guards were found liable under existing national law, ‘judges who imposed harsh sentences on those who were unsuccessful in their attempts to cross the border’ may also be liable to criminal prosecution under a similar chain of reasoning using the international standard of crimes against humanity.⁷⁵

It is unclear how Hart would deal with this. On the one hand his method of interpretation would require the judge to have no recourse to moral principles, while on the other hand he would enjoin the judges to do justice. The position of the judge is thus particularly ambiguous, being placed between the idea that ‘morally iniquitous provisions may be valid as legal rules or principles’⁷⁶ and the principle that ‘laws may be but too evil to be obeyed’.⁷⁷ Either way the judge is left open to sanctions. Neither would Hart’s well known solution to the Nazi dilemma of retrospective legislation be of any assistance to a judge in this situation. A judge simply must take morality into the question at the time when the judge is required to determine the law and make a particular decision.

Implications for the Meaning of ‘Law’

Sartorius suggests that for Hart law could be defined ‘as the union of

⁷⁰ B.G.H. Urt 3.11.1992, *Neue Juristische Wochenschrift*, 1993, No 2. Cited in Moens, *Ibid*, 141.

⁷¹ L.G. Berlin Urt 20.1.1992, *Neue Justiz*, 1992, 269-273. Cited Moens, *Ibid*.

⁷² Moens, *op. cit.*, 157.

⁷³ *Ibid*, 156.

⁷⁴ *Ibid*, 149.

⁷⁵ *Ibid*, 157.

⁷⁶ Hart, *The Concept of Law*, 268.

⁷⁷ Hart, “Positivism and the Separation of Law and Morals”, 77.

primary and secondary rules',⁷⁸ but recognises that other elements must also be taken into account. Hart's theory incorporates two such elements, morality (or the absence thereof) and interpretation. The stronger interpretation of Hart appears to force him, despite his protests, into formalism. The second interpretation strongly pressures Hart to abandon his positivistic assertions. But even the formalism which finds its way into *The Concept of Law* cannot avoid a necessary connection with morality, and it is this connection which we must now explore.

The issue to be pursued is whether Hart sees 'law' as being constituted by the expressed words of a rule, or whether he sees the words of a rule as merely an expression of law. That is, the question is whether Hart believes that 'law' can be distinguished from the language in which it is written. If law is simply identified as rules existing within the framework of primary and secondary rules, and if those rules are considered to have a core meaning which must be determined without reference to social aims or morality then the words of any particular rule must be constitutive of the law. On the other hand, if we consider that the same law may be expressed in different words then we must conclude that law can be distinguished from the words in which it is expressed and, for any particular law, we would be entitled to search for further elements of that law. This would not be to say that the 'law' exists out there somewhere, but rather it would allow each rule to be read as not expressing a totality of the law on that subject matter. In practice this would allow the interpreter to look to the purpose or intention of the rule in question. Such an approach would open a rule, which appeared to be clearly expressed, to arguments of overriding principle. As Schauer notes the dispute between these two meanings of 'law' has a long and distinguished history.⁷⁹

Consistency with the preponderance of Hart's legal theory leads us to conclude that Hart would see law as constituted by the words of particular rule. Clearly, though, there is no such thing as a language which is capable of conveying meaning in an absolutely acontextual manner. The minimum context which is required is a common set of language rules between two persons and it is in this sense that Schauer argues that rules can have an acontextual meaning which is capable of delimiting the choice of the decision maker. While he finds that statutes can be 'wrenched from most of the context of their enactment and application and still be read and understood',⁸⁰ he is careful to add that this can only be the case in the short-term. Schauer uses this conclusion to develop his idea of presumptive formalism, where the rule is presumed to apply unless some other norm

⁷⁸ Sartorius, *op. cit.*, "Hart's Concept of Law", 138.

⁷⁹ Schauer, *op. cit.*, 532. See also Dworkin, *op. cit.*, 16-17. Dworkin draws the basic distinction in the context of *Riggs v Palmer*.

⁸⁰ Schauer, *Ibid*, 529.

provides ‘especially exigent reasons’⁸¹ for overriding that rule.

If Schauer is correct in asserting that language can only have an acontextual meaning in the short-term, and it appears reasonable to accept his argument, then Hart is locked into a rather base form of formalism, as Hart’s theory of interpretation does not allow him to escape an unjust application of a rule, nor does it allow for the fact that the meaning of words develop and change over time.

Fish asserts that it is Hart’s belief that plain cases are inherently plain.⁸² In one sense this is not a fair interpretation of Hart, as Hart does concede that the meaning attributed to particular words is a question of consensus or ‘general agreement’.⁸³ Yet it is true that Hart does not appear to take the process by which consensus is reached into account and thereby does seem to attribute an inherent plainness to words. Fish draws our attention to this process, stating that,

a plain case is a case that was once argued; that is, its configurations were once in dispute; at a certain point one characterisation of its meaning and significance—of its rule—was found to be more persuasive than its rivals; and at that point the case became settled... became plain.⁸⁴

Thus the quality of ‘plainness’ is derived by virtue of an interpretative exercise by which meanings of laws, and words, change over time. A plain case is not one that was established at a past point in time, but rather one that has been retrospectively attributed the quality of ‘plainness’. Fish argues that this attribution occurs because it is seen as the best way to justify the present decision.⁸⁵ Hart would presumably say that the quality of ‘plainness’ could be determined from the words themselves. This difference in turn brings us to a further discussion of language and, in particular, Schauer’s qualification of ‘short-term’ to his belief that meaning can be determined acontextually.

Under the consensus mode of determining meaning a word only gains its meaning within a particular community of users and while this meaning may be fixed at a particular point in time it is a meaning which

⁸¹ Schauer, *Ibid*, 547.

⁸² S. Fish, *Doing What Comes Naturally*, (Clarendon Press, Oxford, 1989), 513.

⁸³ Hart, *The Concept of Law*, 126

⁸⁴ Fish, *op. cit.*, 513.

⁸⁵ See also N. MacCormick, *Legal Reasoning and Legal Theory*, (Oxford University Press, Oxford, 1978), 252. MacCormick, in an interpretation of *Donoghue v Stevenson* [1932] AC 562, also lends his consent to this retrospective attribution of plainness.

also may change over time. To be fair, Hart does appear to recognise that meaning is derived from within a particular community when he says;

The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic', are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms.⁸⁶

What Hart does not take into account in his theory is that it is difficult to determine from the words themselves, without reference to broader social and moral contexts, exactly which cases are plain as there are many other factors, other than the literal language of the rule, at work. Bix identifies some of these other factors:

Among the things that can make an apparently clear case unclear, or an apparently hard case easy, are the issues of speaker's intention, dialects and idiolects, context, community practices and assumptions, views about justice, and ideas about rule-application, as well as the issues of vagueness and 'open texture'...⁸⁷

But if these things, particularly 'community practices and assumptions [and] views about justice', are incorporated into the determination of what a rule means then positivism is very quickly left behind. 'Plain' meaning simply cannot be determined without reference, implicit or explicit, to other factors, including morality, all of which Hart has expressly excluded. Moreover, while the 'plain' meaning of language at any particular time may be evident enough at that particular time, it can never really be understood without understanding the process by which that language came to gain its meaning. Aside from the exclusion of context, it is this process aspect of rules that Hart's theory cannot accommodate. By insisting on a separation between law and morals Hart simply cannot explain how the wills act in *Riggs v Palmer* came to exclude Elmer, how the apparently absolute right to adoption records came to be denied to Smith in *R v Registrar General, ex parte Smith*, and nor, for that matter, how the House of Lords in *R v R* came to consider as invalid a previously valid rule of common law. Whilst both Elmer and Smith came within the apparently 'plain' meaning of the respective statutes, this meaning was modified, on moral grounds, to exclude them both. Morality then must be one of the factors which is intrinsic to the process of interpreting law as it is a factor necessarily involved in the attribution of the quality of 'plainness'.

What meaning, then, does *The Concept of Law* attribute to the word

⁸⁶ Hart, *op. cit.*, 126.

⁸⁷ Bix, *op. cit.*, 76.

‘law’? Certainly more is needed than a consideration of primary and secondary rules. Having explored interpretation and morality within *The Concept of Law* we find two possible interpretations of Hart. Firstly, by excluding morality from law we are left with a narrow focus on the words themselves. However, this then leads us to consider moral factors in determining the meaning which those words have developed over time. Alternatively, if we interpret law so as not to offend justice or morality, then morality becomes integral to the question of what is law. Either approach that Hart outlines leaves us with morality as an important factor in the consideration of law and either approach allows us to provide a meaning for Hart’s usage of ‘law’. What is law? Particularly if we remember the tensions within the rule of recognition and the potentially difficult position of a judge, the answer can be stated quite simply:- ‘law’ is the union of primary and secondary rules which accords with the moral claims of a given legal system. For Hart, there is a necessary connection between law and morality.

Conclusion

Using the framework which Hart provides us in *The Concept of Law* we have sought a meaning for the word ‘law’ that is consistent with Hart’s theory. That is, we have sought a meaning for ‘law’ within the context of Hart’s union of primary and secondary rules as fleshed out by a consideration of the two further elements that are incorporated by his theory.

Whilst drawing attention to both the rule of recognition and the position of a judge, we focus particularly on his theory of interpretation and his separation between law and morals. In doing so we find that there are a number of paths open to us, and that, contrary to Hart’s claims, each path leads us to find a necessary relationship between law and morals. If judges may interpret law so as not to offend established principles of justice or moral sentiment, then they have ceased to have recourse solely to ‘legal’ materials and have begun the process of interpreting all law according to moral criteria. This indeed is exactly what the courts did in *R v R*, in *Riggs v Palmer*, and in *R v Registrar General, ex parte Smith*. However, the preponderance of Hart’s theory is not consistent with such an approach—indeed he specifically and categorically rejects it.

The clearer interpretation of Hart is that rules should be interpreted without recourse to morality or justice. Only where such interpretation admits of ambiguity or gaps is morality admitted, and in such situations the judge performs a legislative function by creating appropriate law. This approach creates a tension for the judge who is placed in the position of having to decide according to ‘evil’ law, but it also means that ‘law’ must

mean law as constituted by the words of a rule, and not law as distinguishable from the words which express it.

Hart accepts that rules can have 'plain' acontextual meanings which limit the discretion of judges. However, he does not recognise that this is feasible only in a 'snap-shot' of a legal system. Over time the community which attributes meaning to words can effect changes in the meaning of words and what is 'plain' at one particular time, or to a particular community, is not necessarily 'plain' at another time or to another community. Unfortunately for Hart, morality is an important part of the environment from which, and the process by which, words and rules gain their meaning. With respect to meaning, we can only conclude that within *The Concept of Law* 'law' is word which must have moral content, and preferably a moral content that both removes the tensions from within the rule of recognition and disentangles judges from difficult positions. In pursuit of this meaning we are led to the conclusion that 'law' means the rules within the union of primary and secondary rules that accord with the moral claims of a given legal system. While, then, it remains incontrovertible that Hart's contribution to legal theory brought about a renaissance, the same cannot justifiably be said of his contribution to positivism.