

Book Review
Compte rendu

Law as a Moral Idea

By Nigel E. Simmonds
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Reviewed by Mark Bennett*

In *Law as a Moral Idea*,¹ Nigel E. Simmonds continues the long tradition of natural law or “anti-positivist” jurisprudence by arguing that to be law a norm must not only be recognized as valid within a particular legal system, but must also conform to a moral ideal of law. It follows that judges and lawyers are under a simultaneously moral and legal duty to make their legal order more fully conform to this ideal of law. Simmonds’ book, which engages a number of the most influential views in modern jurisprudence with clarity and insight, should therefore be of great interest to the legal community.

The book’s key arguments can be summarized as follows. Law is a moral idea. It is a moral idea because our everyday practices and settled understandings of law’s nature as a particular way of ordering social life show it to be so. Law is invoked by officials as a justification for their ordering of sanctions against citizens; people are forced to part with their property or freedom through the actions of judicial and executive officials, and we understand that those official actions are justified because they are applying the law. How exactly law is capable of justifying these actions is understood through moral inquiry into law’s nature. Much of this moral inquiry can already be found in the ideal of “the rule of law,” particularly Lon L. Fuller’s influential statement of the “inner morality of law.” The rule of law in Fuller’s sense is not, however, the final step in understanding the ideal of law. It is a waypoint in the attempt to spell out the moral ideal of law as “liberty as independence,” by which every individual secures independence from the will of another individual. Given that liberty as independence is the vision of justice that we should seek to fulfill, the legal community – especially judges – has a duty develop particular areas of law so as to push the law towards that moral ideal.

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¹ Oxford: Oxford University Press, 2007 [Simmonds, *Moral Idea*].

These arguments are made in great detail, and this review can only briefly describe and discuss a few of the most important moves. First, I will discuss Simmonds' methodology, which takes our "settled understandings" of law as paramount. This leads to the second key argument, that these settled understandings of law's essentially moral nature provide the justification for official application of the law. Next I will discuss Simmonds' provisional characterization of the moral ideal of law as a development of Lon Fuller's work on the rule of law, and the debates this has provoked. Finally, I will describe how Simmonds thinks law as a moral ideal might be developed, and the role that judges and doctrinal writers ought to play in that development.

1. Methodology

If law is a moral ideal, we are immediately faced with the difficulty of coming to know and understand it, given the contested nature of morality in the modern world. Simmonds is clear that the ideal is not found through lofty philosophical forays into the realm of Platonic forms.² The opposite is true; the ideal of law is found by reflecting on our everyday thoughts and practices concerning law, the "settled understandings" that we find "implicit in our understanding of the commonplace world."³ This is the methodological point on which Simmonds' entire argument hangs. Naturally, he believes that law's status as a moral ideal is a "well-established feature of our ordinary pre-theoretical outlook."⁴ Law is a moral idea because we have made it so through our practices: through thinking, talking, and acting as if law is a moral idea.⁵ These morally-charged ways of thinking and talking about law are the data that legal philosophy must explain. They are not something to explain away as error or confusion, as Simmonds repeatedly accuses positivists of doing.⁶

Yet as an argument about how we come to understand the concept of law, the methodological reliance on everyday practices and settled understandings does not discredit legal positivism. That a concept of law must explain a society's own concept of law is not a particularly controversial methodology. Indeed, legal positivists also claim to be explaining our settled understanding of law, and, predictably, they insist that on that basis law is not a moral idea. The prominent contemporary legal positivist Joseph Raz affirms that the concept of law that he

² *Ibid.* at 6-7, 58.

³ *Ibid.* at 7, 55.

⁴ *Ibid.* at 41, 169.

⁵ *Ibid.* at 23, 25.

⁶ *Ibid.* at 17, 20-21, 38, 40-42, 51, 170.

supports is not just something thought up by academic philosophers. Rather,

it is a concept entrenched in our society's self-understanding. ... It is used by each and all of us to mark a social institution with which we are all, in various ways, and to various degrees, familiar. ... It is part of the self-consciousness, of the way we conceive and understand our society. Certain institutions are thought of as legal institutions. That consciousness is part of what we study when we inquire into the nature of law.⁷

Similarly, H.L.A. Hart's famous positivist theory expressly relied on observations that he presumed to be the settled understandings of "educated Englishmen,"⁸ and sought to lay out how most people would understand "salient features of a municipal legal system."⁹ Hart sought to refine our understanding of law by challenging aspects of our everyday views he thought were in error and incongruous with other settled understandings and concepts, including many of the ideas about law's intrinsic morality that Simmonds defends.¹⁰ He also sought to discredit the pervasive understanding of law as the command of the habitually obeyed and uncommanded commander,¹¹ and promoted an alternative understanding of law as a complex social practice of primary and secondary rules.¹²

Simmonds does not highlight the similarities between his position and those of positivists such as Hart and Raz, and many readers are likely to be left thinking that legal positivists generally hold a strange methodological position that arbitrarily stipulates what law is and then asks us to abandon our many settled understandings that conflict with that stipulation. Hart and Raz's theories are presented as forcing our concept of law into a Procrustean bed, lopping off the parts that don't fit their arbitrary views,¹³ and thus removing the concept of law from the web of political concepts that it belongs to in our society's pre-theoretical understandings of law.¹⁴ That is clearly not their view of

⁷ Joseph Raz "Can There Be a Theory of Law?" in Martin P. Golding and William A. Edmundson, eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Malden, MA: Blackwell, 2005) at 331.

⁸ H.L.A. Hart, *The Concept of Law*, 1st ed. (Oxford: Oxford University Press, 1961) at 2-3 [Hart, *Concept*].

⁹ *Ibid.* at 5, 17, 77.

¹⁰ Simmonds, *Moral Idea*, *supra* note 1 at 20-23.

¹¹ *Ibid.* at Chapter IV.

¹² *Ibid.* at Chapters V and VI.

¹³ Simmonds, *Moral Idea*, *supra* note 1 at 52.

¹⁴ *Ibid.* at 28-29.

what they are doing, for their methodological statements show a broad similarity with those of Simmonds.

That positivists think that settled understandings come out *in their favour* also creates problems for Simmonds' explanation of judges' justification of their decisions. Legal positivists, because they broadly share his methodological approach, directly challenge Simmonds' view of what our settled understandings are. At many points Simmonds admits that our settled understandings of law are plural and conflicting;¹⁵ in other words, not so settled after all. Nevertheless, Simmonds views "positivist" understandings as error – "simply wrong"¹⁶ – while chiding those who take this view of "anti-positivist" understandings. He justifies this by saying that his theory makes coherent the various and seemingly inconsistent understandings we have about the law;¹⁷ but the same claim can be made by positivists, for example by explaining our anti-positivist settled understandings as related to the concept of the rule of law rather than being intrinsic to law.¹⁸ Probably the likeliest and most telling criticism of Simmonds method will be that what he takes to be settled understandings of law are equally well described as settled understandings about *good law*. I will expand on this point below.

2. Justification

One of the key disagreements between positivists and anti-positivists such as Simmonds is whether *law in itself* provides justification for coercion. Anti-positivists argue that law is something more than an effective system of norms deployed by the powerful: the idea of law has a moral content that – where fulfilled – provides a justification for force. In contrast, positivist theories usually see nothing about law itself that warrants any claim to moral legitimacy – there is no immediate step from legality to legitimacy. Simmonds falls squarely on the anti-positivist side, arguing the idea that the law justifies coercion is simply part of our settled understandings of law. He thinks that the fact that a norm is law is regularly used by judges as the key moral justification for coercive enforcement of legal norms.¹⁹ Because these are our settled understandings of law, we must ask what law must be that the mere mention of it explains why a judge may justifiably interfere in peoples' lives – even to the point of taking all they own or depriving

¹⁵ See e.g. *ibid.* at 5, 21, 37-43, 51, 58.

¹⁶ *Ibid.* at 59.

¹⁷ *Ibid.* at 43-44.

¹⁸ *Ibid.* at 48.

¹⁹ *Ibid.* at 2, 170-72, 191.

them of their liberty. If all a judge needs to do to justify their application of the law is to point out that it is law that they are applying, then law must be an intrinsically moral idea.

In many ways Simmonds is on solid ground; it is clear that judges and other officials do invoke the fact that they are applying law as a justification for their actions. This is one of the settled understandings of law that legal positivists could agree with. This is not a simple phenomenon to explain, however. There are two key complications. First, it is not obvious that the justification that judges are giving is necessarily a *moral* justification. Second, assuming that judges are giving a moral justification, it is still not obvious whether they are justifying their actions by reference to the fact that the norms they are applying are law, or by reference to the fact that the norms are *good* law. I will take the two complications in turn, as the answer Simmonds provides to the first complication leads to the second.

The first complication points to the complicated debates about the “normativity” of law. A norm is a reason for action; norms tell us what we “ought” to do. Laws, it is commonly thought, claim to prescribe conduct, giving us *moral* reasons for action, rather than just the *prudential* (self-interest based) reasons for action that any command backed by a threat would present us with.²⁰ Law claims moral authority over us, and thus claims to be able to change our moral world by giving us normative guidance; legal norms give us a reason to do *X*, and also tell us to disregard most other reasons to not do *X*.²¹ Law has normativity, and a simple way of explaining that normativity is by relating it to justice or morality, as anti-positivists do.²² Naturally, positivists explain normativity differently. Hart’s basic position is that law is a system of norms that officials apply to people’s conduct, those norms themselves being picked out by a rule of recognition that is sustained by the practices of officials. Normativity exists here in two senses: the judges apply the norms of a legal system to its subjects, and their own practice of the rule of recognition constitutes a (normative) social rule.²³

As Simmonds notes, Hart thought that the second aspect of normativity – the judge’s practice of the rule of recognition – could be engaged in by the judge for a variety of reasons, not all of which are moral; for example, a judge might be acting out of unreflecting

²⁰ *Ibid.* at 118-19.

²¹ *Ibid.* at 16.

²² *Ibid.* at 120.

²³ *Ibid.*

tradition or habit, or according to self-interest in a career, social status, or protection from negative consequences.²⁴ In other words, a judge might engage in the practicing of a rule of recognition, and thus apply norms to the law's subjects, without thinking that either their own application of the rule of recognition or the norms that they apply to the subjects are morally justified. This view has been supported by Raz, who states:

it is not only logically possible but also not uncommon for an official of the system to follow its rule of recognition without regarding them as morally justified. ... [T]he official may follow the rule either without having any beliefs about why he is justified in doing so, or for prudential reasons...²⁵

If so, then a judge's justification of their decision does not necessarily have to be a moral justification, and yet, through the account set out above, we can still explain law's normativity.

This first objection fails, however, if there is a settled understanding that judges necessarily morally justify their decisions, and that in such justifications the fact that judges are applying law plays a key part; law must have some feature that is morally charged. But Simmonds provides no evidence that these are our settled understandings. If his articulations of these settled understandings strike the reader as plausible, then that is some evidence of their correctness, but it is clear that this is not a consensus position, for Hart and Raz think our settled understandings are that judges' justification of their decisions can merely be relative to the rule of recognition. Positivists do not deny that we must offer explanations that make intelligible why judges engage in the practices they do; but they deny that such explanations have to see judges as engaging in practices for moral reasons.

If, contrary to the argument above, we grant that judges engage in moral justifications of their decisions, the second problem arises: Simmonds has to show that *law itself* is a moral idea that plays the key role in such justifications. He attempts to do this by again appealing to our settled understandings of law. His first move is to attack the positivist view of law as whatever is picked out as legally valid by the rule of recognition of a particular legal system. Because Simmonds thinks there is a settled understanding that law itself plays the key role in morally justifying judicial decisions, he finds this positivist view

²⁴ *Ibid.* at 40, 122, 132-33.

²⁵ Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999) at 147-48.

untenable; it would be bizarre for judges to try to morally justify their application of law by reference to the rule of recognition, which is merely a social rule practiced by judges.²⁶ He therefore introduces a morally-richer concept of law – “legality” – which would be able to explain why law can justify coercion.²⁷ The idea of “legality” supplies us with a way to reflect about what gives norms the property of being law, in contrast with the morally-neutral positivist reference to derivability from a rule of recognition.²⁸ To cohere with our settled understandings, our reflections on legality must find some property of law that could be relevant to the justification of force.²⁹ If we follow Simmonds and provisionally take legality to refer to Fuller’s criteria of the rule of law, then there is a connection between legality and freedom, for if the rule of law exists to any degree “citizens will enjoy some zones of optional conduct that are protected from the interference of others.”³⁰ This, for Simmonds, is the germ of the moral ideal of law that explains our settled understanding that law plays a key part in justifying judges’ decisions and the coercive force that often follows them.

Simmonds’ argument on justification here faces a second ambiguity in our settled understandings and practices, however. Even if we grant that judges do morally justify their decisions, we still do not have to conclude that law itself is a moral ideal that plays the key role in such justification. It may be that judges morally justify their application of the law not by reference to the fact that it is law they are applying, but by reference to the fact that the law is *good* law – that it is just, democratic, rights-respecting, conducive to human flourishing and so on. Good law does justify coercion. But it does so because it is good, not because it is law. The question shifts from “What must law be that it justifies coercion?” to “What must good law be in order or it to justify coercion?” It may well be that our dominant settled understandings include that law justifies coercion, but that settled understanding is ambiguous: it is very hard to rely on it to make the case that this thought is fulfilled by law itself being a moral ideal, rather than by our view that our own particular legal system has good law. One view sees law as an intrinsically moral idea, the other sees law’s ability to provide moral justification as contingent on it being good, rather than just repeating that it is *law* that they are applying.

²⁶ Simmonds, *Moral Idea*, *supra* note 1 at 129.

²⁷ *Ibid.* at 127-29.

²⁸ *Ibid.* at 137.

²⁹ *Ibid.*

³⁰ *Ibid.* at 142.

Looking at our settled views and practices is likely to be inconclusive. For example, officials need not expressly say that they are relying on contingent features of the law to justify their behaviour, if it is well known that the features of their society's rule of recognition mean that the law is to some degree good law. The society's law might be identified by a "good" rule of recognition that picks out norms that were democratically enacted, or that respect fundamental rights, or conform to the formal features of the rule of law, or in some other way make it good law. If this is the case, when judges morally justify their decisions by pointing out that the law requires that decision, they are likely to be relying on the contingent fact that the law is good law, not that it is law and that law is necessarily moral. They might, if the moral justification of their application of the law is challenged, explicitly point to these features that make law good.

Again, we have positivists lined up on one side, anti-positivists on another. So which interpretation of judges' morally justificatory argument is correct? On Simmonds' methodology, this really depends on which settled understanding of law is actually prevalent in the society. If the settled understanding is that it is the law itself that intrinsically plays a role in justifying judges' decisions, then when judges do so they are upholding the view of law as a moral ideal: there is some intrinsic moral value in law. If the settled understanding is that law is not intrinsically moral, then judges will be justifying their decisions on the basis of the contingent fact that this law is good law in some way. How can we tell which of these view is the settled understanding? It is very hard, as the statements of ordinary people and legal officials are likely to be ambiguous between the two views. If I tell you I was justified in doing something because it was mandated by the law, does that mean that law is somehow intrinsically moral, or does it mean that in our society the law has morally valuable features that we are implicitly referring to? Complex empirical discourse analysis would be needed to figure this out, and it may be that our settled understandings are ambiguous, contradictory, or confused.

However one personally thinks about our settled understandings about the justification of judicial decisions, figuring out its intricacies is an instructive exercise in legal theory for any judge or practitioner. Furthermore, there is much in Simmonds' analysis that positivists could agree with, once they are allowed to distinguish between legal validity under a rule of recognition ("law") with the ideal of the rule of law ("legality"). A judge justifies a decision legally by reference to its derivability from the law, but – and here positivists are in agreement with Simmonds – they cannot morally justify their decision that way.

To morally justify the decision, judges must point to moral reasons for decision.³¹ There is a strong argument to be made that the moral reasons that apply to the practice of judging are indeed provided by our concepts of the rule of law or legality. As such, the idea of legality is a moral ideal that is closely connected with law, but more specifically, answers the questions that positivism's concept of law leaves unanswered: How should judges decide cases? What is the moral obligation of the judge?³²

What legality or the rule of law requires would then become the crucial issue in jurisprudence, as a moral question all theorists must answer. It can be answered in a number of ways. Political positivists argue that the values of democracy and certainty require judges to follow the letter of the law enacted by democratic legislatures. Common law constitutionalists argue that judges have a moral duty (anti-positivists think this is a legal duty as well) to interpret the law consistently with fundamental human rights. There is nothing to prevent a positivist from agreeing that judges have a moral "duty of fidelity to law," which requires judges to reflect on and contribute to the creation of "liberty as independence."³³ Therefore, legal positivists need not automatically reject the development of the ideal of the rule of law or legality; indeed, many have seen anti-positivist theories as generally complementary to positivism. Thus, the development of this ideal should be recognized as important by all legal theorists.

3. The Ideal

If legal theorists can agree that interrogating the idea of legality is a central task of jurisprudence, they will find Simmonds' analysis and development of that ideal instructive. Although the moral ideal of law that Simmonds wants to develop legality into is a Kantian notion of "liberty as independence,"³⁴ he takes as a provisional statement of the

³¹ John Gardner, "The Legality of Law" (2004) 17 *Ratio Juris* 168 at 177 argues that how officials could be morally required or permitted to apply legal norms is the "main puzzle of law":

Legal practitioners, including judges, should act morally in their work for the same reason that doctors and soldiers should: because their work affects people's lives in morally significant ways. There is no further problem of why they should act morally. Whereas there is a further problem – a moral problem – of why they should defer to legal norms when they do so.

³² Cf. Simmonds, *Moral Idea*, *supra* note 1 at 188.

³³ *Ibid.* at 188-89.

³⁴ *Ibid.* at 12-13, 124, 158-59; on Kant's view of law and liberty, see also Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, forthcoming 2009).

ideal the principles or attributes referred to in legal philosophy as the rule of law, found most notably in the work of Fuller.³⁵ Simmonds reminds us that Fuller's insights can be separated out into two key claims: first, that the eight principles – generality, publicity, “non-retrospectivity,” intelligibility, non-contradiction, possibility of compliance, and congruence of official application – are a key part of the existence conditions of legal systems; and second, that these principles are moral.³⁶ Combining these two claims, Fuller offered a challenge to legal positivism: if law necessarily conforms to the rule of law, and the rule of law is somehow moral, the law is necessarily moral, to some degree.

Simmonds argues that Fuller's tale of King Rex – the ruler who issues secret laws, and laws that he never follows or applies – is meant to trigger our intuitions about legality; we are meant to think, “That is not law.”³⁷ Legal systems that have no rules, no norms that could possibly be reasons for actions, are not legal systems according to our settled understandings.³⁸ Simmonds is correct to say that positivists might accept this, for Raz did so in his famous essay, saying that without rules a legal system could not exist.³⁹ Given this acceptance, it would seem that such a view is not “fatal to positivism.”⁴⁰ Positivists might not have any problem in recognizing that there is some minimal moral value in the mere fact that a system of norms exists; indeed, this is the position that emerges from a close reading of the works of Hart and Raz in which they discuss Fuller's argument.⁴¹

In any case, Simmonds sees an ambiguity in Hart's position, and so proceeds to argue with the most trenchant positivist defender of the view that the rule of law is not a moral ideal, Matthew Kramer. Simmonds's debate with Kramer has been ongoing for a number of years, and defines the state-of-the-art thinking on many aspects of the rule of law. In short, Simmonds defends Fuller's view that the principles of the rule of law are intrinsically moral, whereas Kramer argues that they are morally neutral. Their debate has progressed to a level of abstraction and complexity so that now the key question is whether “wicked regimes motivated solely by self-interest of the rulers

³⁵ Simmonds, *ibid.* at 65.

³⁶ *Ibid.*

³⁷ *Ibid.* at 66.

³⁸ *Ibid.* at 66-68.

³⁹ Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1983) at 210ff [Raz, *Authority*].

⁴⁰ Simmonds, *Moral Idea*, *supra* note 1 at 68.

⁴¹ Raz, *Authority*, *supra* note 39 at 38-39 and 240.

will nevertheless have good reason for complying with the requirements of the rule of law.”⁴² It is easy to see that a benevolent regime will have reason to comply with the rule of law, for such compliance generally increases the autonomy and happiness of their subjects, by allowing them to know what the law require of them and to be able to plan their lives on that basis. But why would a wicked regime comply (except to present an ideological façade of acceptability), given that the wicked regime presumably cares little about its subjects’ autonomy and happiness?⁴³ Kramer’s answer points out that Fuller’s eight rule-of-law principles are instrumental virtues of rules; they make rules better able to guide human conduct, in terms of ensuring both that people know what the rules demand of them, and that they have a reason to comply with them. This observation is – along with that of the moral value of conformity – a key insight about the idea of the rule of law. If the rule of law is instrumentally valuable in securing compliance with rules, then wicked regimes have a non-moral reason to conform to its principles. Kramer thinks this is so, and that the rule of law “is indispensably serviceable for the pursuit of benevolent ends on a large scale over a sustained period, but it is also indispensably serviceable for the pursuit of wicked ends on such a scale over such a period.”⁴⁴ Because of this serviceability for evil, wicked regimes have non-moral reasons to conform to the principles of the rule of law, and therefore the rule of law is not an intrinsically moral idea.

The debate between Simmonds and Kramer about whether the rule of law is a moral idea has, as a natural progression from this question of whether wicked regimes have prudential reasons to abide by it, become a clash between classical and behavioural economic assumptions. This is because it has moved from an analysis of how conformity to certain principles allows people to know what the law demands of them, to an analysis of how deviations from prospectivity and congruence of official action with the rules saps the incentives that people have to comply with the law.⁴⁵ Kramer argues that if people know that their actions will be evaluated against non-existent or retrospectively introduced rules, or that they will be simply be subject to arbitrary non-legal violence whether or not they comply with the law, their incentives for complying with the law will be sapped, and the complex kind of governance – a system of norms governing a large area

⁴² Simmonds, *Moral Idea*, *supra* note 1 at 79.

⁴³ See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 273-74.

⁴⁴ Matthew Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007) at 143.

⁴⁵ Simmonds, *Moral Idea*, *supra* note 1 at 84.

over a long time – that law enables will be impossible. Kramer and Simmonds have thus made a number of forays into the sociological-economic analysis of whether wicked regimes do or do not have prudential reasons to conform to the rule of law.⁴⁶ Kramer thinks that deviations will sap incentives, whereas Simmonds thinks that they will not, meaning that wicked regimes do not have reason to comply with the rule of law.

Recently, Hamish Stewart has shown that who is right about this depends on whose sociological-economic analytical assumptions are found to be correct in practice.⁴⁷ Simmonds' view depends on the assumptions of classical economic analysis, whereas Kramer's depends on economically unorthodox views of human action that factor in things other than mere self-interest in not being punished, and which takes into account systematic failures of rationality.⁴⁸ As Stewart concludes, who is right will depend on the empirical confirmation of either theorist's assumptions in particular societies.⁴⁹

After analyzing the economics of the debate, Stewart offers a general observation that may prove to be of more importance: however the economics comes out in practice, the rule of law is in any case valuable because of the way it secures liberty.⁵⁰ Compliance with the rule of law, even compliance by a wicked regime in service of evil ends, will create some moral value through securing at least some degree of liberty for the law's subjects. This would be the situation suggested by Hart – some minimal moral value might exist in rule of law compliance, even in a deeply unjust regime.⁵¹ The point here is that, as Hart observed in his encyclopedia article, the rule of law is both instrumentally and morally valuable:⁵²

These requirements and the specific value which conformity with [the rule of law] imparts to laws may be regarded from two different points of view. On the one hand,

⁴⁶ Matthew Kramer, "The Big Bad Wolf: Legal Positivism and its Detractors" (2004) 49 Am. J. Juris. 1; Nigel E. Simmonds, "Straightforwardly False: The Collapse of Kramer's Positivism" (2004) 63 Cambridge L. J. 98; Nigel E. Simmonds, "Law as a Moral Idea" (2005) 55 U.T.L.J. 61; Matthew Kramer, "Once More into the Fray: Challenges for Legal Positivism" (2008) 58 U.T.L. J. 1; see also Jeremy Waldron, "All We Like Sheep" (1999) 12 Can. J. L. & Jurisprudence 169.

⁴⁷ Hamish Stewart, "Incentives and the Rule of Law" (2006) 51 Am.J.Juris. 51.

⁴⁸ *Ibid.* at 160-62.

⁴⁹ *Ibid.* at 164.

⁵⁰ *Ibid.* at 163.

⁵¹ Hart, *Concept*, *supra* note 8 at 202.

⁵² H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 114-15.

they maximize the probability that the conduct required by the law will be forthcoming, and on the other hand, they provide individuals whose freedom is limited by the law with certain information and assurances which assist them in planning their lives within the coercive framework of law.

There is historical evidence for this very point, as Kristen Rundle has recently shown: many of the persecuted in Nazi Germany felt better off when their oppression was carried out according to the rule of law.⁵³ This is so even though it might be said that this is exactly the kind of case that Kramer envisions, in which a complex project (genocide) was planned in a large society over a period of time, proceeding through a number of stages (identification of Jews and dehumanization were arguably conditions for their extermination).⁵⁴ Overall we will say that the Nazi law was unthinkable evil, and that the Nazi's observance of the rule of law at certain stages aided them in their goals, but it seems wrong to deny that their compliance with the rule of law generated at least some kind of moral value that did not exist when there was arbitrary violence. At least that is how many experienced it.⁵⁵

In the end it is this argument, and not Simmonds' sociological-economic argument "that practices observing and pursuing the rule of law cannot be rendered intelligible by the idea that they are instrumentally effective techniques for the pursuit of non-moral goals,"⁵⁶ that seems to better ground the view that the rule of law is intrinsically morally valuable. Again, the argument should not be that the principles themselves are moral principles, nor that their fulfilment invariably creates moral value – there are some situations where no detriment to autonomy or happiness will flow from a breach, nor any benefit from conformity. The point is that the fulfilment of these principles will generally result in a greater amount of liberty and happiness. As Simmonds himself puts it,⁵⁷ "if the rule of law is a reality, [a person's] duties will have limits and the limits will not be dependent upon the will of any other person." If this is the case, doesn't this mean that even if a wicked regime conforms to the rule of law and thus achieves its wicked ends more effectively, there is some moral value secured by that conformity?

⁵³ Kristen Rundle "The Impossibility of an Exterminatory Legality: Law and the Holocaust" (2009) 59 U.T.L.J. 65.

⁵⁴ *Ibid.* at 68.

⁵⁵ *Ibid.* at 90-98, 118-25.

⁵⁶ Simmonds, *Moral Idea*, *supra* note 1 at 110.

⁵⁷ *Ibid.* at 101.

4. *Developing the Ideal*

In the latter parts of the book, Simmonds sets about refining the ideal of law – the rule of law. This cannot be done through abstract philosophical reflection alone; value is created through human interaction. We cannot depend on abstractly-stated principles or ideals to guide us in advance, but have to reflect on our moral judgments as we make them in response to particular situations and circumstances:

We discover the limitations of an explicitly formulated principle, and deepen our understanding of the moral value that it imperfectly expresses, through the experience of trying to apply it in the multifarious circumstances of the real world. ... Jurisprudence can only properly be understood in the light of the possibility that moral insight might be derived from historically informed reflection upon our practices and institutions.⁵⁸

The reflection about “our” intuitions that is so prominent in contemporary moral and political philosophy must always begin “within a particular fabric of practice and judgement, and depend on our education into that fabric.”⁵⁹ Simmonds thus proceeds to show how further insight into the moral ideal of law is prevented by contemporary jurisprudence’s characteristic severance from historical reflection on our practices.⁶⁰ When questions of justice and right were separated out from questions of the common good by various precursors to liberalism found in Grotius, Pufendorf and Kant, reflection on the form of common good found in the rule of law was abandoned in favour of the search for the system of individual rights that will allow people to achieve their individual goods.⁶¹ Reflection on the complex common good of “liberty as independence” cannot, however, be found in abstraction and in advance, but must be informed by our experience of seeking that good.⁶²

Because of the above views, Simmonds sees our participation in actual legal practices as crucial in developing the moral ideal of law. Fuller’s understanding of the ideal of law is only a useful provisional guide to further reflection, and his principles must be refined to better embody the complex good that is “the set of conditions for the realization of liberty as independence.”⁶³ Simmonds argues, for

⁵⁸ *Ibid.* at 146-47.

⁵⁹ *Ibid.* at 150.

⁶⁰ *Ibid.* at 151.

⁶¹ *Ibid.* at 152-56.

⁶² *Ibid.* at 156.

⁶³ *Ibid.* at 158.

example, that publication is not an essential part of the ideal of law as “liberty as independence,” for rules only have to be knowable in advance in order to guide human conduct, and we can often know what standards will be applied to a new situation because of our background knowledge and expectations that we share with our society.⁶⁴ The workings of the common law, in Simmonds’ view, is a familiar example of such a situation. This view might be subjected to the countering experiential observation that many of us live in societies in which such shared and pervasive background knowledge has fallen away, meaning that publication may indeed be necessary for “liberty as independence” to be fulfilled.⁶⁵ This is just the kind of analysis that Simmonds thinks will result in the further development of the idea of law as liberty as independence.

Doctrinal writing that seeks to systematize certain areas of law is of great importance developing the ideal of law. In some theories of law such doctrinal systematization seems to involve the writer overstepping the proper bounds where it extends to statements of the law in areas which are uncertain and unresolved by the courts.⁶⁶ In Hart’s theory, judges act as interstitial legislators when they resolve such problems in their decisions, but in Simmonds’ view Hart cannot explain what the doctrinal theorist is doing, for it seems that the doctrinal writer has no authority to perform such a role.⁶⁷ In contrast, from the position that law is a moral idea we can see how the doctrinal theorists’ view on unresolved areas of the law are legitimate attempts to move the law towards the ideal of law.⁶⁸

Of even more importance, of course, is the judge’s role in developing the ideal of law. Judges have a duty of fidelity to law, which in Simmonds’ view means a duty to develop the system of law as they find it in a way that increases its coherence as the system of rights and freedoms that creates liberty as independence.⁶⁹ Legality requires each legal system to correspond to the greatest degree possible with justice, otherwise the judge will have to do more “developing” of the law and fill in more and more “just” content herself. This gives the judge more power of choice and thus subjects the system’s subjects to the power of

⁶⁴ *Ibid.* at 161.

⁶⁵ See Joseph Raz, “The Politics of the Rule of Law” in Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1995); Jeremy Waldron *Law and Disagreement* (Oxford: Oxford University Press, 1999); Jürgen Habermas, *Between Facts and Norms* (Cambridge, MA: MIT Press, 1996).

⁶⁶ Simmonds, *Moral Idea*, *supra* note 1 at 165.

⁶⁷ *Ibid.* at 166-67.

⁶⁸ *Ibid.* at 167.

⁶⁹ *Ibid.* at 197.

others, which is a departure from legality as independence.⁷⁰ In this way “legality can only be achieved where justice is achieved also. For only when the law is just will judges’ ‘justice-guided’ interpretations be a smooth and natural fit for the law.” The converse also holds: justice cannot be fully achieved without legality, because only legal rules can overcome the indeterminacy that is necessarily found in trying to determine how to impartially and equally apply the abstract reasons of justice to concrete persons and their situations.⁷¹ Thus, though legality and justice are distinct concepts, they can:

Be fully realized only in conjunction with the other. Outside the context of law, the idea of justice can seem empty and arbitrary... [seeming] to leave plenty of room for individual variation of opinion. Detached from its background in justice, the law will be a set of rules permeated by penumbral situations where the will of the judge must be decisive. Only in the union of legality and justice is either idea fully realizable.⁷²

With these final words, Simmonds caps a line of argument of a book that provides ample food for thought for both legal theorists, and for judges, lawyers, and all the subjects of law.

5. Conclusion

This review has not been able to do full justice to the rich and complex arguments that make up *Law as a Moral Idea*. Simmonds has developed a coherent and attractive anti-positivist theory of law, drawing on a historical understanding of the development of modern jurisprudence and engaging in some of the most important debates about the methodology of legal philosophy, the ideal of the rule of law, and the legal and moral justification of judicial decisions. Arguments within the book have already pushed these debates forward, and legal theorists of both positivist and anti-positivist persuasions will want to make their own engagement with Simmonds’ ideas. Those who have not kept up with legal theory but who are interested in whether law is a moral ideal – and, if so, how its moral character is created and what obligations judges, lawyers and law’s subjects have to further liberty as independence – will find *Law as a Moral Idea* a deep but accessible discussion that will prompt reflection and re-engagement with many of the most important and difficult problems of jurisprudence.

⁷⁰ *Ibid.* at 198.

⁷¹ *Ibid.*

⁷² *Ibid.*