

interpretation. Can it be said that the postwar German courts gave full effect to Nazi laws when they interpreted them by their own standards instead of the quite different standards current during the Nazi regime? Moreover, with statutes of the kind involved, filled as they were with vague

phrases and unrestricted delegations of power, it seems a little out of place to strain over questions of their proper interpretation.

3. *Law and Social Change* (1951), p. 281.

REVIEW AND DISCUSSION QUESTIONS

1. List the ways Rex failed to make law.
2. In what sense has Fuller shown there is an inherent "morality" of law?
3. How might Fuller be said to provide an account of the ideal of the rule of law?
4. How does law differ from mere maintenance of order, according to Fuller?

Grudge Informers and the Rule of Law

H. L. A. Hart

Using the example of people who used Nazi law and power to work out grudges against other citizens, H. L. A. Hart continues the consideration of a range of issues that will occupy us in later sections. These issues include the duty to obey law, the relationship between law and morality, and the ideal of the rule of law. H. L. A. Hart was professor of jurisprudence at Oxford University.

Gustav Radbruch was a German legal philosopher who had shared the "positivist" doctrine [that law and morality are in principle distinct] until the Nazi tyranny. Prior to his recantation of positivism, he 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 its requirements were morally evil or even by showing that the effect of compliance with the law would be more evil than the effect of disobedience. . . .

Radbruch, however, had concluded from the ease with which the Nazi regime had exploited subservience to mere law—or expressed, as he thought, in the "positivist" slogan "law is law"—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 the horrors.

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.

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 . . . The husband was an apparently pursuant not executed but wife was prosecuted offense which we v . . . priving a person of h . . . as a crime under the which had remained enactment. The wife imprisonment was pu . . . hence that she had of appeal to which th the wife was guilty her husband's libert man courts, even th a court for having v the words of the co the sound conscien cent human beings. many cases which h the doctrines of n overthrow of posit ion with this result : of us might applau

REVIEW AND DISCUSSION QUESTIONS

1. Describe the facts of the case.
2. What solution did the court give?
3. Explain why Hart's alternative(s) is/are better.
4. Do you think the court's decision is justified? Explain.

The Problem

Lon Fuller

In the following essay, Lon Fuller discusses the problem of political change. The regime, raises complex questions about the nature and purpose of law.

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— Readings in the Phil of Law —
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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. 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 punish-

ing 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.

REVIEW AND DISCUSSION QUESTIONS

1. Describe the facts relating to the woman accused of being a grudge informer.
2. What solution to the problem does Hart recommend? Why does he recommend it?
3. Explain why Hart thinks that retrospective legislation, whatever its disadvantages, is better than the alternative(s).
4. Do you think that "positivism" was a relevant factor in the German experience, as Radbruch did? Explain.

The Problem of the Grudge Informer

Lon Fuller

In the following essay, Lon Fuller discusses an issue that is often confronted as societies undergo rapid political change. The specific question he poses, whether to prosecute grudge informers from a prior regime, raises complex questions about the meaning and importance of the rule of law and about the nature and purpose of law itself. Lon Fuller was professor of law at Harvard Law School.