

explores ways in which literature can engage jurisprudential themes. It then draws parallels between the novel's narrative of a student's trial and the law-morality contretemps.⁹ Does the Hart-Fuller controversy, generated over 50 years ago, still have relevance for our contemporary legal world? The affirmative conclusion is drawn that Hasluck's incorporation of contradictory themes of justice trumped by positive law provides a means of awakening jurists to fundamental questions about the nature of law which still resonate where claims of fair process for the individual conflict with the need to preserve a stable society.

How Literature Can Explore Legal Themes

Law and literature as a field of academic study

Law and literature notionally exist in discrete territories yet can overlap and inter-relate 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

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.

10 Studying the relationship became significant in the 1940s and flourished in succeeding decades; see Richard Weisberg, *Poetics: And Other Strategies of Law and Literature* (Columbia University Press, New York, 1992); Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge University Press, Cambridge, 1995) and Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press, Cambridge, 2007).

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

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. Hence G Twaddell in 'A Novel Approach to An Ethics Assignment'¹³ advocates using novels to reveal ethical problems and principles. Novels provoking legal questions include *The Stranger* (Albert Camus), *Bleak House*,¹⁴ *Great Expectations* (Charles Dickens), and *The Grapes of Wrath* (John Steinbeck). Dostoyevsky's *Crime and Punishment* deals directly with criminal process, guilt and retribution. Films can fulfil the same role. *Dirty Harry*, featuring Clint Eastwood, is used in police ethics courses in the United States.¹⁵ One literary creation that succeeded both as novel and film in confronting society with issues of racial prejudice and injustice in the American Deep South during the Great Depression is Harper Lee's *To Kill a Mocking Bird*. Another notable example is Herman Melville's *Billy Budd*,¹⁶ discussed below.

Law and literature studies offer a means of representing legal problems from a fresh perspective which, in a case like *Bellarmine*, can extend to conflicts between theories of justice and actual practical judicial adjudication. By delineating these underlying themes in novels, students and practising lawyers can access new insights that inform their understanding of both law and literature.

12 Including Richard Posner of the US Federal Court of Appeals; *Law and Literature: A Misunderstood Relation* (3rd edn, Harvard, Boston, 2009). Bernard Schlink, German judge and professor of jurisprudence, uses themes of legality, justice and guilt in Nazi Germany in *The Reader* (Pantheon Books, New York, 1996).

13 Newsletter on Computer Use – Law, Medicine, Teaching, published by American Philosophical Association, 4, 1996, Vol 90, Pt 1 pp 38-40.

14 See Kieran Dolin, 'Law, Literature and Symbolic Revolution: *Bleak House*' (2007) 12 *Australasian Journal of Victorian Studies* 10.

15 John Kleinig used *Dirty Harry* films in Police Ethics courses to illustrate conflicts in policing: *The Ethics of Policing*, Cambridge Studies in Philosophy and Public Policy (Cambridge University Press, Cambridge, 1996) pp 53-62.

16 University of Chicago Press, Chicago, 1962.

Legal themes as metaphor

Moving from generalities, we can explore how Hasluck in *Bellarmino* has illuminated certain legal problems 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.¹⁷ As James Murray points out,¹⁸ 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 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.¹⁹ Metaphors challenge our settled views.²⁰ They make us aware there are not always simple and right answers.²¹ By understanding law through literature, we can re-examine the fundamentals of the legal domain. It thereby opens a new methodology of legal instruction.

17 G Casenave, ‘Taking Metaphor Seriously’ (1979) 17 *Southern Journal of Philosophy* 1, 20.

18 ‘Understanding Law as Metaphor’, (1984) 34 *Journal of Legal Education* 714 at 715.

19 *Ibid.*, at 717.

20 *Ibid.*, at 730.

21 *Ibid.*, at 728.

Billy Budd: a model for analysis

For those unfamiliar with metaphoric analysis, Herman Melville's novella *Billy Budd, Sailor* provides a model that can be adapted to reveal the jurisprudential underpinnings of *Bellarmino*.

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.²²

A significant debate focuses on its procedural aspects: Was Billy properly tried and convicted and in any event was Vere legally compelled to take the action that he did? That raises higher moral issues, some of which are common to *Bellarmino*. If, according to natural law²³ a person is innocent (as Billy arguably was) are there overriding considerations of expediency that might compel an unjust outcome? As Domnarski suggests,²⁴ this is a classic case of principles versus circumstances. To quell a mutiny it may be necessary

22 K Lynn, 'Lemuel Shaw and Herman Melville' (1985) 5 *Constitutional Commentary* 411 at 428.

23 The inter-relation of natural law and literature has inspired commentators such as Robert White, *Natural Law in English Renaissance Literature* (Cambridge University Press, Cambridge, 1996) to explore the impact of natural law upon renaissance literature, including in Shakespeare's *The Merchant of Venice*.

24 'Law – Literature Criticisms; Charting a Desirable Course With *Billy Budd*' (1984) 34 *Journal of Legal Education* 702 at 707.

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?²⁵ In *Billy Budd*, criticism thus shifts from questions of procedural irregularities to arguments entailed in the classic natural law/positive law conflict.²⁶ 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,²⁷ 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.²⁸ Again, as will be explored later, the subversion of normal procedural forms in the interest of institutional self-preservation is paralleled in *Bellarmino*.

Elements of *Bellarmino*

Delving into the events, action and dialogue in *Bellarmino* one can discern the elements of a major 20th century

25 Ibid, at 710

26 Ibid, at 711

27 'Sanctioned Irregularities: Martial Law in *Billy Budd Sailor*', *Law/Text/Culture*, Volume 1 (1994) 129 at 130.

28 Ibid, at 135.

jurisprudential controversy. More specifically, once the metaphoric signposts underlying the narrative have been revealed, one can then ask: Do they correspond to issues regarding the interplay between law and morality developed in the Hart-Fuller debate?

The narrative

Bellarmino'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,²⁹ fomented revolution in Christian Europe at that time.³⁰

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

29 Torrensius was imprisoned for blasphemy around 1630.

30 According to *The Western Mail*, 24 December 1897, 'The Abrolhos Tragedy', in 1893 a West Australian, F Broadhurst, discovered in London a copy of a Dutch book published in 1647 based on Pelsaert's journals describing outrages committed on the Abrolhos by Jeronimus Cornelisz, a follower of Torrensius.

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.³¹

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.³²

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

31 A Bellarmine jug recovered from the *Batavia* is displayed at the Maritime Museum, Fremantle.

32 *Bellarmino*, p 118.

political situation. He suggests that in such circumstances it is *necessary* to apply principles *flexibly* rather than be guided rigidly by rules.³³ 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.³⁴ Ultimately the Warden moves to terminate the inquiry.³⁵ 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. 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 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

33 Ibid, p 127.

34 Ibid, p 176.

35 Ibid, p 169.

is economic justice ... Continuity. ... Those things depend on order. Strength.³⁶

Asserting the relativity of justice, he asks, rhetorically: ‘Who is the worst? Torrentius. Young Grotius. Streicher.’³⁷

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.³⁸ 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*’.³⁹ 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.

36 Ibid, pp 183-184.

37 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.

38 *Bellarmino*, pp 225-235.

39 Ibid, p 6. The quote is from Thrasymachus, a Greek Sophist whose argument with Sophocles is recorded in Plato, *The Republic*, Book I, 338c.

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 heresies such as Rosicrucianism through the use of inquisition, and 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.⁴⁰

Biographical background: Bellarmine and the Hart-Fuller debate

Nicholas Hasluck and the writer were law students together at the University of Western Australia in the early 1960s. Professor Kingston Braybrooke taught us jurisprudence. 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

40 This afterword focuses on the proceedings against Aveling, leaving aside *Bellarmino's* wider themes of international subversion and Cold War implications of the British and Australian governments' attempts to use Australian north-west offshore islands as an atomic test-site. Regarding the latter, see Robert Drewe, *Montebello* (Penguin Books Melbourne, 2012). It also omits Davies' latter-day interrogation by British Intelligence seeking to identify a communist spy who had penetrated the Institute in the late 1940s, echoing the 1954 Petrov Royal Commission into Soviet espionage in Australia, a controversial investigation to which Hasluck has recently returned in *Dismissal*, n 3.

had to be obeyed because they consisted of ‘commands’ by the sovereign.⁴¹ 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 Hart⁴² and the riposte by Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’.⁴³ This debate still reverberates in contemporary jurisprudence although is now conducted at a more sophisticated level.⁴⁴

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? Were judges under a Nazi juridical system under any *moral* duty not to apply and enforce unjust and secret laws?

The Hart-Fuller debate, as Daniel Wueste states,⁴⁵ went on for more than a decade. The articles in the *Harvard Law Review* were followed by Hart’s *The Concept of Law* in 1961⁴⁶ and Fuller’s *The Morality of Law* in 1964.⁴⁷ Hart’s review of Fuller’s 1964 book appeared in the *Harvard Law Review* in

41 Austin’s principal work was *The Province of Jurisprudence Determined* (1832).

42 HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) *Harvard Law Review* 593.

43 Lon L Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71(4) *Harvard Law Review* 630.

44 See H Hart, P Hacker and J Raz, *Law, Morality, and Society: Essays in Honour of HLA Hart* (Clarendon Press, Oxford, 1977); Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004).

45 ‘The Hart-Fuller Debate Revisited: Law’s Regulation of its own Creation’ (1996) *American Philosophical Association Newsletter* Issue No 96, p 59.

46 Hart, *Concept*, n 7.

47 L Fuller, *The Morality of Law* (Yale, New Haven, 1964.)

1965 while Fuller's 'Reply to Critics' was added to his 1969 revised edition of *The Morality of Law*. For the purposes of this afterword, the 1958 form of the debate is material.

In 'The Separation of Law and Morals', Hart focused on the Utilitarian claim by Austin and Bentham that law as it is should be separated from law as it ought to be.⁴⁸ This was not to say that the Utilitarians denied altogether that there was an 'intersection of law and morals'.⁴⁹ 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. While 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.⁵⁰

Hart pursues this notion in his Harvard article. While rejecting the command theory, he expressed the view that rules conferring rights or imposing penalties are not necessarily just or morally good.⁵¹ 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

48 Note 44, at 596.

49 Ibid, at 598.

50 Ibid, at 603.

51 Ibid, at 606.

guided by moral considerations.⁵² Importantly, Hart's claim for consistency with constitutional rules does not exclude the content of particular laws from moral scrutiny, nor does it require 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.⁵³

In that respect, Hart's perception of a legal system diverged from that of the German philosopher Gustav Radbruch.⁵⁴ 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 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 because they were contrary to conscience and justice.

Hart dismissed this view as 'naïve'. 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

52 One such constructive canon is the 'principle of legality'; see *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131. This holds that if a law is expressed ambiguously a court should interpret it to avoid infringing human rights. See similarly French CJ in *South Australia v Totani* (2010) 242 CLR 1 at [31].

53 Note 44, at 614.

54 Radbruch's ideas are summarised in 'Five Minutes of Legal Philosophy' (*Rhein-Neckar-Zeitung*, 12 September 1945), and discussed by Hart, n 44 at 617-618 and Fuller, n 45 at 656-657. Hart did not address Franz Neumann's powerful critique of the Nazi regime in *Behemoth: The Structure and Practice of National Socialism* (1st edn, Oxford University Press, Oxford, 1942).

morality. He conceded however⁵⁵ 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.⁵⁶

Fuller makes his position clear when he states that ‘the positivistic theories have had a distorting effect on the aims of legal philosophy’.⁵⁷ 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.⁵⁸ 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’.⁵⁹ It was impossible to dismiss the problems of the Nazi regime simply by accepting that Nazi laws were law even if bad.⁶⁰ 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 and arbitrary it lacked legitimacy. The claim that law must be severed from morality was a positivistic acceptance that smoothed the way for dictatorship and totalitarian regimes.⁶¹

55 Note 44, at 622-624.

56 Ibid, at 626.

57 Note 45, at 631.

58 Ibid, at 634.

59 Ibid, at 641. See P Nicholson, ‘The Internal Morality of Law: Professor Fuller and His Critics’ (1974) 84 *Ethics* 307.

60 Note 45, at 646.

61 Ibid, at 657-659.

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 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 ... [T]he centrality of this question to legal philosophy is [the] thread that ties together the various issues debated by Hart and Fuller.⁶²

As Wueste states,⁶³ Hart and Fuller agreed that 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.⁶⁴

Historically, 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:

62 Note 48, at 59.

63 Ibid, at 61.

64 Joseph Mendola, 'Hart, Fuller, Dworkin, and Fragile Norms' (1999) 52 *Southern Methodist University Law Review* 111, asserts that Fuller's position is elusive.

he encountered Hart's seminal work, *The Concept of Law*, in his post-graduate studies with Hart in the mid-1960s.⁶⁵ Hasluck was also influenced by his study of the Austrian positivist philosopher Hans Kelsen,⁶⁶ on whose theories Hart had drawn.⁶⁷ Kelsen similarly represented the positivist position in opposition to his German counterpart, Gustav Radbruch, who envisaged law as having a moral content.⁶⁸

What is reasonably evident is that Hart's ideas, later supplemented by his more sophisticated version in *Concept*, profoundly influenced, consciously or unconsciously, the set of legal and ethical issues that appear in *Bellarmino*.

Bellarmino's metaphoric incorporation of Hart-Fuller

In *Bellarmino*, Hasluck uses the classic literary device of the trial⁶⁹ 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 sacrificed to protect the institution?⁷⁰

65 Hasluck also drew upon his studies at The Hague Academy of International Law in 1976 (personal communication with writer, 11 August 1997).

66 See his *General Theory of Law and State* (Harvard University Press, Boston, 1949).

67 Hasluck, in 'The *Bellarmino Jug* - Constitutions and Reconstitutions', a paper presented at Law and History Conference, La Trobe University, 17 May 1986, refers to Kelsen's central premise of a legal system, the *Grundnorm* (basic norm). Hart regarded his rule of recognition as an evolution from Kelsen's *grundnorm*.

68 F Haldemann, 'Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law' (2005) 18 *Ratio Juris* 162, discusses the views of Radbruch and Kelsen about whether 'law' could apply to amoral Nazi enactments.

69 In *Our Man K*, 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*.

70 Kieran Dolin in 'Legal Fictions and Nicholas Hasluck's *The Bellarmino Jug*' *Westerly*-(1992) 37(4) *Westerly* 47 makes an original and major contribution to identifying these metaphors.

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 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'. Or are the proceedings to be judged against a set of pre-existing moral precepts that may be said to constitute a system of 'Natural Law'?⁷¹ 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 continuity are set against the challenge by students seeking to prevent Aveling's 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 inherent illegality, disregard for human rights, arbitrary punishment and unfair procedures that characterised the Nazi regime in Germany. These were partially redressed at Nuremberg.⁷² The Institute's unfair and manipulated '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.⁷³ The

71 On the relationship between natural law and morality see Neil MacCormick, 'Natural Law and the Separation of Law and Morals', p 105 and John Finnis, 'Natural Law and Legal Reasoning', p 134 in R George (ed) *Natural Law Theory: Contemporary Essays* (Oxford University Press, Oxford, 1992).

72 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 1946*.

73 See n 39.

inquisition provides a 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.⁷⁴ It, and its cognate principle *inter arma silent leges*,⁷⁵ 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. This justification is prominent in attempts by political leaders to prevent judicial scrutiny of their actions, such as President Nixon's claim to executive privilege to suppress the Pentagon tapes.⁷⁶ It 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.

74 Cicero, *De Legibus*, book III, Pt III, sub VIII adopted by John Locke in his Second Treatise, *On Civil Government*, 1790, para 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 and P Gerangelos (eds) *Constitutional Advancement in a Frozen Continent* (Federation Press, Sydney, 2009) p 53.

75 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 famously rejected by Lord Atkins (in dissent) in *Liversidge v Anderson* [1942] AC 206, discussed by Robert French CJ, 'The Executive Power', Inaugural George Winterton Lecture, Sydney Law School, The University of Sydney, 18 February 2010.

76 The US Supreme Court ordered the tapes' disclosure in *United States v Nixon* 418 US 683 (1974).

Whether necessity provides a justification for subverting justice is a challenge that *Bellarmino* shares with *Billy Budd*. Both pose problems of procedural irregularities in the way institutions deal with ostensible threats. This leads to the question: Is the positive law invoked in such proceedings *necessarily* opposed to the rules of natural justice? As Weisberg⁷⁷ points out, the concrete historical context in *Billy Budd* raises issues of a more general and universal nature. Figures such as Billy (and Aveling in *Bellarmino*) 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.⁷⁸ The adjudicator in *Bellarmino* ultimately must choose between morality (reflecting subjective considerations) or the ostensible objectivity of the positive law as it is to be professionally applied. 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*. *Bellarmino* 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 superficially may appear legal but whose procedures were manipulated more arbitrarily and in a discriminatory manner to accommodate a corrupt purpose.⁷⁹ As such it was, arguably, both immoral and unlawful.

Dolin complements this metaphorical analysis by exploring, from an alternative view-point, Hasluck's use of *fictions* in *Bellarmino*.⁸⁰ He sees Hasluck's adopting an amalgam

77 Richard 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.

78 *Ibid*, at 13.

79 Toblen too suffers Aveling's fate. Innocence, objectively, is not the issue where procedures are corrupted to preserve the system.

80 Note 74, Dolin covers the wider, elements of *Bellarmino*, including 17th century Rosicrucian subversion and its parallel, post-war Communism and imminent atomic warfare.

between legal fiction (as an agency of change) and literary fiction (the creation of imaginary worlds providing alternatives to existing orders of society). 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.⁸¹ 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’?⁸²

Dolin sees Van Riebeck’s justification for his actions⁸³ 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’.⁸⁴ He continues:

The 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’.⁸⁵ In this, Dolin suggests,⁸⁶ 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

81 Ibid, at 47-48.

82 Ibid, at 49.

83 See quotation, n 39.

84 Note 74, at 49.

85 Ibid, at 50.

86 Ibid, at 51.

come face to face with important statements about how the world operates. In *Bellarmino*, 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. The following part seeks to draw together these various threads and make explicit the deeper jurisprudential thesis explored in this study.

Understanding the Issues

How does the opposition between natural law and legal positivism, reflected in Vere's dilemma in *Billy Budd* and the Institute's in *Bellarmino* reflect the jurisprudential tension entailed in the Hart-Fuller debate? Aligning 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 body in a state of corruption analogous to do that under the Nazi regime, particularly given the self-interest of judges and administrators in the preservation of each system.

The same is true of the Institute's actions. The Council'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 imperilled by what Aveling might expose. Despite the Warden's justifications, shutting down the tribunal and the Council's perversion of its 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, 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 1930s 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 opposed though reconcilable views advanced in the Hart-Fuller debate.

Developments in Theory and Contemporary Relevance

The elements of the Hart-Fuller debate reflected in *Bellarmino* 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 in *Bellarmino* may serve as a useful introduction to fundamental legal questions but, having regard to the time of publication, do not engage the continuing and contemporary philosophical disputes regarding systemic illegality and the relationship between moral precepts and legal rules.

This afterword is not the place to expound in detail on the later sophisticated arguments criticising or defending the views originally presented by Professors Hart and Fuller. That debate has engendered an elaborate jurisprudential literature since its inception. Unsurprisingly, the 50th anniversary of the publication of Hart's *Concept* provided a cornucopia of commentary on his legacy.⁸⁷

On the other side, notwithstanding deficiencies in Fuller's early critique of Hart,⁸⁸ later theorists, such as the Australian Oxford scholar John Finnis, have rehabilitated Fuller's claim for a significant role for moral principles in legal adjudication.⁸⁹ A major contribution to the debate was made by the late American scholar Ronald Dworkin, who sought to vindicate Fuller's demand that morality has an essential role in legal determination.⁹⁰ The earlier Hart-Fuller contretemps has subsequently morphed into a later disputation, the Hart-Dworkin debate.⁹¹

Again, it is an open question whether different contributions by the proponents of each side are truly in opposition.

87 Most notably *The Hart-Fuller Debate in the Twenty-First Century: 50 Years on* (Peter Cane (ed), Hart Publishing, Oxford, 2010).

88 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.

89 John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980); 'Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections' (1996) 71 *The Notre Dame Law Review* 595.

90 Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal Legal Studies* 1; *Justice in Robes* (Harvard University Press, Boston, 2006).

91 S Shapiro, 'The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed' (2007) *University of Michigan Public Law Working Paper No 77*.

Dworkin's basic concern, shared by many in the American realist tradition, focuses on the judicial process itself, particularly the judges' role of interpretation and adjudication as fundamental to any legal system. Ironically, Hart's exclusion of morality as a criterion of validity has arguably been misunderstood. His separability thesis did not require him to deny the scope for considerations of fairness as an internal criterion of validity of a legal process.⁹² 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 *Bellarmino*.

Conclusion

The main purpose of this exploration was to demonstrate how a particular literary work can be used as a means of jurisprudential study. It has sought to show how an understanding of fictional elements in *Bellarmino* can illuminate certain issues, initially identified in the Hart-Fuller debate, that are fundamental to our legal system. Hasluck, in illuminating the jurisprudential sub-strata of his novel, has made it accessible to conscious realisation.

Given subsequent advances in jurisprudential theory to explore the potential clash between positive law and morality in contemporary settings, Hart-Fuller would be merely the starting point.⁹³ Necessarily, one would now go beyond that debate as it was joined in the early 1960s. Hart's views about the operations of the Nazi legal system could in retrospect now be compared with those of Franz Neumann, for

92 Tony Honore, 'The Necessary Connection between Law and Morality' (2002) 22 *Oxford Journal of Legal Studies* 489.

93 There is an extensive literature discussing the issues, including M Bayles *Hart's Legal Philosophy* (Kluwer, Dordrecht, 1992); L Green, 'The Concept of Law Revisited' (1996) 94 *Michigan Law Review* 1687; M Kramer, *Where Law and Morality Meet* (Oxford University Press, Oxford, 2004).

example,⁹⁴ offering a basis on which latter-day natural law arguments could be developed. Regard could also be had to later contributions to the debate.⁹⁵ But its central message of the 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.⁹⁶

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'.⁹⁷ That is a sentiment Hasluck would certainly endorse.

94 Note 57.

95 These could include B Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' in J Coleman (ed) *Hart's Postscript* (Oxford University Press, Oxford, 2001); J Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199 and J Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 *New York University Law Review* 1136.

96 Brian Tamanaha, 'The Contemporary Relevance of Legal Positivism' (2007) 32 *Australian Journal of Legal Philosophy* 1 at 38.

97 Weisberg, n 82, at 69.