The Bellarmine Jug: A Jurisprudential Analysis of Nicholas Hasluck's Novel

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Nicholas Hasluck, who recently retired from the Supreme Court of Western Australia, had a parallel life as a poet, essayist and novelist. His novels often deal with Australian historic events in which legal themes are embedded in the narrative. This article interprets his novel, The Bellarmine Jug, *in the light of one of the most significant jurisprudential debates of the 20th century, that between Professor HLA Hart of Oxford and Professor Lon Fuller, the American political scientist, about the relationship between law and morality. Using the device well-known to law and literature studies, that of metaphor, the article decodes the way in which the novel's narrative is shaped by the conflict between positivist institutional rules and wider considerations of fairness and justice. It concludes by asking whether the conflict between law and morality is significant for today's legal world.*

NICHOLAS HASLUCK: JUDGE AND NOVELIST

When Nicholas Hasluck retired from the Supreme Court of Western Australia on 7 May 2010 the bench and legal profession properly acknowledged him as a highly respected, humane and knowledgeable jurist.[1] This article seeks to recognise his engagement in another field of intellectual endeavour, that of novelist, and his contribution to law and literature.

Over a period spanning more than four decades he has written, in addition to many poems and essays,[2] a number of novels based on significant Australian

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1. See Supreme Court of Western Australia, *Farewell to the Honourable Justice Nicholas Hasluck AM* <http://www.supremecourt.wagov.au/publications/pdf/Hasluck_farewll_transcript_0705 2010.pdf>. See also N Burmeister, 'Judges and Magistrates of Western Australia: Nicholas Hasluck' (2003) 31 *University of Western Australia Law Review* 114.
2. Hasluck's literary commentaries include *The Legal Labyrinth: The Kisch Case and Other Reflections on Law and Literature* (Perth: Freshwater Bay Press, 2003); 'The Liaison between Law and Literature' (2006) 33 *University of Western Australia Law Review* 1.

constitutional and historical events.[3] Subtly intertwined in them, Hasluck has introduced themes of law and jurisprudence. This is evident in one of his earliest novels, *The Bellarmine Jug*.[4] The story alternates in time between the wreck of the Dutch East Indies (VOC) vessel, the *Batavia*, off the Western Australian coast in 1629,[5] and fictitious events at the Grotius Institute, a prestigious international law academic institution at The Hague in the late 1940s, a period when Indonesia under Sukarno was pressing for its independence from its former colonial masters, the Dutch government.

This article is an exercise in speculative jurisprudence. It embarks on a metaphoric study of the novel seeking to discover the extent to which it was influenced by Hasluck's early jurisprudential studies of the fundamental question: 'What is law?'[6] It first identifies Hasluck's novel as a significant contribution to the emerging field of law and literature involving jurisprudential issues. It then traces the underlying strands in the novel and their connection to the philosophy of the great 20th century Oxford legal philosopher, Professor HLA Hart, whose writings Hasluck studied in the 1960s. Underpinning Hart's positivist jurisprudence, classically set forth in his seminal work, *The Concept of Law*,[7] was his grappling with the apparent tension between legal rules as laid down in statute and judicial pronouncements, and morality. Historically the conflict crystallised in the example of German judges who enforced unjust laws during the Nazi era. Hart's contribution regarding the dilemma faced by such judges was to develop a theory of 'recognition' of primary rules by reference to which other rules of law could be authenticated.[8] He pre-figured this in his notable debate in the late 1950s with the major American philosopher, Lon Fuller who represents the other polarity in the Law-Morality controversy.

The article, after exploring ways in which literature can engage jurisprudential themes, draws parallels between the novel's narrative of a student's trial and the

3. These include N Hasluck, *Truant State* (Melbourne: Penguin 1987), about Western Australia during the Secession period in the early 1930s; and *Our Man K* (Melbourne: Penguin 1999), discussed in N Hasluck, 'Reinventing the Kisch Case' (2000) 2 *University of Notre Dame Law Review* 67, about the anti-Nazi, Czech communist journalist Egon Kisch who visited Australia in the 1930s. Attempts to prevent Kisch entering Australia resulted in constitutional litigation: *R v Carter: ex parte Kisch* (1934) 52 CLR 221; *R v Wilson; ex parte Kisch* (1934) 52 CLR 234; and most recently *The Dismissal* (London: Fourth Estate, 2011) dealing with the dismissal of the Whitlam Government in November, 1975.
4. N Hasluck, *The Bellarmine Jug: A Novel* (Melbourne: Penguin Books, 1984)
5. For details, see M Dash, *Batavia's Graveyard* (London: Weidenfeld & Nicholson, 2002). Dutch wrecks have featured strongly in Western Australian legal history: see *Robinson v WA Museum* (1977) 138 CLR 283.
6. This entails related issues including: what is the source of legal authority; why are laws obeyed; and when is a judgment valid?
7. H Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). The 2nd edition, published in 1997, included an Epilogue responding to criticisms of the 1st edition by the American political philosopher, R Dworkin, with commentary by P Bulloch and J Raz.
8. J Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27 *Oxford Journal of Legal Studies* 373.

law-morality contretemps.[9] Does the Hart-Fuller controversy, generated over 50 years ago, still have relevance for our contemporary legal world? This article concludes by delineating the more contemporary aspects of that great debate. It argues that Hasluck's earlier incorporation of its underlying features provides a means of awakening students to fundamental questions about the nature of law, which while refined in contemporary scholarship, still resonant in the dilemmas faced by judges confronted by claims of justice for the individual that conflict with preservation of a stable society.

LITERATURE AS A MEANS OF EXPLORING LEGAL TRUTHS

1. The field of law and literature as an accepted basis for analysis of juriprudential issues

In one sense law and literature exist in discrete territories. Yet they can overlap and interrelate in different ways. That intersection extends from counsel's allusions in argument to Kafka or Shakespeare to the identification of explicit or underlying legal themes in novels. 'Law and literature' as a field of scholarly study is now well established.[10] It is not confined to delineating the various relationships between the two disciplines.[11] Rather it has emerged as a loosely defined discipline engaging topics across a wide spectrum. Judges are not immune from its allure and have made substantial contributions to the expanding literature.[12]

Literature as a basis for legal analysis emerged in the United States as an accepted vehicle for confronting broader issues in philosophy. Among others, G Twaddel in 'A Novel Approach to An Ethics Assignment'[13] advocated using novels to reveal

9. The Hart-Fuller debate can be discerned in the conflicts between the governing body of the Grotius Institute and students opposed to the expulsion of an Australian student, Martin Aveling, for breach of its examination rules. A secondary theme is the sacrifice of an individual to preserve the institution. These aspects are developed below: see pp 398–403. In writing *The Bellarmine Jug* Hasluck also drew upon his studies at the Hague Academy of International Law in 1976 (personal communication with writer, 11 Aug 1997).

10. Studying the relationship commenced in the 1940s and has flourished in the last three decades, initially in American academies and then elsewhere. See R Weisberg, *Poetics and Other Strategies of Law and Literature* (New York: Columbia UP, 1992); I Ward, *Law and Literature: Possibilities and Perspectives* (New York: Cambridge UP, 1995); K Dolin, *A Critical Introduction to Law and Literature* (Cambridge: CUP, 2007).

11. A distinction can be drawn between law *in* literature and law *as* literature: see S Petch, 'Law as Literature?' (1990) 16 *Sydney Studies in English* 121.

12. See RA Posner (US Federal Court of Appeals), *Law and Literature: A Misunderstood Relation* (3rd edn, Massachusetts: Harvard UP, 2009); B Schlink (German judge and professor of jurisprudence) uses themes of legality, justice and guilt in Nazi Germany in *The Reader* (New York: Pantheon Books, 1996), discussed in articles in (2004) 16 *Law and Literature*, pt 2; R French, 'Singers of Songs and Dreamers of Plays' (Speech delivered at the Victorian Bar Association Annual Dinner, Melbourne, 3 Septembeer 2010) mentions many examples of Australian judges using literary flourishes, citing M Meehan, 'The Good, The Bad and the Ugly' Judicial Literary and Australian Cultural Cringe' (1989) 12 *Adelaide Law Review* 431.

13. American Philosophical Association (1996) 90(1) *Newsletter on Computer Use – Law, Medicine, Teaching* 38–40.

ethical problems and principles. Examples include *The Stranger* (Albert Camus), *Bleak House*[14] and *Great Expectations* (Charles Dickens), and *The Grapes of Wrath* (John Steinbeck). Novels such as Dostoyevsky's *Crime and Punishment* deal directly with criminal process, guilt and retribution, as do those by John Gresham.[15] Films can fulfill the same role. *Dirty Harry* featuring Clint Eastwood is a film used in police ethics courses in the United States.[16] One literary creation that succeeded both as novel and film in confronting society with dark issues of racial prejudice and criminal injustice in the American Deep South during the Great Depression is Harper Lee's *To Kill a Mocking Bird*, now celebrating its 50th anniversary.[17] Another notable example employing the motif of a trial is Herman Melville's *Billy Budd*,[18] analysed below.

'Law and literature' therefore offers a useful means of representing legal problems from a fresh perspective and, in the case of *Bellarmine*, putting in issue potential conflicts between theories of justice and actual practical adjudication. By identifying and delineating these underlying themes in novels, students can access new insights in an attractive context that informs their understanding of both law and literature.

2. Metaphor in law

Moving from generalities, the principal objective of this article is to explore how Nicholas Hasluck in *Bellarmine* has illuminated a legal problem through metaphoric allusion. 'Metaphor' here means a literal expression that communicates a meaning involving an analogical relationship between two elements, an expression and its referred, symbolic understanding.[19] As James Murray points out,[20] metaphor involves a cognitive dimension of language that going beyond the literal transcends the purely descriptive. Nevertheless, it is incapable of *fully* representing the metaphoric reality. This quality gives metaphor its paradoxical tension. Meaning is not limited to text. Rather a metaphor provides a *framework* for reflection and enlarged understanding. Since novels mirror complex real-life conflicts illustrating the indeterminacy of life, metaphors establish links between facts and values where language connects truth with a deeper sense of reality. By

14. See K Dolin, 'Law, Literature and Symbolic Revolution: Bleak House' (2007) 12 *Australasian Journal of Victorian Studies* 10.
15. Such as J Grisham, *The Firm* (New York: Random House, 1991); *The Pelican Brief* (New York: Doublebay, 1992).
16. J Kleinig used Dirty Harry films in Police Ethics courses to illustrate conflicts in policing: see J Kleinig, *The Ethics of Policing* (Cambridge: CUP, 1996) 53–62; see also K Klockers, 'The Dirty Harry Problem' in F Elliston & M Feldberg (eds), *Moral Issues in Police Work* (New Jersey: Rowman & Allanheld, 1985) 55–71.
17. The novel about a Southern white lawyer, Atticus Finch, who defends a poor black defendant against a fabricated rape charge, was published in 1960. The film starring Gregory Peck won an Academy Award for best picture of 1962.
18. H Merville, *Billy Budd* (Chicago: CUP, 1962).
19. G Casenave, 'Taking Metaphor Seriously' (1979) 17 *Southern Journal of Philosophy* 19, 20.
20. J Murray, 'Understanding Law as Metaphor' (1984) 34 *Journal of Legal Education* 714, 715.

presenting deeper underlying themes, literature can expose issues of contemporary significance, enhancing our ability to respond to them. Narratives reflecting legal and social conflict can offer insights into the nature of law and new possibilities of better understanding legal issues.

Moreover metaphor, being grounded in the imagination, takes meaning beyond the purely rational.[21] Metaphors challenge our settled views.[22] They make us aware there are not always simple and right answers.[23] By understanding law through literature, we can re-examine the fundamentals of the legal domain. It thereby opens a new methodology of legal instruction.

3. The metaphoric example of *Billy Budd*

For those unfamiliar with metaphoric analysis, Herman Melville's novella *Billy Budd, Sailor* provides an instructive introduction that can be adapted to reveal the nuanced jurisprudential underpinnings of *The Bellarmine Jug.*

Billy Budd deals with a naval court martial and summary execution of a simple sailor who has been unjustly accused of criminal conduct by one Claggart. Having struck and killed his accuser, an officer, in the presence of the ship's commander, Captain Vere, Billy is consigned to an immediate drum-head court-martial. As Lynn sums up:

> Falsely accused of treasonous activity by the poisonously jealous Claggart, Billy ... suffused with ... rage ... lashes out with his arm, and the force of the blow he lands is so powerful that his accuser falls dead. But now, Billy's life, too, has been jeopardised, for he has murdered an officer under whom he has served.... Vere, effectively the prosecutor, overbears the will of the officers chosen to constitute the court-martial, virtually dictating they find Billy guilty. Without awaiting review by the commander of the fleet, he then orders Billy be executed the next morning.[24]

Since the 1940's the novella has spawned academic analysis both literary and more recently, legal. One significant debate focuses on the procedural aspects: Was Billy properly charged, tried and convicted and was Vere legally compelled to take the course of action that he did? That raises higher moral issues, some of which are common to *The Bellarmine Jug.* If, according to natural law,[25] a person is innocent (as Billy arguably was) are there overriding considerations of

21. Ibid 717.
22. Ibid 730.
23. Ibid 728.
24 K Lynn, 'Lemuel Shaw and Herman Melville' (1985) 5 *Constitutional Commentary* 411, 428.
25. The interrelation of natural law and literature has inspired commentators such as R White, *Natural Law in English Renaissance Literature* (Cambridge: CUP, 1996) to explore the impact of natural law upon renaissance literature, including Shakespeare's adoption in the *Merchant of Venice* of equitable notions over strict legalism; similarly T Stretton, 'Contract, Debt Litigation and Shakespeare's *The Merchant of Venice*' (2010) 31 *Adelaide Law Review* 111.

expediency that might compel an unjust outcome? As Domnarski suggests,[26] this is a classic case of principles versus circumstances. To quell a mutiny it may be necessary to execute Billy. Better that one man dies so that the nation, tribe, etc, survives. This presents an exquisite dilemma for both prosecutor and adjudicators.

Billy Budd crystallises a universal conflict between individual and society. Do the forms of naval discipline mask a situation requiring the inevitable sacrifice of a single man to preserve society's fundamental structures? Does a disciplinary system positively require Billy to be judged objectively guilty overriding what might be viewed subjectively as his natural innocence?[27] In *Billy Budd,* criticism thus shifts from questions of procedural irregularities to arguments entailed in the classic natural law/positive law conflict.[28] Vere's actions mirror irreconcilable tensions between conscience and how strict penal laws affect individuals. Must the individual's integrity be violated by forcing him to conform to society's dictates?

Billy Budd shifts the focus from the abstract to the particular. It causes us to examine whether specific laws, past and present, are just. As Kieran Dolin notes,[29] Vere, in rejecting the claims of 'Nature' reflects the transition from natural law to legal positivism in American legal theory during the 19th century. For him, *Billy Budd* portrays a complex situation in which authorities commit ostensibly 'sanctioned irregularities' in martial law to meet the exigencies of war. 'Necessity' is invoked to compromise normative procedures. Such measures, however, were at variance with American democratic traditions.[30] Again, as will be explored later, the subversion of normal procedural forms in the interest of institutional self-preservation is paralleled in *The Bellarmine Jug.*

ELEMENTS OF THIS ANALYSIS

1. *The Bellarmine Jug:* the narrative

The events, action and dialogue in *The Bellarmine Jug* provide a basis for developing metaphors to illumine and interpret our understanding of the legal world. The novel's plot thereby becomes a vehicle for discovering the elements of a jurisprudential controversy. Once the metaphoric significance underlying the narrative has been explicated, one can ask: Does the tenor of the revelations correspond to issues regarding the interplay between law and morality developed in the Hart-Fuller debate?

26. W Domnarski,'Law – Literature Criticisms: Charting a Desirable Course with *Billy Budd*' (1984) 34 *Journal of Legal Education* 702, 707.
27. Ibid 710.
28. Ibid 711.
29. K Dolin, 'Sanctioned Irregularities: Martial Law in *Billy Budd Sailor*' (1994) 1 *Law/Text/Culture* 129, 130.
30. Ibid 135.

Bellarmine's protagonist, Welshman Leon Davies, is a Cambridge law student selected to attend the prestigious Grotius Institute in Amsterdam in 1948. This was a time of turmoil during recovery from World War II, exacerbated in Holland by post-liberation political struggles over Indonesian independence.

While taking an examination, Davies is confronted by an Australian student, Martin Aveling who thrusts some notes into his hands as he enters the examination room. These concern a mysterious document, the 'Pelsaert fragment.' It suggests that among those implicated in the murder of innocent people on the Abrolhos Islands when the *Batavia*, under Pelsaert's command, was wrecked off Western Australia in the early 17th century, was a son of Hugo Grotius, the famed Dutch jurist who promulgated the freedom of the seas doctrine. It implies that young Grotius was involved in the murders through his association with the Rosicrucian (Rose Cross) sect whose teachings, disseminated in the Netherlands by heretical painter Johannes Torrensius,[31] fomented revolution in Christian Europe at that time.[32]

The Warden of the Institute, Van Riebeck, sees the fragment's disclosure of a criminal connection of a near-relative of Grotius with the Batavia massacre as a threat to the reputation of the Institute. Van Riebeck, an authority figure, dominates the following events. Although the Institute claims to be based on principles of reason, democracy and fairness, the Warden's attempts to suppress Aveling's discovery contradict those aims. Initially, the governing authority reacts swiftly. Aveling is peremptorily expelled, ostensibly for cheating. When this is discovered by members of the student body, Van Riebeck at first denies that Aveling was ever a student. In a clumsy attempt to corroborate this, Toblen, the sub-warden, produces a register showing that Aveling's name was not listed as an entering student. Davies, however, shows that the relevant page was tampered with. The students insist Aveling's expulsion be referred under the Institute's rules to a tribunal. This demand is pressed by some Dutch students who support Indonesian independence, exacerbating the situation as the conservative Institute apparently endorses the Government's opposition to Sukarno's revolution.

The proceedings before the tribunal were to take the form of a trial, with Davies representing Aveling and Ramshaw, a right-wing American student undertaking the role of prosecutor. Aveling then seeks vindication before an arbitrator appointed by the Institute. Davies, pursuing investigations, starts to appreciate the threat that young Grotius and his connections with the Rosicrucian sect represent to the Institute. Davies discovers confirmation of a possible connection in the form of a Rosicrucian emblem on a Bellarmine Jug recovered from the Abrolhos.[33]

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31. Torrentius was imprisoned for blasphemy around 1630.
32. In 1893, according to 'The Abrolhos Tragedy', *The Western Mail*, 24 December 1897, a West Australian, F Broadhurst, discovered in London a copy of a Dutch book published in 1647 based on Pelsart's journals describing outrages committed on the Abrolhos by Jeronimus Cornelisz, a follower of Torrensius.
33. A Bellarmine jug recovered from the *Batavia* is displayed at the Maritime Museum, Fremantle.

Wider implications of Aveling's disclosure crystallise when Ramshaw seeks to amend the charge against Aveling from cheating to one of subversion; that is, attempting to undermine the Institute.[34] In the commotion that follows the arbitrator adjourns the proceedings.

Van Riebeck then attempts to traduce Davies' support of Aveling by defaming Aveling, falsely accusing him of supporting Sukarno. The Warden asserts that a student such as Davies cannot appreciate the subtler complexities entailed in the political situation. He suggests that in such circumstances it is *necessary* to apply principles *flexibly* rather than be guided rigidly by rules.[35] Van Riebeck tries to persuade Davies that it is imperative to suppress Aveling in pursuit of higher objectives, claiming the issue is not Aveling but the viability of the Institute.[36] Ultimately the Warden moves to terminate the inquiry.[37] Aveling, disenchanted by the whole episode, withdraws his appeal and disappears from the Institute.

Davies persists and discovers from Niesman, the Librarian, that Van Riebeck has lied about the Institute's possession of the Pelsaert fragment. Van Riebeck's reacts by discrediting Niesman while appealing to Davies not to press the matter. Otherwise, Niesman, a good servant of the Institute, is likely to lose his job. Van Riebeck poses the question: Are legal rules the only basis for a fair hearing, the only test of what is right? This is to be measured against Van Riebeck's sole concern, the Institute's preservation. He suggests that Davies' attempts to demand a fair hearing for Aveling proceeds from too narrow a conception of 'justice' when vindicating the individual threatens the stability of the Institute. Defined rules of procedural fairness, acceptable in normal circumstances, may not be in times of turmoil. Asserting that Davies has no appreciation of recent European history where constitutions were uprooted and legal systems were swept away in Nazi Germany, he sums up as follows:

> Agitation. Grotius himself the subject of derision and contempt. We are being attacked. You will never know the full story. Having indulged your mood of righteous indignation you will go home happy and talk about it for years.... In the meantime, those of us who are attached to the Institute are left to soldier on. I say to you, and ... say it without apology. Yes, I am prepared to defend myself. In so doing, I defend the Institute. I received it in good order and I intend to hand it on.... My test of what is right must be judged by the catastrophe I avert. Justice is not really fine points of evidence in a court of law. There is economic justice ... Continuity.... Those things depend on order. Strength.[38]

34. *The Bellarmine Jug*, above n 4, 118.
35. Ibid 127.
36. Ibid 176.
37. Ibid 169.
38. Ibid 183–4.

Asserting the relativity of justice, he asks, rhetorically: 'Who is the worst? Torrentius. Young Grotius. Streicher'.[39]

Davies, however, presses the matter and the Institute's Council decides to investigate Van Riebeck's administration. Initially, a British judge who is a member of the Council commences investigations leading to a full convening of that body. The Council proceeds with the *forms* of propriety, 'to ascertain the facts' as the British judge puts it. But it becomes evident that there is collusion between Ramshaw, who sees the whole episode in terms of Communist subversion, Van Riebeck and other pliant members of the Council concerned for its reputation. Van Riebeck successfully shifts the blame to Toblen, the sub-warden, citing the latter's attempts to suppress the Aveling matter. Toblen becomes the sacrificial lamb. The outcome, not surprisingly, is that apart from several honourable dissentients, including the British judge and a German law professor concerned about 'principles', the Council clears Van Riebeck of any maladministration.[40] Van Riebeck's authority is thus assured, though at Toblen's cost.

Davies lets the matter drop while he successfully completes his examinations at the Institute, his final exam topic being, rhetorically: *'Justice is the Interest of the Stronger Party: Discuss'*.[41] Ironically, this assertion is not just abstractly posed as a matter of theoretical inquiry: it is an expression of the Warden's own will to subjugate those like Davies who seek to question the propriety of the Institute's decisions.

Hasluck thus offers a rich metaphoric tapestry, presenting a series of conflicting binary relationships in diverse but parallel time-universes. There is first the 16th–17th century struggle for religious supremacy involving Reformation faith overturning Catholic orthodoxy with concomitant political division, the suppression of heresy such as the Rosicrucian through the use of inquisition, and Hugo Grotius seeking to impose order based on natural law upon a disarray of contested maritime territorial claims in an age of discovery. This foreshadows the political dissidence of 1947 with Sukarno's anti-colonial threat to Holland's Grotian-based imperial claim to Indonesia, following the disruption of the established European order by global war in a context of possible Atomic destruction. That international cauldron of dissent, struggle and resistance is mirrored in the microcosm of the Institute's attempts to crush Aveling's making-known a destabilising heretical interpretation of the Grotian legacy and the threat it presents to the Institute's legitimacy.[42]

39. Julius Streicher, Gauleiter of Franconia and editor of the virulently anti-Semitic newspaper, *Der Sturmer*, was one of the principal Nazi defendants at the Nuremberg war-crime trials.
40. *The Bellarmine Jug*, above n 4, 225–35.
41. Ibid, 6. The quote is from Thrasymachus, a Greek Sophist whose argument with Sophocles is recorded in Plato, *The Republic* (Paul Shorey trans, 1930 edn) Book I, 338c.
42. This review focuses on the proceedings against Aveling. It does not discuss the book's wider themes of international subversion involving the threat that Indonesian independence represented to the British and Australian governments' attempts to use the Abrolhos Islands as an atomic test site. It also omits Davies' latter-day conversation with a middle-aged Aveling in Western

2. Biographical background: *The Bellarmine Jug's* origins in the Hart-Fuller debate

Nicolas Hasluck and I were fellow law students at the University of Western Australia in the early 1960s. Professor Kingston Braybrooke taught us jurisprudence.[43] Its central topic was: What is law and why were particular laws binding? Essentially, this proceeded from an analysis of the jurisprudence of John Austin, particularly his thesis that laws had to be obeyed because they consisted of 'commands' by the sovereign.[44] Austin was influential in the development of positivist theories. A central tenet of Austin was that law should be distinguished from morality.

Braybrooke then introduced students to the Hart-Fuller debate. This comprised two articles appearing in the 1958 *Harvard Law Review*; 'Positivism and the Separation of Law and Morals' by Hart[45] and the riposte by Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart'.[46] This debate still reverberates in contemporary jurisprudence although now conducted at a more sophisticated level.[47] The issue of whether morality imposes some external standard against which the validity of domestic laws (entailing their upholding by courts) can be tested is still open to dispute.

The polarities exhibited in the Hart-Fuller debate crystallised in the issue of whether laws promulgated in Germany during the period of the Nazi regime were valid enactments. This also entailed questions of the responsibility of judges under such a regime to apply unjust laws. Were the judgments of such courts, in retrospect, not to be recognised by later courts as having legal effect?[48] Were judges under a Nazi juridical system under any *moral* duty not to apply and enforce unjust and secret laws?

Australia about Davies' interrogation by British Intelligence seeking to identify a communist spy who had penetrated the Institute in the late 1940's, echoing the 1954 Petrov Royal Commission into Soviet espionage in Australia.

43. Jurisprudence comprised two units studied over two years.
44. Austin's principal work was *The Province of Jurisprudence Determined* (London: John Murray, 1832), discussed in *Momcilovic v The Queen* [2011] HCA 34, [229], [238]–[241] (Gummow J), [291] (Hayne J).
45. (1958) 71 *Harvard Law Review* 593
46. (1958) 71 *Harvard Law Review* 630.
47. See P Hacker & J Raz, *Law, Morality, and Society: Essays in Honour of HLA Hart* (Oxford: Clarendon Press, 1977); M Martin, *The Legal Philosophy of HLA Hart: A Critical Perspective* (Philadelphia: Temple UP, 1987); M Bayles, *Hart's Legal Philosophy* (Boston: Kluwer Academic, 1992); N Lacey, *A Life of HLA Hart. The Nightmare and the Noble Dream* (New York: OUP, 2004).
48. For example, in *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 the House of Lords declined to uphold Nazi-era confiscations of Jewish property, holding that a German decree depriving Jews of their citizenship so gravely infringed human rights that it should not be recognised as a law at all.

The Hart-Fuller debate, as Daniel Wueste states,[49] went on for more than a decade. The articles in the *Harvard Law Review* were followed by Hart's *The Concept of Law* in 1961[50] and Fuller's *The Morality of Law* in 1964.[51] Hart's review of Fuller's 1964 book appeared in the *Harvard Law Review* (volume 78) in 1965 whilst Fuller's 'Reply to Critics' was added to his 1969 revised edition of *The Morality of Law*. But for the purposes of this paper, it is the 1958 form of the debate that is most material.

In 'The Separation of Law and Morals' Hart commences by focusing on the insistence by the Utilitarians, Austin and Bentham, that law as it is should be separated from law as it ought to be.[52] This was not to say that the Utilitarians denied altogether that there was an 'intersection of law and morals'.[53] Although recognising that the content of many legal rules is influenced by moral principles, Bentham and Austin held even if a rule violated standards of morality it did not cease to be a rule of law. Whilst the thrust of Hart's article was ultimately to endorse that insight, he nevertheless saw as defective Austin's notion that laws should be obeyed because they were sovereign commands. For Hart:

> [N]othing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential law-making procedures.... These ... rules specifying what the legislature must do to legislate are not commands habitually obeyed ... they lie at the root of a legal system, and what is missing in the Utilitarian scheme is an analysis of what it is for a social group or its officials to accept such rules.[54]

Hart, while rejecting the command theory, holds to the view that rules conferring rights or imposing penalties are not necessarily just or morally good.[55] Focusing on what courts do in deciding cases he saw their task as essentially identifying a core of settled meaning for any particular rule. But given the generality of legal rules, he conceded that there would be a 'penumbra' in which clear meanings were not possible. The judicial function was therefore not mechanical, based purely on logical deduction. Hart accepts that there is room for interpretation and that in some instances a decision may be guided by moral considerations.[56] Importantly,

49. American Philosophical Association, 'The Hart-Fuller Debate Revisited: Law's Regulation of Its Own Creation' (1996) 96 *Newsletter* 59. See also D Wueste, 'Book Review: Fuller's *Procedural Philosophy of Law*' (1986) 71 *Cornell Law Review* 1205.
50. *Concept of Law*, above n 7.
51. L Fuller, *The Morality of Law* (New Haven: Yale UP, revised edn, 1969).
52. Hart, above n 45, 596.
53. Ibid 598.
54. Ibid 603.
55. Ibid 606.
56. This corresponds with the 'principle of legality' articulated by Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131, that if a law is expressed ambiguously the court should interpret it to avoid infringing human rights. See *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ); *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 529 (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 28–30.

Hart's claim for consistency with constitutional rules does not exclude the content of particular laws from moral scrutiny, nor requires judges or officials to disregard considerations of justice and fairness in making decisions.

The scope for judicial avoidance of immoral results is, nevertheless, extremely limited in a system like the Nazi regime where the judicial function was essentially directed to the preservation of the State, by terror if necessary. In those circumstances critical morality had no imperative force.[57]

In that respect, Hart's perception of a legal system diverged from that of the German philosopher Gustav Radbruch.[58] Radbruch saw resistance to law as a matter of personal conscience that was perverted under the Nazi regime. He concluded that the lack of resistance by the German legal profession to the subversion of their judicial system[59] was due to the positivist philosophy prevalent at the time. For Radbruch every lawyer and judge had a duty to denounce statutes transgressing fundamental principles as lacking legal character suggesting that post-Nazi German courts should have denied legality to decrees made by Nazi courts that were contrary to conscience and justice.

Hart dismissed this view as 'naive'. He claimed the answer was not to deny Nazi laws the quality of law. Rather, it was to maintain the primary separation between law and morals, allowing lawyers to condemn laws for their lack of morality. He conceded, however,[60] that some Nazi laws failed to measure up to certain characteristics he saw as essential to a legal system. These included the requirement that laws should treat all persons equally, in a non-arbitrary way, and that they be publicised. They would not be invalid merely because they were morally reprehensible.[61]

See also R French, 'Constitutional Review of Executive Decisions – Australia's US Legacy', (Speech delivered at John Marshall Law School, Chicago, 25 & 28 January 2010).

57. Hart, above n 45, 614.
58. Radbruch's ideas are summarized in G Radbruch, 'Five Minutes of Legal Philosophy (1945)' (2006) 26 *Oxford Journal of Legal Studies* 13, and discussed by Hart, above n 45, 617–18 and Fuller, above n 46, 656–7. See also S Paulson, 'Radbruch on Unjust Laws' (1995) 15 *Oxford Journal of Legal Studies* 489; T Spaak, 'Meta-Ethics and Legal Theory: The Case of Gustav Radbruch' (2009) 28 *Law & Philosophy* 261. Hart did not address F Neumann's powerful critique of the Nazi regime in *Behemoth: The Structure and Practice of National Socialism* (Toronto: OUP, 1942).
59. The Jewish/Catholic advocate Hans Litten was a notable exception to quiescent acceptance of Nazi illegality. He courageously represented communists and trade unionists, once summoning Hitler as a witness about Nazi principles, humiliating and discrediting him: see B Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (Oxford: OUP, 2008). Hitler never forgave Litten and had him imprisoned for five years. He died in Dachau in suspicious circumstances.
60. Hart, above n 45, 622–4.
61. Ibid 626.

Fuller makes his position clear when he states that 'the positivistic theories have had a distorting effect on the aims of legal philosophy'.[62] Even though he accepted that Hart was not suggesting that Nazi laws should automatically have been obeyed he saw Hart's argument as deficient because it left out 'fidelity to law'. Central to Fuller's consideration was the role to be assigned to the judiciary in the framework of government.[63] Addressing Hart's claim that the foundation of a legal system lies in certain 'fundamental accepted rules specifying the essential law-making procedures', Fuller attacked Hart for not having defined the nature of those fundamental rules. For Fuller the task was to identify the necessary features of fundamental laws that determine the validity of other laws. Those essential rules were predicated on an internal 'morality'.[64] It was impossible to dismiss the problems of the Nazi regime simply by accepting that Nazi laws were law even if bad.[65] Addressing the problem of post-World War II recognition of Nazi judicial decisions, Fuller denied legitimacy to Nazi laws because of irregular procedures of law-making, their secret promulgation and the fact that Nazi-dominated courts often disregarded statutes anyway. Where administrative discretion was unconstrained it lacked legitimacy. Law could not be reduced to a simple amoral datum.[66] The claim that law must be severed from morality was a positivistic acceptance which smoothed the way for dictatorship and totalitarian regimes.[67] It was open to German courts, according to Fuller, to rule statutes invalid on the ground of their lack of fidelity to legal principles.

Wueste summarises the central features of the Hart-Fuller debate as follows:

> Several issues are addressed in the debate: the positivist's distinction between the law as it is and the law as it ought to be, the nature of the relationship between law and morality, judicial interpretation, the link between the hegemony of legal positivism in Germany and the rise of Nazism, the plausibility of the Hartian notion of a rule of recognition, the status of the principles Fuller identifies as the morality internal to law. But perhaps the central concern in the debate is the authority or normativity of law, an issue flagged by Fuller's talk, in the first round, of fidelity to laws.... Recognition of the centrality of this question to legal philosophy is a thread that ties together the various issues debated by Hart and Fuller.[68]

62. Fuller, above n 46, 631.
63. Ibid 634.
64. Ibid 641. See P Nicholson, 'The Internal Morality of Law: Professor Fuller and His Critics' (1974) 84 *Ethics* 307; R Summers, 'Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law' (1978) 92 *Harvard Law Review* 433.
65. Fuller, ibid 646. In this Fuller is closer to Radbruch: see S Paulson, 'Lon L Fuller, Gustav Radbruch and the "Positivist" Theses' (1994) 13 *Law and Philosophy* 313. Regarding how Hart and Fuller differed in their perceptions of Radbruch, see S Taekema, *The Concept of Ideals in Legal Theory* (New York: Kluwer Law International, 2003).
66. Fuller, ibid 650–2, 656.
67. Ibid 657–9.
68. Wueste, above n 49, 59.

As Wueste states,[69] Hart and Fuller agreed that the law's authority is a product of law itself: a legislature's acts create law only if they comply with rules specifying the essential law-making procedures. But whereas Hart saw the essential test of an authoritative law as compliance with what he calls in his later writings 'rules of recognition' Fuller argued that principles constituting a 'morality' internal to law must be included among the criteria of legal validity. A problem with Fuller's account, however, is that his understanding of the word 'morality' is fraught with ambiguity.[70]

In summary, the Hart-Fuller debate focused attention on the conditions under which a legal system could be considered authoritative when its constitutive rules lacked procedural regularity, were subject to secretive processes, or were otherwise unjust.

Hart's 1958 essay engendered much controversy. Hasluck was not only familiar with the Hart-Fuller debate: he encountered Hart's seminal work, the *Concept of Law* in his postgraduate studies with Hart in the mid-1960s. Hasluck was also influenced by his study of the Austrian positivist philosopher Hans Kelsen,[71] on whose theories Hart had drawn.[72] Kelsen similarly represented the positivist position in opposition to his German counterpart, Gustav Radbruch, who envisaged law as having a moral content.[73]

It is clear that the *Concept of Law* must have had some more general impact on Hasluck's writing. It is also arguable that the less developed version of Hart's ideas in the Hart-Fuller debate profoundly influenced, consciously or unconsciously, the set of legal and ethical issues that appear in *The Bellarmine Jug*. While the origins of the debate are found in the mid-20th century, a reading of Hasluck's novel, written in 1984, demonstrates its continuing relevance into this century.

69. Ibid 61.
70. While Fuller's position is elusive, Hart's arguments are precise and logical; J Mendola, 'Hart, Fuller, Dworkin, and Fragile Norms' (1999) 52 *Southern Methodist University Law Review* 111. See also M Kramer, 'Scrupulousness without Scruples: A Critique of Lon Fuller and His Defenders' (1998) 18 *Oxford Journal of Legal Studies* 235.
71. See H Kelsen, *General Theory of Law and State* (Massachusetts: Harvard UP, 1949).
72. N Hasluck, '*The Bellarmine Jug* – Constitutions and Reconstitutions' (Paper presented at Law and History Conference, La Trobe University, Melbourne, 17 May 1986) refers to Kelsen's central premise of a legal system, the *Grundnorm* (basic norm) and Kelsen's contention that if one subverts the basic construct on which a society is founded its legal order ceases to exist. Hart regarded his rule of recognition as an evolution from Kelsen's grundnorm
73. F Haldemann, 'Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law' (2005) 18 *Ratio Juris* 162, discusses whether 'law' can apply to the amoral enactments of the Nazis and how Radbruch and Kelsen stood in relation to that issue.

3. *The Bellarmine Jug's* metaphoric incorporation of Hart-Fuller

In *The Bellarmine Jug* Hasluck uses the classic literary device of the trial[74] to explore the conflict that arose between those administering the Institute and the requirements of natural justice. A secondary metaphor can also be discerned; that of administrative expediency in a time of turmoil. Should fair procedures yield to a higher imperative and the student be sacrificed to protect the institution?[75]

The turbulent events involving Aveling's expulsion provoke divergent views about where essential authority is to be located in a legal system. Is justice constitutionally intrinsic to the system itself – that is, is the system self-validating according to its own Hartian rules, including the need to maintain stability – or is it dependent on the extent to which the constitutive rules of the system conform to higher moral principles that are independent of and external to the system itself? If so, the Institute's irregular proceedings against Aveling arguably were 'illegal'. If a set of pre-existing moral precepts determines the legitimacy of a legal regime do they constitute a system of 'Natural Law'?[76] Each point of view represents the contending concepts of constitutional legitimacy presented in the Hart-Fuller dispute.

More specifically, Hart-Fuller themes can be discerned in the conflict between the governing body of the Institute and the students opposing the expulsion of Aveling in the disciplinary proceedings. The interests of the Institute in avoiding threats to its continuance are set against the challenge by students seeking to vindicate Aveling and prevent his arbitrary dismissal. Set in the immediate post-World War II era, the shadows of that catastrophe constitute the story's backdrop. Part of that background was the illegality, disregard for human rights, arbitrary punishment and unfair procedures that characterised the Nazi regime in Germany. These were partially redressed at Nuremberg.[77] The Institute's unfair and manipulated

74. In N Hasluck, *Our Man K* (Melbourne: Penguin, 1999), Hasluck alternates between the two Czechs writers, Egon Kisch and Franz Kafka, significantly drawing on the trial motif deployed in the latter's novel, *The Trial* (New York: Chelsea House, 1987).

75. In summarising these metaphoric features, I acknowledge the major contribution by K Dolin, 'Legal Fictions and Nicholas Hasluck's *The Bellarmine Jug*' (1992) 4 *Westerly* 47.

76. On the relationship between natural law and morality, see contributed works in R George (ed), *Natural Law Theory: Contemporary Essays* (Oxford: OUP, 1992). N MacCormick, 'Natural Law and the Separation of Law and Morals', 105; J Finnis, 'Natural Law and Legal Reasoning', 134; J Waldron, 'The Irrelevance of Moral Objectivity', 158.

77. The prosecution of Nazi war criminals before the International Criminal Tribunal established the principles of a fair trial incorporated in the UN Declaration of Human Rights (GA Res 217A(III) 1948), later adopted in the European Convention on Human Rights (opened for signature, 4 November 1950, ETS 5, entered into force 3 September 1953) art 6; and the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, 999 UNTS 17, entered into force 23 March 1976) art 14. For a discussion on the relevance of Hart-Fuller to fair trials for war crimes from Nuremberg to East Timor, see G MacCarrick, 'The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition)' (Paper delivered to the 19th International Conference of the International Society for the Reform of Criminal Law, Edinburgh, Scotland, 2005).

'hearing' into Aveling echoes those departures from regularity. Hasluck implies this correspondence with Nazi illegalities by his rhetorical reference to Streicher when asking who is more unjust: Torrentius or Streicher.[78] The inquisition provides the key metaphor for Hasluck's contrasting the demands of justice and fairness with the application of positive rules, thereby instantiating a central element of the Hart-Fuller debate.

Van Riebeck's justification for irregularities in the inquiry into Aveling's affairs is an appeal to Cicero's higher principle *salus populi suprema lex esto* which holds that the welfare of the people is the paramount law.[79] It and its cognate principle *inter arma silent leges*[80] imply that an individual's welfare should in cases of necessity yield to that of the community. A person's liberty and life may, in those circumstances, be sacrificed for the public good.[81] This justification is prominent in attempts by political leaders to prevent judicial scrutiny of their actions. This was true of President Nixon's claim to executive privilege to supress the Pentagon tapes[82] and features in contemporary invocations of national security to permit extraordinary measures to combat 'terrorism'. Aveling's trial exemplifies the dilemma democratic institutions face in times of great crisis. Do situations *in extremis* justify exceptions to normal judicial process?

The problem here is that usually it is those in control who determine that exceptional circumstances exist. The primacy of national security may be conceded but where power to determine such threats resides exclusively in the executive the claim can be based on false premises that may not factually exist.

Whether necessity provides a justification for subverting justice is a challenge that *The Bellarmine Jug* shares with *Billy Budd*. Both pose problems of procedural irregularities in the way institutions deal with ostensible threats. This leads to the question of whether the positive law invoked in such proceedings is opposed to the rules of natural justice. *Billy Budd*, as Weisberg[83] points out, deals with

78. See above n 39.

79. Cicero, *De Legibus*, book III, pt III, sub VIII adopted in J Locke, *The Second Treatise on Civil Government* (New York: Prometheus Books, first published 1969, 1786 edn) [158], as a fundamental rule of government. Concerning its application in the Australian constitutional context, see HP Lee, '*Salus Populi Suprema Lex Esto*: Constitutional Fidelity in Troubled Times' in HP Lee & P Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Sydney: Federation Press, 2009) ch 3, 53.

80. This is another of Cicero's maxims: in time of war the laws are silent – with its implication that in extreme emergency the executive should not be answerable to the courts, a proposition rejected by Lord Atkins (dissenting) in *Liversidge v Anderson* [1942] AC 206, discussed by R French, 'The Executive Power' (Speech delivered at the Inaugural George Winterton Lecture, Sydney, 18 February 2010); Lee, ibid.

81. In the *Australian Communist Party Case* (1951) 83 CLR 1 the High Court held the principle had to yield to the rule of law; but now see *Thomas v Mowbray* (2007) 233 CLR 307.

82. The US Supreme Court denied President Nixon's claim and ordered the tapes' disclosure in *United States v Nixon* 418 US 683 (1974).

83. R Weisberg, 'How Judges Speak: Some Lessons on Adjudication in *Billy Budd, Sailor* with an Application to Justice Rehnquist' (1982) 57 *New York University Law Review* 1.

events in an historical context which raise issues of a more general and universal nature. Figures such as Billy (and Aveling) may not only be seen as types in opposition to the world; they personify the working out of wider principles going beyond procedural miscarriages and implicate questions of judicial choice.[84] The adjudicator in *The Bellarmine Jug* ultimately must choose between morality (reflecting subjective considerations) as against the objectivity of the law and its positivistic demands for professional duty. Whether the decision of the Institute's administrators to expel Aveling is compelled by necessity is prefigured in the debate about the conviction and execution of *Billy Budd*. The expulsion of Aveling is not, however, directly analogous to Billy's execution. The latter resulted from a rigid enforcing of the mutiny laws *as they were*. It arguably shares a closer positivist analogy with Nazi courts where the *institution* is legal but fundamentally corrupt. Aveling is the victim of a *legal process* whose existence may ostensibly be legal but whose procedures were varied arbitrarily and in a discriminatory manner to accommodate a corrupt purpose.[85] As such it was, arguably, both immoral and unlawful.

Dolin complements his metaphorical analysis by exploring, from an alternative view-point, Hasluck's use of *fictions* in *The Bellarmine Jug*.[86] He sees Hasluck's adopting an amalgam between legal fiction (as an agency of change) and literary fiction (the creation of imaginary worlds providing alternatives to existing orders of society).[87] Literary fictions both reproduce and reinterpret the 'sacred' or 'governing' narratives and traditions of a society. As such, they can influence our understanding of law in a broad or ideological sense.[88] He asserts that:

> [Hasluck] incorporates another fictional narrative, the 'Pelsaert fragment', a dubious account of the Abrolhos mutiny.... In control of the past, the authority of Grotian jurisprudence (on which the Empire was founded) is threatened. When Aveling's access to the document and his subsequent expulsion from the Institute are discovered the integrity of the Institute and of the legal tradition it represents is questioned. Is it committed to the ideal of justice according to law, or is justice, as [Davies'] exam question ... suggests, 'the interest of the stronger party'?[89]

Dolin sees Van Riebeck's justification for his actions[90] as founded on the argument that justice is not solely defined by procedural means, and that 'legalism ... is not necessarily conducive to order: it can promote the just regulation of society but it can also expose an establishment that is corrupt'.[91] He continues:

84. Ibid 13.
85. Toblen too suffers Aveling's fate. Innocence, objectively, is not the issue where procedures are corrupted to preserve the system.
86. Dolin, above n 75, covers wider, inter-temporal elements than this study, including 17th century Rosicrucian subversion and its parallel, post-War Communism and imminent atomic warfare.
87. Ibid 47.
88. Ibid 48.
89. Ibid 49.
90. See quotation, above n 38.
91. Dolin, above n 75, 49.

> [T]he Warden's language is typical of nations in war time or states of emergency, in which the rights of citizens are suspended in deference to ... 'the national security'.

The Institute is not, as Dolin sees it, 'a symbol of an abstract *nomos* (the rule), but a figure of a particular type of political system, the constitutionally-governed nation-state'.[92] In this, Dolin suggests,[93] the fictional situations represent an attempt to make sense of the real world. In that sense both metaphor and legal fictions are creative. In decoding the symbol we come face to face with important statements about how the world operates. In *The Bellarmine Jug* the Institute's corrupt exercise of adjudicative authority causes the reader to reflect on the nature of the basis of a legal system and its relationship to both justice and morality. It thereby serves to explicate the deeper jurisprudential thesis explored in this study.

SYNTHESIS: DRAWING THE STRINGS TOGETHER

The opposition between natural law and legal positivism, reflected in Vere's dilemma in *Billy Budd* and the Institute's in *The Bellarmine Jug* arguably entails the jurisprudential tension explored in the Hart-Fuller debate. Aligning the relevant metaphors and fictions with issues in that debate, one can discern the following parallels.

The Institute represents the body politic. It is an institution with perpetual succession. Its rules, conventions, statutes and administrative procedures constitute, in effect, a legal system. This incorporates both the rights of students and the reciprocal responsibilities of the Institute towards them.

What Hasluck depicts is a system in a state of corruption. The analogy may be drawn with that under the Nazi regime. This is particularly so given that a defect of the latter was the self-interest of judges in the preservation of the system.

The same is true of the Council's actions. The Institute's reaction to the problem of Aveling reflects a universal issue addressed in the Hart-Fuller debate; namely, an individual's claim to justice measured against the collective claims of society (the 'public interest'). Legality, morality, legitimacy, fairness and justice itself all yield to necessity. Van Riebeck has raised this to an even higher quasi-constitutional level. Not only the Institute but the whole national and international order is imperiled by what Aveling might expose. Can the Institute's adjudication *validly dispense with normal processes in a time of emergency*? Despite the Warden's justifications, shutting down the tribunal and the perversion of the Council's proceedings are clear breaches of normal standards of judicial process.

These irregularities, including suppression of evidence, are so morally reprehensible and discordant with notions of fairness that on Fuller's internal criteria they disqualify the proceedings from any claim to lawfulness. For Fuller,

92. Ibid 50.
93. Ibid 51.

given its systemic corruption, the Institute's administration of 'justice' would be unlawful both because it is incompatible with internal 'morality' and externally (that is, by communal standards) immoral. The same conclusion follows if Hart's rule of regularity is applied as an external point of reference. For Hart the deviation from normally accepted *procedural rules and standards of fairness* would render the adjudication incompetent. The Institute, in dispensing with its conventional procedures, is doubly vulnerable to the attacks formulated by both Hart and Fuller.

But in a curious inversion, Hasluck turns the question of the validity of a Nazi-type system on its head. The German system of the 1930's could ostensibly claim internal legitimacy because it drew its authority from the law as it was. According to Hart, the Institute's operations would be unlawful not because they are immoral but because they contravene the essential characteristics of an authentic system which in his later *Concept* he described as rules of recognition. These include standards of impartiality and openness as against arbitrary expedience and secret processes. Even the Warden could not claim to be observing normal practices. Arguably, on Hasluck's metaphoric representation, there is no real difference between applying Hart's rule and Fuller's claims based on fidelity to law. Hence Aveling's treatment reflects in broad terms aspects of the ostensibly opposed though reconcilable views advanced in the Hart-Fuller debate.

HART-FULLER: LATER DEVELOPMENTS AND ITS CONTEMPORARY RELEVANCE

The elements of the Hart-Fuller debate reflected in *The Bellarmine Jug* draw on a relatively undeveloped portrayal of the conflict between justice, fair procedures and open government and administrative expediency, corrupted practices, and executive manipulation of institutional rules. These metaphoric elements, while serving as a useful introduction to fundamental questions about legal systems, do not aspire to engage the ongoing philosophical disputation regarding systemic illegality and the relevance of the moral context in which legal rules are required to function.

This article is not the place to expound in detail on the later sophisticated arguments and justifications criticising and defending the contending views presented by Professors Hart and Fuller. Suffice it to say that the Hart-Fuller debate has engendered an elaborate jurisprudential literature since its inception. Much of this has been in response to Hart's more developed propositions in his *Concept of Law.* While Hart's highly original contribution to legal theory should not be taken as a conscious attempt on his part to promulgate an explicit positivist thesis, *Concept of Law* provided the foundation for the development and refinement of a burgeoning positivist program. Unsurprisingly, the 50th anniversary of its publication has provided a cornucopia of commentary on its legacy.[94]

94. Most notably, P Cane (ed), *The Hart-Fuller Debate in the 21st Century: 50 Years on* (Oxford: Hart Publishing, 2010) including contributions by N Lacey, H Charlesworth, M Krygier,

As in any scholarly pursuit, latter-day positivists, building on Hart's analysis, have divided into roughly two groups.[95] Some like Joseph Raz[96] and Jules Coleman[97] have gravitated to an exclusivist, prescriptive position which posits the strict separation of law and morality. Others including Waluchow[98] have coalesced around a more inclusive polarity. This accepts that legal systems are conceivable where moral considerations *can* provide criteria of validity.

On the other side of the debate, notwithstanding the deficiencies in Fuller's early critique of Hart,[99] later legal theorists such as the Australian Oxford scholar John Finnis, espousing a more nuanced natural law analysis, have rehabilitated Fuller's claim for a significant role for moral principles in legal adjudication.[100] Oxford, the inspiration for Hart's early thinking, has further contributed to the debate with Hart's successor to its chair of jurisprudence, the American scholar Ronald Dworkin seeking to vindicate Fuller's demand that morality has an essential role in legal determination.[101] The earlier Hart-Fuller contretemps has morphed into a later disputation, the Hart-Dworkin debate.[102]

Again, it is an open question whether different contributions by the proponents of each side are truly in opposition. Dworkin's basic concern, shared by many in the

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J Waldron, L Green, N Naffine, G Postema and B Bix.

95. It would be too grand a claim to describe either as a 'school' given the differences in formulation and emphasis of individual authors.

96. A short selection includes J Raz: *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979); 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in J Coleman (ed) *Hart's Postscript Essays on the Postscript to the Concept of Law* (Oxford: OUP, 2001) 37; 'About Morality and the Nature of Law' (2003) 48 *American Journal of Jurisprudence* 1.

97. Including J Coleman: 'Negative and Positive Positivism' (1982) 11 *Journal of Legal Studies* 139; 'Authority and Reason' in R George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996); 'Constraints on the Criteria of Legality' (2000) 6 *Legal Theory* 171, *The Practice of Principle* (Oxford: Clarendon Press, 2001).

98. W Waluchow, 'Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism' (2000) 6 *Legal Theory* 45. Regarding the divergence into inclusive and exclusive positivism, see B Bix, 'Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate' (1999) 12 *Canadian Journal of Law and Jurisprudence* 17; K Himma, 'Book Review: *Substance and Method in Conceptual Jurisprudence and Legal Theory*' (2002) 88 *Virginia Law Review* 1119; K Himma 'The Instantiation Thesis and Raz's Critique of Inclusive Positivism' (2001) 20 *Law & Philosophy* 61.

99. Fuller arguably misunderstood Hart's original intentions, especially that the latter was not seeking to deny a role for moral considerations in *condemning* unjust legal rules; Hart's objection was to the *validity* of laws depending on *external* moral principles

100. J Finnis: *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); 'Propter Honoris Respectum: On the Incoherence of Legal Positivism' (2000) 75 *Notre Dame Law Review* 1597; 'Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections' (1996) 71 *Notre Dame Law Review* 595.

101. R Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1; R Dworkin, *Justice in Robes* (Massachusetts: Harvard UP, 2006).

102. E Soper, 'Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute' (1977) 75 *Michigan Law Review* 473; S Shapiro, 'The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed' (University of Michigan, 2007) Public Law and Legal Theory Working Paper No 77.

American realist tradition, focuses on the judicial process itself, particularly the judges' role of interpretation and adjudication as fundamental to any legal system. This allows considerable scope for recognising moral considerations in shaping judicial outcomes. Ironically, Hart's exclusion of morality as a criterion of validity has seemingly been misunderstood. His separability thesis did not require him to deny the scope for considerations of fairness in determining whether judicial adjudication conforms to internal rules of legal validity.[103] If one removes this false premise from the adversarial debate between Hart and Fuller-Dworkin one can see room for a common agreement that trials such as those conducted in the Nazi era would have failed to qualify as legal. The same would be true of Van Riebeck's machinations in *The Bellarmine Jug.*

CONCLUSION

This article has sought to show how an understanding of fictional elements in *Bellarmine* can illuminate certain issues, initially identified in the Hart-Fuller debate, that are fundamental to our legal system. The parallels are instructive, given that Hasluck was actually influenced by his acquaintance with that debate. The main purpose of this article is to demonstrate how such a literary work can be used as a means of jurisprudential study. Hart-Fuller would be merely the starting point.[104] Necessarily, one would now go beyond that debate. Hart's views about the operations of the Nazi legal system could be compared with those of Franz Neumann, for example,[105] offering a basis on which latter-day natural law arguments can be developed.[106] As outlined above, the positivist jurisprudence advanced by Hart in the early 1960's has now been developed by later philosophers and engendered its own continuing debate.[107] But its central message of the

103. T Honore, 'The Necessary Connection between Law and Morality' (2002) 22 *Oxford Journal of Legal Studies* 489; L Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 *New York University Law Review* 1035; J Nadler 'Hart, Fuller and the Connection between Law and Justice' (2008) 27 *Law & Philosophy* 1.

104. There is an extensive literature discussing the issues, including M Bayles, *Hart's Legal Philosophy* (Dordrecht: Kluwer, 1992); C Covell, *The Defence of Natural Law* (New York: St Martin's, 1992); L Green, 'The Concept of Law Revisited' (1996) 94 Michigan L Rev 1687; M Kramer, *Where Law and Morality Meet* (New York: OUP, 2004).

105. Hart, above n 58.

106. See, eg, A Allott, *The Limits of Law* (London: Butterworths, 1980); P Hacker & J Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Oxford: Clarendon Press, 1977).

107. K Fuesser, 'Farewell to "Legal Positivism": The Separation Thesis Unravelling' in R George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) 119; D Dyzenhaus, 'Positivism's Stagnant Research Program' (2000) 20 *Oxford Journal of Legal Studies* 703; B Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: OUP, 2001) 355; J Gardner, 'Legal Positivism: 5½ Myths,' (2001) 46 *American Journal of Jurisprudence* 199; F Schauer, '(Re)Taking Hart' (2006) 119 *Harvard Law Review* 852; R Noble & D Shiff, 'The Emperor's New Clothes' (2007) 70 *Modern Law Review* 139; J Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 *New York University Law Review* 1135.

need for vigilance to detect bad laws and corrupt adjudication still resonates. As Tamanaha states:

> The future of legal positivism as a vital way to understand law ... hinges on whether it speaks to the problems of the day. As legal systems around the world become more powerful and efficient in their capacity to apply coercion against their [populations] ... the need to remind people that law can be bad even when it claims to be moral is greater than ever.[108]

Sensitising people to such dangers through study of relevant novels has a place in the legal curriculum. It may not be too much to claim: 'Literary culture has its place in the development of contemporary legal theories that may realistically aspire to the renaissance of a just society'.[109] That is a sentiment Hasluck would certainly endorse.

108. B Tamanaha, 'The Contemporary Relevance of Legal Positivism' (2007) 32 *Australian Journal of Legal Philosophy* 1, 38.
109. Weisberg, above n 83, 69.