

**“Forms liberate”:  
Reclaiming the Legal Philosophy of Lon L. Fuller**

by

Kristen Ann Rundle

A thesis submitted in conformity with the requirements for the degree of  
Doctor of Juridical Science

Faculty of Law  
University of Toronto

© Copyright by Kristen Ann Rundle 2009

# **“Forms liberate”: Reclaiming the legal philosophy of Lon L. Fuller**

Kristen Rundle

Doctor of Juridical Science

Faculty of Law  
University of Toronto

2009

## **Abstract**

This thesis offers a reading of the legal philosophy of the mid-twentieth century legal scholar, Lon L. Fuller. By illuminating how Fuller’s vision of law gravitates constantly to the relationship between the form of law and the status of the legal subject as an agent, this reading provides a basis for revisiting the issues in dispute in his famous exchanges with the legal positivist philosopher, H.L.A. Hart.

The thesis as a whole seeks to meet two main objectives. First, I seek to demonstrate how Fuller’s persistent concern for the way that the form of law instantiates respect for the legal subject lends his legal philosophy a coherence that has been insufficiently appreciated to this point. Second, I seek to elaborate the claim that once we appreciate the centrality of the relationship between legal form and agency to Fuller’s thought, we come to understand why he insisted that law can and should be distinguished from other modes of ordering, and why it must also be regarded as distinctively moral.

The thesis is comprised of five chapters. In Chapter 1, I introduce the context of Fuller’s legal philosophy by surveying the concerns of his jurisprudential writings prior to the

commencement of his exchanges with Hart. In Chapters 2, 3 and 4, I offer a close textual analysis of Fuller's position in the three major writings that are most readily associated with those exchanges: his reply to Hart in the 1958 *Harvard Law Review*, his 1964 book *The Morality of Law*, and the "Reply to Critics" that brought the Hart-Fuller debate to a close in 1969. In Chapter 5, I conclude the thesis by assessing the implications of my reading for prevailing debates in legal philosophy about the relationship between law and legality, and for our understanding of the questions at issue in the Hart-Fuller debate more generally.

## Table of Contents

Acknowledgments .....	vi
-----------------------	----

Image – “Forms liberate” .....	viii
--------------------------------	------

### Chapter 1 - Introducing the picture

1 Introduction.....	1
1.1 “Form” and “agency” .....	4
2 Structure and context of the thesis .....	7
3 Economics.....	13
4 Other recurring themes .....	24
5 Which label? .....	26
6 Conclusion .....	30

### Chapter 2 - The Hart-Fuller debate

1 Introduction.....	32
2 Hart’s “Positivism and the Separation of Law and Morals” .....	33
2.1 On the history of the positivist insistence of the separation of law and morality .....	34
2.2 The seeds of Hart’s novel account of legal positivism .....	34
2.3 The law-morality connection and the interpretation of particular laws .....	36
2.4 The problem of Nazi law .....	39
2.5 The law-morality connection and the foundations of legal order .....	42
2.6 Other challenges to the law-morality connection in legal philosophy.....	44
3 Fuller’s “Positivism and Fidelity to Law – A Reply to Professor Hart” .....	45
3.1 Re-orienting the agenda: challenging positivism on what it seeks to exclude when it excludes morality from its account of law .....	46
3.2 On the moral foundations of legal order .....	47
3.3 On the morality of law itself .....	49
3.4 On the problem of Nazi law .....	53
3.5 On Hart’s model of interpretation.....	58
3.6 On the moral and emotional foundations of positivism.....	60
4 Conclusion .....	61

### **Chapter 3 - The Morality of Law**

1 Introduction.....	66
2 <i>The Morality of Law</i> .....	69
2.1 The story of King Rex.....	71
2.2 Situating his claims .....	75
2.3 The conception of the person implicit in legality .....	78
2.4 Observations .....	81
3 Hart's review of <i>The Morality of Law</i> .....	83
3.1 Observations .....	87
4 Conclusion .....	96

### **Chapter 4 - Fuller's replies**

1 Introduction.....	98
2 Fuller's "Reply to Critics" .....	101
2.1 Observations .....	111
3 Conclusion .....	119

### **Chapter 5 - Defending the picture**

1 Introduction.....	124
2 Fuller's consistency .....	126
3 Revisiting Hart's responses to Fuller.....	130
4 Raz on the rule of law .....	141
4.1 The negative value and instrumental arguments.....	147
4.2 The minimal compliance argument .....	148
4.3 The moral value argument .....	149
5 Conclusion .....	152

<b>Selected Bibliography .....</b>	<b>157</b>
------------------------------------	------------

## Acknowledgments

Completing this thesis would not have been possible without the support of so many people, only a handful of whom I acknowledge here.

First, I wish to thank my family in Australia for acceding to my unreasonable request that they not ask me about my work, or when I expected it to be finished. In this, as in so many things, you knew that I just had to get it done my way, and that I'd be sure to report when it was all over. I thank you sincerely for your love and pride and for knowing me so well.

Closer to home, I thank Whitney Smith with all of my heart for providing the daily love and foundations that underpinned these 4.5 years of hard work. A lifetime of insight into the creative process gave you a special capacity to be unperturbed by those decidedly unpretty moments when I insisted that it was all about to fall apart. Your faith in my abilities, which consistently astonishes me, means the world to me.

I am also indebted to the powers that be in the Graduate Program at the Faculty of Law, University of Toronto for selecting such a fabulous group of students with whom to endure the trials of doctoral study. This group quickly became a community of friends who were there to offer encouragement and good humour at every step. I wish especially to acknowledge Zoran Oklopčic, Rayner Thwaites, Emily Hammond, Kim Stanton, and Rose Ann Macgillivray, each of whom was not only close at hand at all times, but also added laughter and enduring friendship to the mix. It is a privilege to have shared these years with you.

No small contribution to surviving this process was made by the people and places that formed part of my day-to-day life. Moonbeam Café in Kensington Market offered a warm and welcoming environment (and excellent tea) for many a morning's work. Visits to the beautiful Hart House swimming pool were indispensable to the maintenance of sanity. The School of Graduate Studies (SGS) at the University of Toronto deserves special acknowledgment for providing me with a generous medical bursary to assist with the costs of managing a challenging body through a difficult process. Thanks especially to Michelle Ryan for helping me to gain this assistance, and for all her good-natured and efficient efforts in managing the administrative side of my enrolment. This was met, at the Faculty of Law, with the equally stunning efficiency and good humour of Julia Hall, who I also wish to thank for her efforts in keeping me on track.

On the academic side, the development of this thesis was greatly aided by a number of opportunities to engage with scholars and resources outside of the University of Toronto. My visit in April 2008 to the archive of Fuller's private papers that is held at the Harvard Law School library, made possible through the assistance of an SGS travel grant, proved to be invaluable to the shape that the thesis ultimately took, and to the insights that I was able to offer through it. Thanks in particular go to Lesley Schoenfeld from the Special Collections library at Harvard Law School, whose friendly assistance was instrumental to

my gaining access to the materials I needed, both while visiting Harvard and subsequently. During the same trip, I also benefited greatly from conversations with Kenneth Winston of the John F. Kennedy School of Government at Harvard, who generously shared both his time as well as some of his own valuable research on Fuller's archive with me.

Elsewhere, the symposia convened to commemorate the fortuitously-timed 50<sup>th</sup> anniversary of the Hart-Fuller debate provided a rare opportunity to meet and engage with many leading legal philosophers on the questions of concern to this thesis. My thanks thus go Jeremy Waldron at the New York University School of Law, and Peter Cane at the College of Law, Australian National University, for organizing these events and welcoming me to them. It was at these symposia that I had the good fortune to meet and discuss my research with Nicola Lacey from the London School of Economics, whose support for my work and career has been enormously encouraging. I am also indebted, as always, to my LLM supervisor at McGill Law School, Rod Macdonald, for his ongoing caring attention to all of my projects, and for encouraging me to take this academic path in the first place.

At the University of Toronto, Melissa Williams deserves special thanks for welcoming me into her community of fellows at the Centre for Ethics for the 2008-2009 academic year. The gift of this fellowship, and the environment of the Centre generally, provided the perfect setting in which to bring my doctoral project to a close. In addition to Melissa, I would like especially to extend my gratitude to Yasmin Dawood, Burke Hendrix and Doug McKay for their friendship and kind attention to my work, to Ashfak Khan for keeping all good things on track, and to Evelyn Wong for providing life-saving technical assistance at the submission stage.

At the Faculty of Law, I wish to convey my deep gratitude to my supervisory committee who deserve as much credit for the completion of this project as I do. The ebullient presence of Mayo Moran supplied much-needed encouragement from beginning to end, alongside a disarming knack for asking precisely the questions that needed to be asked at each point of the process. Ernie Weinrib brought great wisdom and a formidable knowledge of Fuller to the later stages of the project. Being the beneficiary of his support and guidance has been one of the great privileges of my time as a doctoral student. At the examination stage, engagement with Jutta Brunnée, my internal examiner, planted many seeds that I hope to develop in subsequent work, and again all delivered with great warmth and encouragement. Finally, my external examiner, Mark Walters of Queen's Law School, deserves my very sincere thanks for providing an examiner's report that engaged closely with my thesis at every step, and which raised many constructive criticisms and questions that will improve my future work immeasurably.

I reserve my deepest gratitude for my primary supervisor, David Dyzenhaus, whose distinctly unsentimental style compels me to keep this short. You were the best imaginable supervisor. Thank you.

Local Morality of  
[redacted]  
[redacted]  
[redacted]  
[redacted] Forms liberate.

of negative concept  
of freedom



# Chapter 1

## Introducing the picture

### 1 Introduction

Lon L. Fuller was an American legal philosopher, and Professor of Jurisprudence at Harvard Law School, who published his reflections about law from the early 1930s through to the early 1970s. Among legal philosophers, he is mostly remembered as the natural lawyer who, in a famous exchange in the 1958 *Harvard Law Review*, responded to the theory of legal positivism advanced by the Professor of Jurisprudence in Oxford, H.L.A. Hart.<sup>1</sup> The generally accepted view is that Hart emerged as the winner of that exchange, and that Fuller's subsequent attempts to point out the deficiencies in Hart's positivism, and to answer the objections to his own account, largely came to naught. After eleven years of back and forth, the Hart-Fuller debate came to a close in 1969.<sup>2</sup>

As is often the case, however, prevailing views can be challenged when we come to an inquiry from a different starting point, or otherwise take a wider view of the questions at issue within it. The task of understanding Fuller's thinking about law and how it might be situated within the debates of legal philosophy is no exception to this. To begin this thesis, therefore, I will invoke an image that speaks directly to the message that I think Fuller sought to convey in his exchanges with Hart, and across his scholarship more generally.

This image is to be found among the many documents that comprise the archive of Fuller's private papers that is held at the Harvard Law School Library. The document in question appears to say so little that one might wonder why it has been kept for posterity at all. Hiding amid the working papers for Fuller's final reply to his critics, it is an

---

<sup>1</sup> See H.L.A. Hart, "Positivism and the Separation of Law and Morals", (1958) 71 *Harvard L. Rev.* 593, and Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart", (1958) 71 *Harvard L. Rev.* 630 [Fuller, "Positivism and Fidelity to Law"]. Fuller was also renowned as a scholar of contract law.

<sup>2</sup> Following the 1958 *Harvard Law Review* debate, Hart and Fuller's exchange is comprised of the following published work: H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, first edition 1961), Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, first edition 1964), H.L.A. Hart, "Lon L. Fuller: *The Morality of Law*", (1965) 78 *Harvard L. Rev.* 1281, and Lon L. Fuller, "A Reply to Critics", in *The Morality of Law* (New Haven: Yale University Press, revised edition 1969).

untitled and undated page on which all words in the four lines of text have been crossed out in thick black pen. Only two are left exposed, and circled in red. Those words are: “forms liberate”.<sup>3</sup>

In some ways, this document shares much in common with other papers in Fuller’s archive: papers that are littered with the crossings-out, exclamation marks, and scrawled annotations of works in progress. Yet in other ways, the document is remarkable. It is remarkable, I think, because it captures something fundamental about the message of Fuller’s legal philosophy as well as the difficulties that he experienced in bringing it to expression. That message is mostly remembered as one about how a necessary connection between law and morality manifests in the principles that guide good lawmaking, even if Fuller was imprecise about exactly what that connection consisted in.<sup>4</sup> In the pages to follow, however, I will show why this idea should be recast into a much more sophisticated claim about how a condition of legality arises from the way that the formal features of law instantiate respect for human agency.

My aim in this thesis, then, is to chart the way that Fuller’s vision of law starts, ends, and gravitates constantly to the relationship between legal form and the status of the legal subject as an agent. Once we recognize the centrality of this relationship to Fuller’s thought, we come to see how it lends his legal philosophy a coherence that has been insufficiently appreciated to this point. Moreover, through giving attention to Fuller’s thinking on the interaction of form and agency, we also come to understand why he insisted that law can and should be distinguished from other modes of ordering, and why it must be regarded as distinctively moral.

The consequences of accepting this reading of Fuller are significant. As I observed above, Fuller is mostly known in contemporary legal philosophy as the natural lawyer who apparently lost the debate about the connection between law and morality to the

---

<sup>3</sup> The page also includes, with an arrow pointing to the circled words, the handwritten note: “cf negative concept of freedom”: The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Notes for the “Reply to Critics”). See the reproduction of this image at page vi of this thesis.

<sup>4</sup> See my discussion of these principles of Fuller’s “internal morality of law” in section 1.1, below.

analytically superior Hart. As a result of this apparent defeat, the scholarly memory of Fuller's contribution to legal philosophy has often been cast in negative terms, or at least in terms that suggest he offers little to enlighten the enduring debates of the discipline.<sup>5</sup> The half century during which this view of Fuller has evolved has equally been one in which the account of law advanced by legal positivism has come to dominate the agenda of legal philosophy, as a consequence of Hart's 1958 *Harvard Law Review* essay, and later, his seminal text *The Concept of Law*.<sup>6</sup>

Initially, Fuller was the most important respondent to Hart's positivism, but was soon replaced by Ronald Dworkin who, in the 1970s, became Hart's major philosophical opponent. The entry of Joseph Raz into the legal positivist camp in the late 1970s did much to return the focus of legal philosophy to the development of aspects of the positivist agenda and to the further marginalization of Fuller.<sup>7</sup> Then, from the 1990s through to the present, we have seen this agenda orient itself principally towards intramural disputes within legal positivism.

Still, and despite the dominance of the positivist agenda, scholars sympathetic to Fuller's position in his exchange with Hart have continued to insist that there is much more to understanding the nature of law than legal positivists seem concerned to address. Most importantly, they argue, Fuller offered us certain insights into the phenomenon of legality, and its relationship to law, that positivists are still yet to fully confront.<sup>8</sup> Thus although legal positivism remains dominant, a turn towards examining Fuller's claims

---

<sup>5</sup> Frederick Schauer, for example, has commented that there has been an "increasing exclusion from the jurisprudential canon of those genuinely deep insights about the operation of the law that might not be matched by their author's knowledge of, talent in, or sympathy for philosophy" and that "a widely held negative view of Fuller is a good illustration of the problem": Frederick Schauer, "A Life of H.L.A. Hart: The Nightmare and the Noble Dream" (Book Review), (2006) 119 *Harvard L. Rev.* 852 at 863. See also Kenneth Winston's comment about how Fuller has received "a largely unsympathetic hearing from the scholarly community for his jurisprudential writings", and that his most famous book, *The Morality of Law*, was "severely attacked by many eminent lawyers and philosophers": Kenneth I. Winston, "Introduction", in *The Principles of Social Order – Selected Essays of Lon L. Fuller*, (revised edition) (Portland: Hart Publishing, 2001) at 25. David Luban has also offered a helpful explanation of the reasons for Fuller's "partial eclipse" in legal philosophy in David Luban, "Rediscovering Fuller's Legal Ethics", (1997-1998) 11 *Georgetown J. Legal Ethics* 801 at 802-806.

<sup>6</sup> H.L.A. Hart, *The Concept of Law*, (second edition), (Oxford: Oxford University Press, 1994) [Hart, *The Concept of Law*].

<sup>7</sup> I discuss Raz's own response to Fuller's claims in Chapter 5.

<sup>8</sup> I explore this issue at length in Chapter 5.

more closely is occurring, prompted in particular by the 50<sup>th</sup> anniversary in 2008 of Hart and Fuller's famous *Harvard Law Review* exchange.<sup>9</sup>

An obstacle that has faced this re-engagement, however, is the sense that although Fuller seems to point us to some important insights, his legal philosophy is a scattered affair, lacking in rigour and internal coherence and, moreover, apparently silent on the objections that have been raised against it. Thus, by offering a comprehensive exposition of Fuller's thought, and then re-situating that exposition within the debates of legal philosophy, my goal in this thesis is to meet two main objectives. First, by taking a wider view of his work and revealing its underlying unity, I hope to provide a basis for reorienting the scholarly memory of Fuller towards a position that reconciles more closely with what I believe to be his actual scholarly contribution. Second, by focusing on the relationship between legal form and agency that I read to be at the centre of his vision of law, I hope to illuminate the continuing value of Fuller's thought to ongoing debates about the nature of legality and, in particular, to the question of whether law is answerable to legality.

## 1.1 “Form” and “agency”

It is fitting at this juncture to clarify the meaning of the terms “form” and “agency” that I have used repeatedly in the preceding paragraphs and which will recur throughout the pages to follow.

The meaning of “form” that animates my reading of Fuller might best be captured in the phrase “formal features of law”. To unpack this phrase, it is helpful to begin with the idea that law is the enterprise of governing through general rules, and of committing to certain means of communication, from lawgiver to legal subject, that make such governance

---

<sup>9</sup> See especially the following contributions to the *New York University Law Review* symposium, “The Hart-Fuller Debate at Fifty”: David Dyzenhaus, “The Grudge Informer Case Revisited”, (2008) 83 N. Y. U. L. Rev. 1000, Nicola Lacey, “Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate”, (2008) 83 N. Y. U. L. Rev. 1059, and Jeremy Waldron, “Positivism and Legality: Hart's Equivocal Response to Fuller”, (2008) 83 N. Y. U. L. Rev. 1135 [Waldron, “Hart's Equivocal Response”]. See further Nicola Lacey, “Out of the ‘Witches’ Cauldron?: Reinterpreting the context and reassessing the significance of the Hart-Fuller Debate, forthcoming in Peter Cane (ed), *The Hart-Fuller Debate in the 21st Century* (Oxford: Hart Publishing, 2009).

possible. The formal features of law are what constitute the ability of law to speak to its subjects in this way, and thus also to facilitate governance through general rules.

Fuller's model of the internal morality of law, which he elaborated at length in his book *The Morality of Law*, represents his most sustained attempt to explain this idea that the enterprise of governing through law is constituted by certain formal features.<sup>10</sup> There he suggests that there are at least eight ways in which a lawmaker might fail to bring a functioning legal order into existence: (1) a failure to achieve rules at all, (2) a failure to publicize or make available the rules that citizens are required to observe, (3) the abuse of retroactive legislation, (4) a failure to make rules understandable, (5) the enactment of contradictory rules, (6) the enactment of rules that require conduct beyond the powers of the affected party, (7) subjecting the rules to too-frequent change, and (8) a failure of congruence between the rules announced and their actual administration.<sup>11</sup> According to Fuller, each of these pathologies translates into a principle to guide the enterprise of lawgiving, with a total failure in any one of them resulting not simply in a bad system of law, but in something "that is not properly called a legal system at all".<sup>12</sup>

For Fuller, then, the very idea of law as a distinctive mode of ordering is inseparable from these formal features, precisely because it is these features that make law distinguishable from other modes of governance. These features are best described as formal, as Jeremy Waldron has recently observed, because they speak to the form that legal norms should take if legal governance is to be instantiated. As such, they can be distinguished from procedural principles, such as requirements of due process or impartial administration, that speak to the procedures that should be followed in the application of these norms.<sup>13</sup>

In the real world, a whole complex of institutions is required to operationalize the formal features of law, and the design of those institutions may vary across different societies

---

<sup>10</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, revised edition 1969) at 39 [Fuller, *The Morality of Law*].

<sup>11</sup> *Ibid.* See my extended discussion of *The Morality of Law* in Chapter 3.

<sup>12</sup> *Ibid.*

<sup>13</sup> Jeremy Waldron, "The Concept and the Rule of Law", (2008) 43 Georgia L. Rev. 1 at 7 [Waldron, "Concept and the Rule"]. See also Waldron, "Hart's Equivocal Response", *supra* note 9 at 1145.

and contexts. Yet legal philosophers of all persuasions generally agree that Fuller's theoretical model of the basic principles of legal governance more or less captures the requirements and distinctiveness of that enterprise. Where legal philosophers disagree, however, is in relation to the place that these features should be given in an account of what law is, and the moral significance that ought to be accorded to them. It is with respect to this last point that the relationship between the formal features of law and the agency of the legal subject becomes so central, because it is key to understanding why Fuller insists that these features have moral significance.

The best way to approach the idea of agency that I claim to be so central to Fuller's legal philosophy is to begin with his understanding of what it means to be an agent. For Fuller, an agent is a person "capable of purposive action":<sup>14</sup> a person in possession of capacities, who can pursue her own purposes, and who is to be regarded as an end in herself. The agent, therefore, is a person who possesses agency in this sense.

The key to understanding the basis of Fuller's interest in agency lies in how he sees this capacity as conditioned – in both positive and negative ways – by the social structures within which we exist and interact. The question, then, is what qualities these social structures must have in order to enable, rather than to diminish, agency.<sup>15</sup> Fuller's answer to this question forms a basic premise of his legal philosophy. This is because, for Fuller, a *legal* order is the institutional arrangement most suited to the task of realizing agency, because the formal features that constitute such an order are defined by a commitment to addressing the legal subject as an agent.

A defining characteristic of Fuller's legal philosophy is thus how he sees law as giving something to us, rather than as encroaching on us. This affirmative view of law finds expression throughout his writings, not only with respect to the relation between lawgiver and subject that is the focus of *The Morality of Law* and related writings, but also with respect to how law provides the background conditions for stable and moral interaction

---

<sup>14</sup> Lon L. Fuller, "Freedom: A Suggested Analysis", (1955) 68 Harvard L. Rev. 1305 at 1307.

<sup>15</sup> The ambitions of the eunomics project, and the writings on different models of ordering that are associated with it, illuminate this point especially well. See my discussion in section 3, below.

among individuals.<sup>16</sup> However, it is Fuller's defence of why his idea of the internal morality of law is properly understood as moral that points us most directly to his view of the relationship between law and agency because, as Fuller explains in *The Morality of Law*, implicit in the very idea of the internal morality of law is a conception of the person as a responsible agent.<sup>17</sup>

The critical point to emphasize, then, is that legal form and agency are inextricably intertwined in Fuller's thinking about law. Recognizing this is indispensable not only to explaining the contours and content of his legal philosophy, but also to understanding the message that he sought to convey about why law is intrinsically moral.<sup>18</sup>

## 2 Structure and context of the thesis

The structure of this thesis reflects my desire to present a wider view of Fuller's legal philosophy than that which tends to prevail within the literature of jurisprudence. While there is no doubt that Fuller's thinking about law was significantly shaped and refined by the challenge of responding to Hart's positivism, it is also important to recognize that he participated in that exchange as both the respondent to Hart's claims about the connection between law and morality *and* as a scholar who held a life-long interest in questions relating to the form, or forms, through which law finds expression. A failure to recognize both of these aspects of Fuller's position has, in my view, done much to obscure the best understanding of his contribution to legal philosophy, not least because it overlooks the

---

<sup>16</sup> Fuller's affirmative view of law is captured especially well in the tribute of an academic colleague, Albert Sacks, on the occasion of Fuller's death in 1978. Sacks commented on Fuller's longstanding frustration towards what in his view was the unbalanced preoccupation of legal education with how law intervenes at the point of the breakdown of social relationships, to the neglect of any sustained examination of the role law plays in creating and maintaining those relationships in the first place: Albert M. Sacks, 'Lon Luvois Fuller', (1978) 92(2) Harvard L. Rev. 349 at 350. See also Fuller's "Rejoinder to Professor Nagel", where he explains that his rejection of the idea that law's primary function lies in the resolution of disputes lies in the how such a perspective conceals how both law and morality have "more affirmative tasks": Lon L. Fuller, "A Rejoinder to Professor Nagel", (1958) 3 Nat. L. Forum 83 at 103-104 [Fuller, "Rejoinder"].

<sup>17</sup> Fuller, *The Morality of Law*, *supra* note 10 at 162. I discuss this observation at length in Chapter 3.

<sup>18</sup> My goal in the chapters to follow is to provide detailed textual evidence from Fuller's writings to support this claim.

fact that Fuller was formulating his own distinctive jurisprudential agenda prior to the commencement of his debate with Hart.

To convey this wider view, the chapters to follow are structured in a way that brings the wider canon of Fuller's work into contact with his arguments in the Hart-Fuller debate. I begin in the remainder of this introductory chapter by charting the themes that animate Fuller's writings before the commencement of that debate. In particular, I pay close attention to the jurisprudential project that Fuller set for himself, in 1954, as a reaction to the failure of contemporary legal philosophers to give attention to the forms through which law is expressed: his "eunomics" theory of "good order and workable social arrangements".<sup>19</sup> The eunomics project is valuably suggestive of Fuller's ambition to integrate a study of the formal features of law, and the quality of social ordering that these features nurture, into the agenda of legal philosophy. I also take the opportunity in this introductory chapter to briefly explore the different intellectual influences that shaped Fuller's scholarly agenda, and which have persistently challenged the ease with which any one label might be attached to his thought.

From this foundation, I turn in Chapters 2, 3 and 4 to closely examine those of Fuller's writings that we associate most readily with his debate with Hart: the 1958 *Harvard Law Review* exchange, Fuller's 1964 book, *The Morality of Law*, and the final reply to his critics that brought the Hart-Fuller exchange to a close in 1969. As I foreshadowed above, my primary aim in traversing this material is to chart the way that Fuller's position returns repeatedly to the relationship between the form of law and the agency of the legal subject. So as to not commit the very error that my project seeks to overcome, however, I also take space in these chapters to highlight how Fuller's position in his exchange with Hart is illuminated by the concerns of various of his writings that are not ordinarily associated with that exchange.<sup>20</sup>

---

<sup>19</sup> See Lon L. Fuller, "American Legal Philosophy at Mid-Century – A Review of Edwin W. Patterson's *Jurisprudence, Men and Ideas of the Law*", (1954) 6(4) J. Leg. Ed. 457 at 477, and "Means and Ends" in Kenneth I. Winston, *The Principles of Social Order – Selected Essays of Lon L. Fuller*, (revised edition) (Portland: Hart Publishing, 2001) 61 at 62.

<sup>20</sup> I also pay special attention to Fuller's working notes for his exchanges with Hart, especially those that relate to his 1969 "Reply to Critics". These archival materials are particularly valuable for revealing the



I then complete the thesis in Chapter 5 by revisiting the central issues of dispute between Fuller and legal positivists on the question of the relationship between law and legality. My aim here is to show how and why, in light of the reading of Fuller that I have provided, the agenda of legal philosophy now contains questions that are at once new as well as reclaimed. That is, legal philosophers must now ask not just whether Fuller met the objections advanced against his account of law by legal positivists, but also whether legal positivists have ever met the objections that Fuller advanced against them. Moreover if, as I will argue, it can be said that both sides of the divide understand the very idea of law in terms of a relationship between certain formal features and human agency, then legal philosophers must now confront the question of how we might develop this understanding through conceptual or practical inquiry or, indeed, through both.

By constructing the thesis in this manner, I have aimed to provide a reading of Fuller that is accessible to a range of scholarly inquiry. Fuller's thought offers much to those who find themselves faced with the challenge of navigating the task of governing through law when the guiding resources of the positive law run out.<sup>21</sup> My goal, therefore, has been to provide a reading of Fuller that can serve such inquiries, in so far as they might benefit from a clearer account of Fuller's thought, at the same time as it clarifies and addresses issues of specific interest to legal philosophers.

With respect to its context, the project of this thesis shares much in common with the work of other scholars who have attempted to illuminate the guiding themes and underlying coherence of Fuller's legal philosophy. Recent Fullerian scholarship reveals an increasing trend towards exploring how the liberal commitments within Fuller's thought might relate to his claims about the necessary moral value of law. Scholars have

---

recurring themes of his vision of law, as well as the basis of his criticisms of the positivist project. See generally The Papers of Lon L. Fuller, Harvard Law School Library.

<sup>21</sup> Fuller's analysis in *Anatomy of the Law* of the kind of dilemmas of legality that will not ordinarily be explicitly addressed in a written constitution is especially salient here: see Lon L. Fuller, *Anatomy of the Law* (New York: Encyclopaedia Britannica, 1968) at 99-110. See also Fuller, *The Morality of Law*, *supra* note 10 at 44: "[w]ith respect to the demands of legality other than promulgation ... the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment".

suggested, for instance, that Fuller's theory of legality is underscored by an idea of freedom as "independence from the power of others",<sup>22</sup> that Fuller understands the rule of law as "inherently respectful of people's autonomy",<sup>23</sup> that a concern for agency animates his theoretical claims and,<sup>24</sup> more generally, that if we are to gain the best understanding of Fuller's position on the moral dimensions of legality we must shift our perspective from that of the lawgiver to that of the legal subject.<sup>25</sup> Thus, as will be apparent in the pages to follow, the project of this thesis resonates strongly with such claims.

More specifically, however, my project can be seen as developing two important cues that have been supplied by scholars who have paid special attention to Fuller's interest in the form of law. The first is Kenneth Winston's attempt to construct a picture of what Fuller's economics theory might have looked like, had he succeeded in bringing that theory to more systematic expression.<sup>26</sup> In elaboration of this project, Winston advances

---

<sup>22</sup> Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 100, 101. Thus, Simmonds says, even if we restrict our account of law's nature "to the relatively austere and formal conditions set out in Fuller's eight *desiderata*, the conditions for liberty as independence will necessarily be realized", and that this will be so "even though the extent of such liberty might not be great, depending as it will upon the content of the law rather than its form": at 142. Simmonds describes the overall project of his book as "an effort to push jurisprudence back towards those more unified models of inquiry that preceded the emergence of so-called 'analytical' jurisprudence as a distinct enterprise", and thus to "oppose outright those positivist legal theories that have denied law's status as an intrinsically moral idea": at 3, 38.

<sup>23</sup> Colleen Murphy, "Lon Fuller and the Moral Value of the Rule of Law", (2005) 24 L. & Phil. 239 at 250. Murphy's project seeks to defend Fuller's view that the rule of law has non-instrumental moral value, as well as to argue for a view of the rule of law as instrumentally morally valuable for how it structures political relationships in a manner that limits the kinds of injustice that governments can pursue: at 239.

<sup>24</sup> Evan Fox-Decent "Is the Rule of Law Really Indifferent to Human Rights?", (2008) 27 L. & Phil. 533 at 535-536, adding elsewhere that "both the coherence and the moral authority of law depend on a view of the person as a free and responsible 'centre of action'": at 552. Fox-Decent's project seeks to demonstrate how a commitment to the internal morality "entails respect for human agency, respect for human agency entails respect for human dignity, and respect for human dignity entails respect for human rights". He also elaborates the idea that the relationship of reciprocity between lawgiver and subject has "an important fiduciary dimension" that "places lawgivers under a legal as well as moral obligation to respect the agency of the people subject to their powers": at 536, 538.

<sup>25</sup> Jennifer Nadler, "Hart, Fuller, and the Connection Between Law and Justice", (2007) 27 L. & Phil. 1 at 25. See also Nadler's comment that "the generality of law not only respects free agency; it presupposes it. Law presupposes human freedom and so too the dignity that flows from that freedom", and that "[l]aw's purpose is not merely to guide human conduct; its purpose is to guide conduct in a manner that fulfills and respects the human capacity for self-determination": at 17, 30. Nadler's investigation of the value of autonomy in Fuller's thought forms part of her inquiry into the moral force of the duty to obey law in both Fuller's and Hart's accounts of law.

<sup>26</sup> Winston's *The Principles of Social Order – Collected Essays of Lon L. Fuller*, published in 1981, marked the first attempt to contextualize Fuller's thought within the wider frame of economics. A further, edition, with additional material and a revised introduction, was published in 2001. The book brings together some of Fuller's lesser-known essays, addresses, and selected unpublished writings on different

the claim that eunomics, in its focus on the formal and moral commitments necessary to sustain good order and workable social arrangements, should be regarded as the general theory of law that underlies Fuller's thought.<sup>27</sup>

While I ultimately disagree with Winston that what we know about eunomics is capable of carrying that claim (though, had Fuller developed the idea further, perhaps it could have), I think that he is right to point to how eunomics helps us to understand Fuller's legal philosophy in key ways, and equally right to suggest that a coherent theory of law cuts across Fuller's diverse writings. Moreover, Winston has repeatedly emphasized Fuller's interest in agency,<sup>28</sup> and has suggested that the requirements set out in Fuller's idea of the internal morality of law are moral because they constitute what it means for a lawgiver to treat the legal subject with respect.<sup>29</sup> The chapters to follow pick up and develop these ideas in multiple ways.

The second cue for my project comes from Jeremy Waldron's 1994 essay, "Why Law? Efficacy, Freedom or Fidelity?".<sup>30</sup> Among commentaries on Fuller's thought, this essay is striking for its attempt to analyze Fuller's claims in their own right, rather than for how those claims meet the objections of legal positivists. Through this effort to understand Fuller on his own terms, Waldron makes certain observations that speak directly to the concerns of this thesis. For example, he suggests that Fuller's thought points us to the idea that the form of law attracts our allegiance in its own right, such that our fidelity to

---

models of social ordering, as well as writings on certain recurring themes of Fuller's thought.

Accompanying these essays with a lengthy introductory essay, Winston describes his project as seeking to piece together "the most comprehensive picture we have, in Fuller's own words, of his general conception of law and legal institutions": see Kenneth I. Winston, *The Principles of Social Order – Selected Essays of Lon L. Fuller*, (revised edition) (Portland: Hart Publishing, 2001) at 26 [Winston, *The Principles of Social Order*]. I explore Winston's project in more detail in my discussion of eunomics in section 3, below.

<sup>27</sup> Winston, "Introduction", *ibid.* at 25.

<sup>28</sup> See especially Kenneth I. Winston, "Legislators and Liberty", (1994) 13 L. & Phil. 389 at 390, and generally "Introduction to the Revised Edition" in Winston, *The Principles of Social Order*, *supra* note 26.

<sup>29</sup> Winston, "Introduction", *ibid.* at 51. In another claim that also resonates with ideas that I explore throughout this thesis, Winston suggests that Fuller's critics have failed to notice that his arguments in support of the idea of the internal morality of law continue a long-standing commitment in traditional liberal thought that the quality of the relationship between government and citizen is what determines the citizen's obligation to obey: at 54.

<sup>30</sup> Jeremy Waldron, "Why Law? Efficacy, Freedom or Fidelity?", (1994) 13 L. & Phil. 259.

law is ultimately predicated on what law is, and not just what it is used for.<sup>31</sup> Thus, Waldron argues, Fuller's writings on the morality of law can be regarded as the initiation of a research program that might explain what the connection between legal forms and fidelity to law might actually consist in.<sup>32</sup>

Waldron's work on Fuller is also particularly valuable for how Waldron has led the way in designating Fuller's account of law as *formal*, rather than procedural.<sup>33</sup> In this clarification alone, therefore, Waldron has done much to direct our attention away from the much thinner historical understanding of Fuller as a theorist of process towards recognition of his deep interest in the constitutive features of legal form.

Finally, it is fitting at this juncture to clarify what I am *not* doing in this thesis. I do not attempt to provide a developed account of Fuller's unfinished theory of economics, but rather draw upon economics only to point to its value for clarifying the premises, orientation, and content of Fuller's legal philosophy. I also do not attempt to advance a conceptual argument about what law is. Although it might be possible to construct such an argument out of Fuller's claims – an argument, for instance, that starts with the idea of the agent and moves from this to the necessity of law – it is not presently my objective to do so.<sup>34</sup>

My objective, instead, is to be true to Fuller's own view that legal theory should take its cue from practice rather than from abstract claims. That Fuller held strongly to this view is apparent throughout his exchanges with Hart, and especially so in the concluding

---

<sup>31</sup> *Ibid.* at 275-276.

<sup>32</sup> *Ibid.* at 276.

<sup>33</sup> As he explains it, Fuller's principles of legality "emphasize the forms of governance and the formal qualities (like generality, clarity, and prospectivity) that are supposed to characterize the norms on which state action is based." This is a distinctive idea from that of procedural principles, which speaks to the character of the procedures, such as due process or impartial administration, which should be adopted in the application of these norms: See Waldron, "Concept and the Rule", *supra* note 13 at 7, as well as Waldron, "Hart's Equivocal Response", *supra* note 9 at 1145.

<sup>34</sup> As will be apparent from my comments in Chapter 3 about Fuller's writings on freedom, his thinking on this subject appears to come close to suggesting a claim cast in terms similar to these: see pp 92-94, below.

remarks of his final “Reply to Critics”.<sup>35</sup> There Fuller expresses the hope that perhaps in time legal philosophers might cease to be preoccupied with building conceptual models to represent legal phenomenon, and will turn instead to “an analysis of the social processes that constitute the reality of law.”<sup>36</sup> As will be apparent in the pages to come, this division between Fuller and his positivist critics with respect to the appropriate starting point for a philosophical study of law is fundamental to the questions that each think are important – or unimportant – to consider when undertaking such a study.

I turn now, therefore, to begin my reclamation of Fuller’s legal philosophy by examining Fuller’s eunomics projects, and other themes of Fuller’s writings that lie outside of the canon that is most readily associated with his exchanges with Hart.

### 3 Eunomics

Fuller never explained in his writings from where, or from whom, he borrowed the term eunomics, which roughly translates from the Greek as good order, or good law.<sup>37</sup> The most likely explanation, which seems to be supported by his private papers, is that Fuller took the term from Aristotle, who wrote of the idea of good law in his *Politics*.<sup>38</sup>

---

<sup>35</sup> Lon L. Fuller, “A Reply to Critics”, in *The Morality of Law* (New Haven: Yale University Press, revised edition, 1969) [Fuller, “Reply”].

<sup>36</sup> *Ibid.* at 242.

<sup>37</sup> The Oxford English Dictionary provides a more specific meaning in its definition of *eunomic* as “[l]aw-abiding; (socially) well adjusted or ordered”, and *eunomy* as “[a] political condition of good law well-administered”.

<sup>38</sup> This seems to be a viable hypothesis given Aristotle’s interest not just in the idea of good order, but of good law. In this sense, Aristotle’s use of the term *eunomia* marked a departure from previous usages of the terms in early Greek thought, where *eunomia* tended to be associated with the notion of normal, as opposed to pathological, social order. Aristotle, however, moved this idea of good, or functioning, order towards the more specific idea of good laws, or good constitutionalism. The evidence that is suggestive of the idea that Fuller borrowed the concept of eunomics from Aristotle can be found in his personal copy of Jerome Hall’s *Readings in Jurisprudence* (1938: The Bobbs-Merrill Company) at 6, where Hall includes the following extract, translated into English, from Aristotle’s *Politics* (Book IV, ch. 8):

“For there are two parts of good government; one is the actual obedience of citizens to the laws, the other part is the goodness of the laws which they obey; they may obey bad laws as well as good. And there may be a further subdivision; they may obey either the best laws which are attainable to them, or the best absolutely.”

Fuller’s personal copy of Hall’s text includes a marginal annotation next to Aristotle’s reference to the ‘goodness of the laws’; a phrase which, in the original Greek, is expressed through the term *eunomia*. Whether Fuller himself read and understood the Greek text of the passage is unclear. However, there is evidence that Fuller had some understanding of Greek, given that in his personal copy of his own text, *The*

Regardless of its source, however, what we do know is that Fuller introduced the term eunomics for the first time in 1954, in a review essay titled “American Legal Philosophy at Mid-Century”.<sup>39</sup>

“American Legal Philosophy” provides a valuable snapshot of Fuller’s preliminary sense of what his eunomics theory might entail. Yet because it is first and foremost a review essay, it is helpful to highlight a number of criticisms that Fuller advances in the essay, before introducing eunomics, about the dominant preoccupations of the legal philosophy of his time. These comments provide a strong indication of how Fuller saw his own thought – and thus also his new project – as departing from that of his contemporaries.

Fuller writes, for example, of his objections to the “imperative theory of law”<sup>40</sup> and, echoing what he later brought to strong expression in his exchanges with Hart, criticizes the proponents of this theory for their refusal to acknowledge the reciprocal basis of legal obligation.<sup>41</sup> To give any recognition to this reciprocity is an uncongenial move for imperative theorists, Fuller argues, because such theorists prefer to identify law with force and thus to characterize it as “a compliant instrument ready to give sanction to ends that are not, and should not be, imbedded within the legal apparatus of coercion itself”.<sup>42</sup> In his own view, however, the proper objective of legal theory must surely be something else: that is, to undertake the task of discerning “those minimum principles that must be

---

*Problems of Jurisprudence*, the extracts from Aristotle on ‘Justice’, from *Nicomachean Ethics*, are annotated in hand in Greek: see Lon L. Fuller, *The Problems of Jurisprudence* (Brooklyn: Temporary edition, The Foundation Press, 1949) [Fuller, *Problems of Jurisprudence*]. I am indebted to Kenneth Winston for sharing this valuable research with me during conversations at the John F. Kennedy School of Government at Harvard University on 29 April and 1 May 2008.

<sup>39</sup> Lon L. Fuller, “American Legal Philosophy at Mid-Century – A Review of Edwin W. Patterson’s *Jurisprudence, Men and Ideas of the Law*”, (1954) 6(4) J. Leg. Ed. 457 at 477 [Fuller “American Legal Philosophy”].

<sup>40</sup> *Ibid.* at 459.

<sup>41</sup> That is, as Fuller explains it, the force which lies behind political authority is “essentially a moral power”, which derives from “the general acceptance of the rules by which the law-making process is conducted”: *Ibid.* at 462.

<sup>42</sup> *Ibid.* at 463. Fuller adds that for assurance that these ends will be good, these theorists suggest that we must look beyond the law, to education, to adherence to the democratic tradition, or to other matters.

accepted in order to make law possible and then to protect the integrity of those principles and to promote a general understanding of them”.<sup>43</sup>

These comments are striking for how they indicate the type of intellectual program that Fuller thought was necessary for jurisprudence. They are also striking for how they gesture to the intuition that Fuller later developed into his idea of internal morality of law. Other comments in the essay, moreover, indicate the view that Fuller develops consistently in his exchanges with Hart that law must be understood in aspirational terms. As he puts it in “American Legal Philosophy”,

... I believe that law is not a datum, but an achievement that needs ever to be renewed, and that cannot be renewed unless we understand the springs from which its strength derives.<sup>44</sup>

It is against the background of these general comments on the foundations that make law possible that Fuller introduces his idea of eunomics. This introduction is accompanied by an expression of frustration towards the way that contemporary legal philosophy fails to concern itself, in any meaningful way, with “general principles that will guide choice among the available forms of order.”<sup>45</sup> As Fuller understands it, this neglect of the means through which social ordering is expressed can be traced to “an exaggerated reaction against the theory of natural law” in an intellectual era that privileged determinate criteria and clarity of analysis.<sup>46</sup> Fuller insists, however, that this desire to dispense with the obfuscations of natural law thought had led to the loss of much that is still necessary and important to illuminating the enterprise of lawmaking.

---

<sup>43</sup> Fuller also comments that if these “fundamental rules of the game” are to be generally accepted, that acceptance must itself “be vitalized by an appreciation of the reasons why these rules are necessary”. He adds: “[i]t is highly important that the fundamental rules which derive their sanction from acceptance should not be unnecessarily intermixed with constraints not essential to the law-making process itself. When this intermixture occurs, insight is lost into the fundamental procedural structure on which law-making rests and confusion results that invited the very evils the imperative theory is thought to avert”: *Ibid.*

<sup>44</sup> *Ibid.* at 467.

<sup>45</sup> *Ibid.* at 477.

<sup>46</sup> *Ibid.* at 477.

Thus with its primary emphasis on “the means aspect of the means-ends relation”, Fuller offers his eunomics project as a corrective to this neglect.<sup>47</sup> He is quick to clarify, however, that his idea of eunomics “involves no commitment to ultimate ends”,<sup>48</sup> and otherwise departs substantially from many of the ideas that are typically associated with natural law thinking.<sup>49</sup> Instead, eunomics is presented as a natural law project only in so far as it picks up on that tradition’s idea that there are natural laws of social order or, as he puts it, “compulsions necessarily contained in certain ways of organizing men’s relations with one another”.<sup>50</sup>

These comments on the relationship between the idea of eunomics and the natural law tradition, the importance of the means-ends relation, and some observations on the relationship between legal philosophy and the actual work of lawyers,<sup>51</sup> together comprise most of the insight that we gain into the eunomics project in “American Legal Philosophy”. The only other way that the project is elaborated in the essay is in the example of a class exercise that Fuller suggests reflects a “problem of eunomics” in which the problem to be resolved is which particular institutional design ought to be adopted for the resolution of a boundary dispute between two countries.<sup>52</sup> The point to

---

<sup>47</sup> *Ibid.* at 477.

<sup>48</sup> *Ibid.*

<sup>49</sup> As I explain further below, Fuller rejects any association between his own views and the idea that natural law “sets itself above positive law and counsels a disregard of any enactment that violates its precepts”: see *Ibid.* at 467.

<sup>50</sup> *Ibid.* at 473, 476. Fuller adds that, contrary to the widely-held impression that the treatises on natural law “were given over to drawing up immutable codes of moral absolutes”, much of the preoccupation of natural law thinking was with what he has defined as eunomics: at 478-479.

<sup>51</sup> Fuller laments the neglect by legal philosophers of questions concerning the results that flow from particular forms of order; questions which speak directly to the lawyer’s attempt to “impose forms of men’s relations with one another”: *Ibid.* at 476-477.

<sup>52</sup> The aim of the exercise is to explore how different forms of ordering, in whole or hybrid form, could be brought to the resolution of such a problem. Having introduced the example, Fuller comments:

“It may be said that such a problem has little to do with legal philosophy. On the contrary, I believe that there are involved in this exercise two fundamental and pervasive principles of social order, *adjudication* and *contract*. By examining how the arbitration between these two countries ought to be arranged, we are discovering the principles that underlie adjudication generally, we are gaining an insight into the limits of the effectiveness of adjudication. In the tri-partite board we have an attempt to combine in one procedure the advantages of two different forms of order: contract and adjudication. By studying them in this uneasy and somewhat hazardous mixture, we can learn something about their social functions generally”: *Ibid.* at 478.



emphasize, then, is that although Fuller heralded eunomics as a new field of study, his elaboration of it in “American Legal Philosophy” is at best a sketch.<sup>53</sup>

Fuller then made no further express mention of the eunomics project until he drafted the essay, “Means and Ends”, some time in the early 1960s.<sup>54</sup> Fuller makes clear at the outset of “Means and Ends” that he intended the essay to be the introduction to a systematic exposition of eunomics.<sup>55</sup> Nonetheless, the essay remained in draft form at the time of his death in 1978, and was not published until Kenneth Winston reproduced it in *The Principles of Social Order – Collected Essays of Lon L. Fuller*, in 1981.

In the essay, Fuller again refers to eunomics as a “science, theory, or study of good order and workable social arrangements”. The significant development from “American Legal Philosophy”, however, is that Fuller states in clear terms that a theory of eunomics is not interested in any type of order – “the order, say, of a concentration camp” – but only in

---

<sup>53</sup> During the same period as the publication of that essay, however, Fuller referred to eunomics in a handout that he distributed to his jurisprudence class of 1954-55, which foreshadowed the outline of a chapter that he intended to include in a revised version of his 1949 class materials, *The Problems of Jurisprudence*: see Fuller, *Problems of Jurisprudence*, *supra* note 38. The original – and ultimately unchanged – version of those materials includes a chapter titled “The Principles of Order”, in which Fuller sets out a “general exposition” of his own views on the various problems of jurisprudence that were addressed in the materials: *Ibid.* at 693. In the 1954-55 class handout, however, Fuller makes clear that he intended to rewrite the chapter under the title “The Problems of Jurisprudence: An Essay in Eunomics”. That handout, though only skeletal in outline, contains some instructive suggestions as to the preoccupations of Fuller’s intended essay. For example, it reveals his desire to more closely examine the means-ends relation, as well as the relationship between different forms of social organization and the goals of “efficacy”, “human satisfaction”, and “human development”. The outline also includes the statement, that I have quoted above, that the envisaged eunomics project is “concerned with those forms of ‘coming together’ or association which result in a benefit to all participants”: see document titled “Jurisprudence – Supplementary Readings – Chapter VI – 1954-1955 – Principles of Eunomics”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 10, Folder 12 (“The Problems of Jurisprudence”).

<sup>54</sup> This is what is suggested in Kenneth Winston’s editorial gloss on “Means and Ends” in *The Principles of Social Order*, *supra* note 26 at 61. There is, however, some suggestion that Fuller circulated the draft essay to certain colleagues, and thus that it received a small readership: see Robert S. Summers, ‘Professor Fuller’s Jurisprudence and America’s Dominant Philosophy of Law’, (1978) 92(2) Harvard L. Rev. 433 at 438 note 34, where Summers also dates the draft essay to 1960.

<sup>55</sup> A curiosity that should be noted about “Means and Ends” is that the language of “law” and “legality” disappears from Fuller’s analysis in favour of the more general vocabulary of “social ordering” and “institutional arrangements”. Fuller’s private papers also reveal that the early drafts of “Means and Ends” include no reference to the term eunomics, or any express mention of the project he announced in “American Legal Philosophy” in 1954. It is only in the final draft of “Means and Ends” that Fuller includes the statement that he “once suggested a term for describing the kind of study undertaken in this book”: namely, eunomics: The Papers of Lon L. Fuller, Harvard Law School Library, Box 14, Folder 2, (“Means and Ends” drafts).

order that is “just, fair, workable, effective, and respectful of human dignity”.<sup>56</sup> Thus, the purpose of the eunomic project is to examine “not simply the principles of social order, but the principles of *good* social order”.<sup>57</sup>

Fuller also explains in “Means and Ends” that one task of the eunomic analysis is to make distinctions between “sound and unsound social institutions”, and to “stigmatize certain forms of social ordering as perverted and parasitic”<sup>58</sup> while also analyzing “the conditions under which particular forms of social order may be said to approach perfection”.<sup>59</sup> These oppositions of sound and unsound, or perfect and stigmatized, thus suggest that Fuller intended his project to address the basis upon which some structures of social ordering – and not others – could be viewed as conducive to the realization of good order and workable social arrangements.

Fuller spends most of “Means and Ends” elaborating his contention that the basic methodology of social philosophy needs to be oriented away from its persistent focus on ends in abstraction from means.<sup>60</sup> Instead, he argues, effort should be directed to exploring “the ways open to human beings to arrange their mutual relations so as to achieve their individual and collective ends, whatever those ends may be”.<sup>61</sup>

Fuller then goes on to identify five modes of thought that, in his view, present an obstacle to such inquiry. These are the assumption that the ends served by social institutions can be viewed as distinct from each other; the assumption that the first task of social philosophy is to arrange human ends hierarchically; the assumption that social

---

<sup>56</sup> Fuller, “Means and Ends”, *supra* note 54 at 61.

<sup>57</sup> *Ibid.* at 62 (Fuller’s emphasis).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> Fuller sets out, by way of an illustration of the approach that he is criticizing, J. S. Mill’s comment in *Utilitarianism, Liberty, and Representative Government* that “rules of action, it seems natural to suppose, must take their whole character and colour from the end to which they are subservient. When we engage in a pursuit, a clear and precise conception of what we are pursuing would seem to be the first thing we need, instead of the last thing we are to look forward to”: quoted in *ibid.* at 63.

<sup>61</sup> Fuller thus describes his inquiry as an “essay in social architecture”, because, like the architect of a building, the architect of social structures “must know what is possible before discussing what is desirable”, and be aware of how “no abstractedly conceived end ever remains the same after it has been given flesh and blood through some specific form of social implementation”: *Ibid.* at 64, 69.

arrangements are infinitely pliable; the assumption that formal structure subsists only in ends, and not means; and finally, the mode of thought that views institutional means as “necessary evils”.<sup>62</sup> Fuller’s analysis of these modes of thought offers some instructive insight into his general preoccupation with the transformative effect of means on ends, and with how social goals must be conceived in structural terms if they are to be meaningful.<sup>63</sup> In particular, the analysis speaks to the idea that I will return to throughout this thesis that, for Fuller, a sound institutional arrangement is one which strives to bring about “a pattern of living that is satisfying and worthy of men’s capacities”, irrespective of the nature of the end being pursued.<sup>64</sup>

Rather than developing these ideas with a view to fleshing out the philosophical foundations of his theory of eunomics, Fuller thereafter directed his attention to the enumeration and description of a wide variety of legal processes, as well as to his writings on the internal morality of law. The latter, as I indicated earlier, are the primary focus of the next three chapters. The former, however, deserve brief attention here, as it is through Kenneth Winston’s work that the very idea of eunomics has become associated with these essays on adjudication, contract, legislation, and other themes relevant to Fuller’s exploration of questions of institutional design.

Until Winston published *The Principles of Social Order*, few scholars had given anything more than a passing reference to Fuller’s eunomics project. When they had done so, it was usually to indicate no more than that Fuller announced the project, or the need for a line of inquiry cast in such terms.<sup>65</sup> Some of the most insightful recent scholarship on

---

<sup>62</sup> *Ibid.* at 67-72.

<sup>63</sup> As he explains it, “[a]ny social goal, to be meaningful, must be conceived in structural terms, not simply as something that happens to people when their social ordering is rightly directed”: *Ibid.* at 72.

<sup>64</sup> Fuller makes this point in the context of commenting on how a social institution “makes of human life itself something that it would not otherwise have been”:

“We cannot therefore ask of it simply, Is its end good and does it serve that end well? Instead we have to ask a question at once more vague and more complicated – something like this: Does this institution, in a context of other institutions, create a pattern of living that is satisfying and worthy of men’s capacities?”: *Ibid.* at 68-69.

<sup>65</sup> Indeed, the virtually exclusive preoccupation of early responses to eunomics, following its introduction in “American Legal Philosophy”, was with whether eunomics could, or should, be properly characterized as a natural law project: See, for example, Ernest F. Roberts, (1961) 6 Villanova L. Rev. 109 at 113 (who asks if the “so-called ‘science of eunomics’” is merely “a fanciful semantic device used to facilitate the

Fuller thus demonstrates a clear debt to how Winston provided a wider path to Fuller's thought by illuminating the concerns of the eunomics project.<sup>66</sup>

Winston presents eunomics as oriented to uncovering the organizing principles, features of design, and participatory commitments that constitute different models of social ordering, and which make them appropriate for use in a given context.<sup>67</sup> Thus, Winston claims, we might understand Fuller's eunomic conception of law as given expression through "a set of models of ordering".<sup>68</sup>

My own view, as I noted earlier, is that Fuller's account of *law* is best understood in terms that are concerned less with the question of variety among institutional forms than

---

return to the study of natural law without directly colliding with the bias of the American intellectual community"); A. P. d'Entreves, "The Case for Natural Law Re-examined" (1956) 1 Nat. L. Forum 5 at 30, 32; Jacob Austin, "The Ideal of Justice: An Approach", (1953-1958) 2 U. B. C. Leg. Notes 347 at 349-357; Edgar Bodenheimer, "A Decade of Jurisprudence in the United States of America: 1946-1956", (1958) 3 Nat. L. Forum 44 at 61-62; Joseph P. Witherspoon, "Relation of Philosophy to Jurisprudence", (1958) 3 Nat. L. Forum 105 at 109-113; Charles L. Palms, "The Natural Law Philosophy of Lon L. Fuller", (1965) 11 Catholic Lawyer 94 at 114; and Julius Stone, *Human Law and Human Justice* (Stanford University Press, 1965) at 221-226. The thrust of this phase of commentaries can be summarized in three questions. First, is eunomics just another name for natural law? Second, is eunomics really a natural law project at all? And third, how, if at all, does eunomics contribute to the debates of legal philosophy with respect to the place within legal philosophy of discussion of the positive aims of the law? For one notable exception to this general trend, see Joseph Lazar, "Eunomics: A Behavioral Science View of the National Railroad Adjustment Board System", (1961) Duke L. J. 262 (Spring, No. 2), "Eunomics and Justice", (1963) Duke L. J. 269 (Spring, No. 2), "Eunomics and Administrative Process", (1964) Duke L. J. 518 (Summer, No. 3), articles that speak to the eunomic concern for questions of institutional competence.

<sup>66</sup> There is an integrative tone to these later writings, in the sense of an attempt to bring the various elements of Fuller's thought together in some way, to speak of its recurring themes and commitments – such as ideas of purpose, interaction, and reason – and then to approach specific questions against this interpretive background. See especially the work of Roderick Macdonald, David Luban, Willem Witteveen, Wibren van der Burg, Karol Soltan, and other essays in Witteveen, Willem J. and van der Burg, Wibren (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999). See also Robert G. Bone, "Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation", (1995) 75 Boston U. L. Rev. 1273, and John M. A. DiPippa, "Lon Fuller, the Model Code, and the Model Rules", (1996) 37 South Texas L. Rev. 303.

<sup>67</sup> As Winston summarizes it:

The central task of eunomics is to describe these models in detail and assess the possibilities for their realization. The contextual factors that enhance, or impair, the effectiveness of particular structures determine whether or not an existing social problem can be collectively managed – and how. We want to know where a mechanism works and where it does not – and cannot be made to. Under what conditions will a legal form continue to retain its integrity, and what are the limits beyond which its distinctive aims and capacities are compromised?": Winston, "Introduction to the Revised Edition", *supra* note 26 at 9.

<sup>68</sup> Winston, "Introduction", *ibid.* at 44.

with his enduring preoccupation with the relationship between the form of law and human agency. Still, the point to emphasize is that the essays that are usually associated with Fuller's eunomics project share certain important themes with the writings that are most readily associated with his thinking about legal philosophy: most notably, the concern common to both for how the integrity and moral force of a mode of ordering relates to the possibilities for agency that it affords to its participants.<sup>69</sup>

Fuller's writings on legislation, for example, present legislation as a form of ordering that provides baselines that "serve to set the limits men must observe in their interactions with one another" so that they might be "free within those limits to pursue their own goals".<sup>70</sup>

Accordingly, legislation, on Fuller's view,

... does not tell a man what he should do to accomplish specific ends set by the lawgiver; it furnishes him with baselines against which to organize life with his fellows.<sup>71</sup>

Fuller sees this conception of legislation or, as he calls it, "enacted law", as qualitatively different to the view that sees legislation as an "instrument of social control" that acts upon the citizen.<sup>72</sup> Fuller also speaks of how the workability of enacted law depends on the development of "stable interactional expectancies" between lawgiver and subject that are maintained by a faith on both sides that they are "playing the game of law fairly", adding that "a single dramatic disappointment" or a "less conspicuous but persistent

---

<sup>69</sup> The way that these questions cut across Fuller's reflections about law is especially apparent in his last book, *Anatomy of the Law*, which is unified by an exploration of the "implicit laws" that constitute legislation, customary law, contract, and adjudication, and which enable us to distinguish between them: Fuller, *Anatomy of the Law*, *supra* note 21 especially at 91-110, 175, and 184. To emphasize this, however, is not intended to detract from the value and insights of the individual essays in their own right. Nor is it to suggest that the concerns of those essays are reducible to an exploration of the content and distinctiveness of legality. It is simply to argue that Fuller's writings on legislation, contract and adjudication appear to confirm certain fundamental commitments within Fuller's thinking about law. See further Winston, *The Principles of Social Order*, *supra* note 26 at 29.

<sup>70</sup> The most detailed portrait in Fuller's writings of the model of ordering known as legislation or "enacted law" emerges from his discussion of the "interactional foundations of enacted law" in the essay "Human Interaction and the Law": (1969) 14 Am. J. Juris. 1. The principle object of the essay is to develop a thesis about the implicit, interactional foundations upon which enacted law is dependent for its effective functioning. Fuller argues that we cannot understand officially declared law unless we first obtain an understanding of customary law, because by failing to give attention to the constitutive elements of customary law and the purposes that it serves, we fail to recognize its relationship to more explicit forms of legal ordering and its contribution to how these more explicit forms actually work.

<sup>71</sup> *Ibid.* at 24.

<sup>72</sup> *Ibid.* at 20.

disregard” of these expectations of legality can undermine the moral foundations of a legal order, both for those subject to it and for those who administer it.<sup>73</sup>

Fuller’s writings on contract echo this emphasis on how the relationships that constitute the form of a given mode of ordering underscore its moral force.<sup>74</sup> These writings return repeatedly to the question of how the form of contract relates to the authority and legitimacy that it has for its participants and thus also how, in order for a contractual arrangement to be effective and binding, each party must recognize the other as having an equal entitlement to the exercise of her agency. In his famous essay “Consideration and Form”, Fuller also speaks of how the formalities of contract shape the quality of the parties’ participation within that institution, for example, by inducing attitudes appropriate to the creation and maintenance of a contractual relationship.<sup>75</sup> This concern for the moral attitude necessary to sustain the form of contract is also repeated in a much later work, where Fuller comments on how the negotiation of a contract requires each of its participants to “understand why the other makes the demands he does even as he strives to resist or qualify those demands”, and to accept the other’s “right to work for a solution that will best serve his own interests”.<sup>76</sup>

Fuller’s well known essay on adjudication, “The Forms and Limits of Adjudication” illuminates this theme still further.<sup>77</sup> The central thesis of “Forms and Limits” is that

---

<sup>73</sup> *Ibid.* at 25.

<sup>74</sup> Fuller’s most famous scholarship on contract was written many years prior to his articulation of the economics project and his writing in the internal morality of law: see Lon L. Fuller and William R. Perdue, Jr, “The Reliance Interest in Contract Damages”, (1936-1937) 46 Yale L. J. 52 and Lon L. Fuller, “Consideration and Form”, (1941) 41 Columbia L. Rev. 799.

<sup>75</sup> *Ibid.* at 805.

<sup>76</sup> “The Role of Contract in the Ordering Processes of Society Generally”, reproduced in Winston, *The Principles of Social Order*, *supra* note 26 at 203. See also the note in Fuller’s archive which includes the statement that “... those who hold the view of common sense, that man is at once both altruistic and selfish, at once capable of seeing his own salvation, and partially blind to it, see that forms and means are tremendously important. For example, contract is important because it brings home to man graphically the fact of social cooperation, and forces him to take a conscious part in that process. So to the common law, natural law, democratic sovereignty”: Undated document titled “Democracy: Philosophic issues, natural law, last chapter”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 16, Folder 5 (“Notes on Law and Democracy”).

<sup>77</sup> The essay, which remained in draft form at the time of Fuller’s death, was published posthumously as part of the tribute to Fuller in the 1978 *Harvard Law Review*. In his editorial note to the 1978 *Harvard Law Review* reproduction, Kenneth Winston speculates that the reason Fuller never published the entire essay is due “to a plan he formulated in 1958 or 1959 to expand it into a book of the same title”, adding that:

adjudication can be distinguished from other forms of ordering by how it confers on the affected party “a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor”, with whatever heightens the significance of this participation lifting adjudication “towards its optimum expression”, and with whatever destroys it equally destroying “the integrity of adjudication itself”.<sup>78</sup>

Again, therefore, in “Forms and Limits” we receive the suggestion that any form of social ordering that is designed to attend equally to the circumstances of its participants must commit to treating those participants as agents. Thus, if this is to be achieved, a commitment to reciprocity must animate the design of the form itself. Thus, forms of ordering that are designed around the principle of reciprocity contain a “certain regard for human dignity” in how they necessarily treat their participants as ends in themselves.<sup>79</sup>

Even from this brief sketch, then, it should be apparent that these essays on different forms of ordering are unified by Fuller’s concern to understand the features of institutional design that enable people to participate directly in the decisions that affect their lives. Indeed, once we recognize this underlying commonality across the forms of ordering that Fuller studied closely, we come to see the striking *dissimilarity* that exists between these models and the mode of order that he called managerial direction,

---

“By 1960, the projected volume had become *The Principles of Social Order*, an essay in economics – that is, in Mr Fuller’s words, “the theory of good order and workable social arrangements.” Though Mr Fuller was subsequently diverted from this project, it embodied what one can see retrospectively was the central preoccupation of his writings during the 1960’s and early 1970’s”: see Lon L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harvard L. Rev. 353 [Fuller, “Forms and Limits”].

<sup>78</sup> “*Ibid.* at 364. Fuller’s interest in the conditions of integrity and moral force internal to adjudication is also expressed especially nicely in a letter to Philip Selznick, in response to Selznick’s request to Fuller for comments on his book, *Law, Society, and Industrial Justice*. In that letter, Fuller makes the following criticism:

“Your treatment seems to me too much oriented towards attitudes and dispositions, rather than towards processes. When it deals with processes, it does not sufficiently recognize that processes have an internal integrity that cannot be violated without damage to their moral efficacy. Plainly this is true of contracts, elections, and deciding issues by lot. I think it is also true of adjudication”: Letter from Lon L. Fuller to Philip Selznick, 12 January 1972, The Papers of Lon L. Fuller, Harvard Law School Library, Box 7, Folder 6 (Correspondence).

<sup>79</sup> Thus, Fuller concludes, “it may be well to point out that the principle of reciprocity is implicit in the ‘golden rule’”: Fuller, “Forms and Limits”, *supra* note 77 at 362.

precisely because managerial direction does not, by design, respect or nurture the subject as an end in herself.<sup>80</sup>

It thus also seems that Fuller appears to have understood his eunomics project in two ways. On the one hand, he conceived of eunomics as concerned with questions of institutional variety and competence. On the other, however, the project clearly also gives expression to Fuller's general interest in the idea that law itself has a distinctive form. In this thesis, I am primarily interested in this last idea, and especially in how it is brought to more sophisticated expression in Fuller's attention to the internal features that give shape and distinctiveness to law, and which he also insisted lent law an inherent moral dimension.

#### **4 Other recurring themes**

The concern of Fuller's eunomics project for how the form of a given mode of ordering both respects and draws upon the agency of those who participate within it also reveals itself in many of Fuller's other early writings. Moreover, the way that Fuller links this theme in his early writings to his criticisms of the prevailing thought styles of legal philosophy is instructive for how we might approach the arguments that he advances in his contest with Hart.

Fuller's early writings, for example, repeatedly express his frustration towards the chilling effect that certain thought styles of legal philosophy have on seeing law, as he does, as a creative and purposive human endeavour.<sup>81</sup> He complains in particular of how

---

<sup>80</sup> I discuss Fuller's thinking on managerial direction at length in Chapter 4.

<sup>81</sup> Fuller's first book, *The Law in Quest of Itself*, provides valuable insight into his commitment to a purposive view of law. The book begins with an analysis of why a purposive orientation is absent from contemporary legal philosophy, given that such an orientation was clearly expressed in the work of the first legal positivist, Thomas Hobbes. As Fuller understands it, Hobbes favoured the idea of imposed positive law because he held the view that the peace and order necessary for the attainment of individual and social goals is invariably thwarted by man's innately warring nature. Thus, because men alone are not capable of achieving these conditions, such order needed to be imposed on them through law: "[w]ith Thomas Hobbes there was no uncertainty or ambiguity about the object which he pursued in constructing his theory. It has been said without paradox that he founded legal positivism on a natural law basis": Lon L. Fuller, *The Law in Quest of Itself*, (Chicago: The Foundation Press, 1940) at 19-20 [Fuller, *Law in Quest*]. The distance between contemporary variants of positivism and Hobbes's purposive conception of law, Fuller argues, is a



the positivist orientation to law advances a disintegrative approach to language and experience that removes the “whole view” from our gaze,<sup>82</sup> and which works against the capacity of legal philosophy to give “a profitable and satisfying direction to the application of human energies in the law”.<sup>83</sup>

The early writings also reveal Fuller’s concern to restore certain aspects of natural law thinking to the agenda of contemporary legal philosophy. As Fuller sees it, and in line with the comments that he made when introducing economics in “American Legal Philosophy”, the rejection of natural law in contemporary legal philosophy can be traced to two main objections: first, dissatisfaction with the failure of natural law thinking to furnish an enduring and unchanging set of criteria that can answer the question of what makes law ‘law’, and second, rejection of the notion that natural law sets itself above positive law and “counsels a disregard of any enactment that violates its precepts”.<sup>84</sup>

---

result of how positivist philosophers have successively developed Hobbes’s idea of the Sovereign, as the source of law, but without regard to the foundational, purposive question of why Hobbes perceived a lawgiver to be needed in the first place: at 24. Fuller also returns to Hobbes in his essay “Reason and Fiat in Case Law”, where he repeats his understanding that Hobbes’s desire for a sovereign lawgiver arose from the problems that Hobbes perceived to plague the nature of man and thus also the nature of society: inevitable and irredeemable conflict that could be resolved by a sovereign lawgiver who could impose peace and order through his laws. See Lon L. Fuller, “Reason and Fiat in Case Law”, (1946) 59 Harvard L. Rev. 376 at 388 [Fuller, “Reason and Fiat”].

<sup>82</sup> *Ibid.* at 377. See also Fuller’s comments in *The Problems of Jurisprudence* about how “distortions proceeding from methodological motives are like optical illusions that are created by our penchant for patterns, that makes us see neat diagrams instead of the complex and moving reality that actually exists”, adding that “[p]robably the principal motive that lies back of the modern tendency to exclude rigidly anything that savours “natural law” from legal thinking rests on a motive of methodology, on a desire to banish from the discussion any factor that works against symmetry and tight logic”: Fuller, *Problems of Jurisprudence*, *supra* note 38 at 717.

<sup>83</sup> Fuller, *Law in Quest*, *supra* note 81 at 2. This sense that the content and orientation of a given legal philosophy can have crucial implications for practice is repeated in these early writings when Fuller argues that law’s existence must be understood as a goal towards which we must strive. Determining the existence of law, Fuller explains in his “Rejoinder to Professor Nagel”, is a necessarily diagnostic inquiry in which it becomes possible to ask whether something that calls itself a legal order “is missing that target so woefully that it cannot in any meaningful sense be termed a system of law”, or that it has “so little ‘value’ that it has ceased to ‘exist’”: Fuller, “Rejoinder to Professor Nagel”, *supra* note 16 at 92.

<sup>84</sup> Fuller, “American Legal Philosophy”, *supra* note 39 at 467. In his 1949 class materials, *The Problems of Jurisprudence*, Fuller suggests a number of other reasons why the idea of natural law has fallen out of favour, including its association with the idea of “natural rights” and its individualistic flavour, its religious connotations, and the idea that natural law suggests that any “law of nature” must be the same for all men, at all times: see further Fuller, *Problems of Jurisprudence*, *supra* note 38 at 701-702.

Fuller makes it clear – repeatedly – that he joins the critics of natural law thinking in rejecting the contemporary salience of both of these ideas.<sup>85</sup> Nonetheless, he is insistent in these early writings that there are elements of natural law thought that deserve our attention: most notably, the tradition’s concern to uncover “those principles of social order which will enable men to attain a satisfactory life in common”.<sup>86</sup> In his early elaborations of this idea, Fuller gestures to the notion that there is an internal sense through which we might understand the idea that there are natural laws of social order. This intuition is brought to especially strong expression in the essay “Human Purpose and Natural Law”, where Fuller speaks of how a form of social order “makes its own technical demands if it is to be in fact what it purports to be”.<sup>87</sup> Developing this idea further in his “Rejoinder to Professor Nagel”, Fuller argues that no one would discern a legal order in any situation where there is “no discernible correspondence” between the laws issued by a government and the acts of those who purport to enforce them, or where all laws are “retrospective in effect and no prospective laws are ever enacted”.<sup>88</sup>

Fuller’s early writings thus reveal his obvious and recurrent concern to find a philosophical approach that can illuminate the conditions necessary for legal institutions to be successful, healthy, and durable. The early writings also reveal Fuller’s awareness

---

<sup>85</sup> See for example his ‘Rejoinder to Professor Nagel’, where Fuller states explicitly that he does not accept any “doctrine of natural law” which asserts any or all of the following: (1) that the demands of natural law can be the subject of an authoritative pronouncement, (2) that there is something called ‘the natural law’ capable of concrete application like a written code, or (3) that there is a ‘higher law’ transcending the concerns of this life against which human enactments must be measured and declared invalid in case of conflict”. In defence of the idea that it is not a ‘perversion’ of the use of the label ‘natural law’ to reject these elements, Fuller suggests that an understanding of natural law in this vein “is at least as ancient as Aristotle, in whom I find no trace of the elements I reject”: Fuller, “Rejoinder to Professor Nagel”, *supra* note 16 at 84. See also Fuller’s statement that “[i]f in our society a man accepts a judicial post with a commitment to disregard laws duly enacted by the same democratic and constitutional procedures that created the office he assumed, a serious issue is presented. That issue will not be clarified, but obfuscated, if it is converted into a general philosophic discussion of the natural law position”: Fuller, “American Legal Philosophy”, *supra* note 39 at 468.

<sup>86</sup> Fuller, “Rejoinder to Professor Nagel”, *ibid.* at 84. Perhaps the simplest formulation of the reason for Fuller’s attraction to the natural law method can be found in his private papers, where he comments that “I do not find natural law in its non-ecclesiastical expression inhibitive; it may be foolish, but it does not bar off whole areas from investigation. It closes fewer doors of inquiry”: Document titled “Natural Law”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 10, Folder 12 (“The Problems of Jurisprudence”).

<sup>87</sup> Lon L. Fuller, “Human Purpose and Natural Law”, (1956) 53 J. of Phil. 697 at 704-705 [Fuller, “Human Purpose”].

<sup>88</sup> Fuller, “Rejoinder to Professor Nagel”, *supra* note 16 at 91.

of how these conditions relate to the lived circumstances of those who are subject to them. Fuller's early writings therefore reveal much about the legal philosophy that was to emerge through his exchanges with Hart. Fleshing out the content of that legal philosophy is the task of the chapters to follow.

## 5 Which label?

Before bringing this introductory chapter to a close, it is helpful to provide some comments on how we might best characterize the general orientation of Fuller's legal philosophy. The first and most important remark to make with respect to this is how difficult it is to subsume that orientation under any one label. Certainly, as the preceding discussion has indicated, Fuller was committed to the natural law tradition only in the modest sense that he thought there were "natural laws", internal to the enterprise of law, that introduce a moral element to law.<sup>89</sup> Beyond this, however, Fuller himself frequently questioned the propriety of the natural law label as a description for his legal philosophy,<sup>90</sup> even to the extent that he coined the term *eunomics* in order to avoid "the confusions invited by the term natural law".<sup>91</sup> Indeed, we might wonder whether Fuller's resistance to the natural law label was, above all, a consequence of the parody of the

---

<sup>89</sup> See Fuller's use of the description "natural laws to which human lawmaking is itself subject" in *Anatomy of the Law*, *supra* note 21 at 184. In his "Reply to Critics" Fuller suggests that the enduring contemporary relevance of natural law thinking lies in "its practical wisdom applied to problems that may be broadly called those of social architecture": Fuller, "Reply", *supra* note 35 at 242.

<sup>90</sup> See, for example, Fuller's response of "an emphatic, though qualified, yes" to the question of whether the principles of the internal morality of law represent some variety of natural law: Fuller, *The Morality of Law*, *supra* note 10 at 96. Fuller's efforts to qualify the extent to which his legal philosophy should be regarded as a development of the natural law tradition seems to have reached its height in his response to the criticisms leveled against *The Morality of Law* by Marshall Cohen and Ronald Dworkin. In a footnote to "A Reply to Professors Cohen and Dworkin", for example, Fuller states that Cohen's criticisms of *The Morality of Law* are "less a criticism of the book under discussion than of my whole life as a legal scholar", adding that "[t]his is hardly the place or the occasion for me to defend myself against the charge that everything I have ever written ... has been devoted to a single objective, that of discrediting 'positivism' and upholding 'natural law'": see (1965) 10 Villanova L. Rev. 655. Fuller's private papers reflect the same sentiment towards criticisms raised by Dworkin. In an undated document, Fuller writes that "[o]ne may wish Professor Dworkin God speed in his labors. I only ask that when they are finished he will do me the elementary courtesy of recognizing the highly qualified sense in which I can be said to be a 'naturalist'": Document titled "natural law", The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 ("Notes on the Reply to Critics").

<sup>91</sup> Fuller, "American Legal Philosophy", *supra* note 39 at 477.

natural law position that is often presented by positivist legal philosophers in their effort to radically distinguish their own project from that of opposing positions.<sup>92</sup>

Labeling Fuller as a natural lawyer is also problematic because of how it has operated to obscure the other intellectual influences that must be recognized if we are to gain the best understanding of his legal philosophy. Foremost among these is the thinking of the early American pragmatists,<sup>93</sup> whose writings influenced Fuller's thought in many ways.<sup>94</sup> Most notably, in Fuller's work we see a strong commitment not only to the notion that ideas are answerable to experience, but also to the notion that ideas shape experience.<sup>95</sup> We see this especially in his views about the function of definitions of law which,<sup>96</sup> for Fuller, were not "mere images of some datum of experience", but rather "direction posts for the application of human energies".<sup>97</sup> Moreover, the way that Fuller builds his legal philosophy around ideal forms that are offered as a model against which to assess any practice that attempts to approximate them – brought to clearest expression in his idea of

---

<sup>92</sup> Fuller captures this tendency towards parody well in his book, *Anatomy of the Law*, *supra* note 21 at 116, where he provides a summary statement of the beliefs embraced by the philosophy of the natural law tradition, "relieved of caution and discharged of any responsibility to be sensible":

"There is an ideal system of law dictated by God, by the nature of man, or by nature itself. The ideal system is the same for all societies and for all periods of history. Its rules can be discerned by reason and reflection. Enacted laws that run counter to this ideal law are void and can make no moral claim to be obeyed."

<sup>93</sup> The movement of early American pragmatism is most commonly associated with the names of Charles Sanders Peirce, William James, and John Dewey. These thinkers held certain views about the nature of ideas, truth, definitions, and the function of philosophy that ran against the intellectual climate of the late nineteenth century into which the movement was born.

<sup>94</sup> For two detailed studies of the pragmatist influence on Fuller, see Kenneth I. Winston, "The Ideal Element in a Definition of Law", (1986) 5 L. & Phil. 89 [Winston, "Ideal Element"], and "Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law", (1988) 8(3) Oxford J. Leg. Studies 329 [Winston, "Is/Ought Redux"]. In the latter essay, Winston explains that Fuller recalled a comment having been made to him by a number of European scholars to the effect that "I thought you were an advocate of natural law, but I see you are just an American pragmatist": "Is/Ought Redux" at 349, note 59.

<sup>95</sup> For the pragmatist, an idea or belief becomes true not because of its ability to stand up to logical scrutiny, but rather as a consequence of whether we find that holding the belief leads us into more useful relations with the world. Ideas become true, therefore, in so far as they "help us to get into satisfactory relation with other parts of our experience": see William James, 'What Pragmatism Means' in *Pragmatism* (1907), quoted in Louis Menand, *Pragmatism: A Reader* (New York: Vintage, 1997) at 100 [Menand, *Pragmatism*].

<sup>96</sup> For pragmatists, the function of a definition is to refer to an ideal presence towards which actual practice must aspire. A definition of a phenomenon is therefore not compelled by the way it is, but rather by what it is endeavoring to be. See Kenneth Winston's entry, "Lon Luvois Fuller", in the online IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law, at <<http://www.ivr-enc.info>> at 2.

<sup>97</sup> Fuller, "Positivism and Fidelity to Law", *supra* note 1 at 632. This belief in the prescriptive potential of definitions of law is one of the points that Fuller raises in his objections to Hart's positivism in his 1958 *Harvard Law Review* essay. See my discussion of the Hart-Fuller debate in Chapter 2.

the internal morality of law – provides a further instance of how the pragmatist mode of philosophy influenced his thought. Further still, some significance must be given to how the means-ends analysis that forms the centerpiece of Fuller’s articulation of economics, in “Means and Ends”, is taken from the thinking of John Dewey.<sup>98</sup>

In many ways then, it seems clear that Fuller sought for legal philosophy the type of reorientation that pragmatism espoused. Thus, from the way that he appealed for an approach to law that could enlighten the actual work of lawyers, as well as inform the philosophical question of what is necessary for law to both exist and to have integrity, it might be said that Fuller sought a legal philosophy that was capable, to borrow Dewey’s words, of yielding ideas relevant “to the actual crises of life ... and tested by the assistance they afford.”<sup>99</sup>

By offering these brief comments on the influence of pragmatism on Fuller’s legal philosophy, my aim has simply been to reveal how a deeper understanding of that philosophy requires a wider view than Fuller’s critics have ordinarily taken. We need to recognize that Fuller was not exclusively a natural lawyer, nor a pragmatist, nor an Aristotelian,<sup>100</sup> nor, indeed, a legal process theorist,<sup>101</sup> a sociological jurist,<sup>102</sup> an

---

<sup>98</sup> According to Dewey’s analysis of the means-ends relation, all purposes are only ever abstract “ends-in-view”: that is, not a “remote and final goal to be hit upon”, but rather “a plan which is *contemporaneously* operative in selecting and arranging materials”: see Dewey, “Experience and Nature” (1925), extracted in Menand, *Pragmatism*, *supra* note 95 at 248. There are multiple references to Dewey throughout Fuller’s working papers on his essay, “Means and Ends”: see generally The Papers of Lon L. Fuller, Harvard Law School Library, Box 14, Folder 3 (“Means and Ends”). Dewey also forms the subject matter of some of Fuller’s correspondence with Philip Selznick, with the latter indicating in that correspondence that he sees Fuller’s thought as bringing an “elevated pragmatism” to the study of jurisprudence: see letter from Philip Selznick to Lon Fuller, 7 July 1965, The Papers of Lon L. Fuller, Harvard Law School Librar, Box 7, folder 6 (Correspondence).

<sup>99</sup> John Dewey, ‘The Need for a Recovery of Philosophy’ (1917), extracted in Menand, *Pragmatism*, *supra* note 95 at 227.

<sup>100</sup> As should be apparent from the preceding pages, Fuller’s writings are littered with references to Aristotle. A further philosophical influence that has been given attention by Kenneth Winston is the thinking of Morris Cohen and his idea of polarity: a principle that Fuller describes in “Reason and Fiat” as one “according to which notions apparently contradictory form indispensable complements for one another”: at 381. For a discussion of the principle of polarity within Fuller’s work, see Kenneth Winston in “Ideal Element” and “Is/Ought Redux”, *supra* note 94. See also Peter Teachout, “The Soul of the Fugue: An Essay on Reading Fuller”, (1986) 70 Minnesota L. Rev. 1073.

<sup>101</sup> Fuller, that is, is often labeled as a legal process theorist given his close association at Harvard with Henry Hart and Albert Sacks, the founders of the legal process school. Fuller supported Hart and Sacks’ work, and some of his own writings, most notably, his essay, “The Forms and Limits of Adjudication”,

economist,<sup>103</sup> nor any other label that might be pinned on his thought. At the same time, we need to recognize that Fuller's approach to theorizing about the nature of law incorporates an eclectic mix of all of these influences.

Fuller himself never rendered these ideas into the type of systematic statement that philosophers prize. Still, my aim in this thesis is to show that even if he did not altogether succeed on this score, Fuller's thinking on the distinctive character of law, and the conditions necessary for its realization, offers crucial insights that are yet to be fully absorbed into the deliberations of legal philosophy.

## 6 Conclusion

The ideas reviewed in this chapter make apparent, I hope, that there is much more to understanding Lon Fuller's legal philosophy than is suggested by the portrait in which he is the natural lawyer who apparently lost the debate about the connection between law and morality to the legal positivist, H.L.A. Hart. To widen our view in this way is the first step to reclaiming that legal philosophy and to restoring it to the position of enduring relevance that it deserves.

I turn now in Chapter 2 to offer a detailed analysis of the 1958 Hart-Fuller debate: a debate that proved to be central not only to how both Hart and Fuller subsequently developed their own work, but also to how others have understood the strengths and deficiencies of the two legal philosophies there represented. My analysis in Chapter 2 thus provides the foundation from which to gain insight into how, and why, the prevailing

---

received close attention in Hart and Sacks' text, *The Legal Process* (see Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, William N. Eskridge, Jr. and Philip P. Frickey (eds) (The Foundation Press, 1994). Fuller's own work, however, was clearly of a more philosophical persuasion than Hart and Sacks, and addressed questions well beyond those of the structure of the American regulatory state with which Hart and Sacks were primarily concerned.

<sup>102</sup> Fuller read sociology, and with increasing enthusiasm as his career progressed. Thus he is often referred to as a sociological jurist.

<sup>103</sup> Here I am referring to the many examples drawn from economics, and the many references to economic terminology, that are scattered throughout Fuller's writings. This can likely be explained by the fact that Fuller's first degree was in economics; a discipline which continued to provide a prism through which he occasionally sought to illustrate his ideas.

scholarly memory of Fuller has the shape that it does. It also helps us to see that, if we are to reshape that memory, we must recognize two things. First, we must recognize the message that Fuller develops throughout his reply to Hart about the relationship between the formal features of law and human agency. And second, we must recognize that although the 1958 *Harvard Law Review* exchange is remembered, above all, as a debate about the connections between law and morality, it is actually best understood – at least from Fuller’s perspective – as a debate about whether law is answerable to legality. That is, what we see throughout Fuller’s reply is his effort to highlight the many ways that Hart’s claim that there is no necessary connection between law and morality neglects any sustained consideration of the conditions that make law itself possible.

## Chapter 2

### The Hart-Fuller debate

#### 1 Introduction

The “Hart-Fuller debate”, as it has become known, arose from the occasion of H.L.A. Hart’s delivery of the Oliver Wendell Holmes lecture at Harvard Law School in 1957.<sup>1</sup> As the story has it, Fuller, then the Carter Professor of General Jurisprudence at Harvard, paced up and down at the back of the lecture hall as he heard Hart elaborate an extended account of why positivist legal philosophy could uphold the claim that there is no necessary connection between law and morality.<sup>2</sup> Fuller demanded a right of reply, and this response was published alongside the text of Hart’s lecture in the 1958 *Harvard Law Review*.<sup>3</sup> More than fifty years after its publication, the Hart-Fuller debate continues to stand as one of the most important texts in the canon of Anglo-American jurisprudence.

My aim in this chapter is to read the Hart-Fuller debate from Fuller’s perspective. Specifically, my aim is to illuminate the elements within Fuller’s response to Hart that I read as giving expression to the view that law must be understood as answerable to legality, and further, that legality is the condition that arises when the formal features of law instantiate respect for the legal subject as an agent.<sup>4</sup>

To provide the foundations for this reading, I begin by setting out an account of the arguments that shape Hart’s 1958 essay. I endeavour as much as possible to set out this account without extended analysis, for the reason that my principal goal in this chapter is

---

<sup>1</sup> The lecture was published as H.L.A. Hart, “Positivism and the Separation of Law and Morals”, (1958) 71 *Harvard L. Rev.* 593 [Hart, “Positivism”].

<sup>2</sup> See Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, (Oxford: Oxford University Press, 2004) at 197.

<sup>3</sup> Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart”, (1958) 71 *Harvard L. Rev.* 630 [Fuller, “Positivism and Fidelity to Law”].

<sup>4</sup> Fuller himself only begins to develop these ideas in the 1958 essay, and does so through use of a range of terminology and arguments. Accordingly, I do not attempt here to consolidate those terms, but rather aim to show, through Fuller’s own words, the ways that he begins to develop a sense of why the form of law is morally significant in its own right.



to illuminate Fuller's position, not Hart's.<sup>5</sup> Having provided a summary of Hart's arguments, I then undertake a close analysis of Fuller's reply. Although this reply addresses each of Hart's claims, Fuller gravitates principally towards those aspects of Hart's position that touch upon the question of whether there is a necessary connection between law and morality in the foundations of legal order. Noticing this recurrent concern in Fuller's essay is the first step towards understanding the way that his reply to Hart relates to the ambitions and content of his legal philosophy more generally.

## 2 Hart's "Positivism and the Separation of Law and Morals"

Hart's goal in "Positivism and the Separation of Law and Morals" is to elaborate and defend a positivist legal philosophy that is capable of explaining the normativity of law while maintaining the traditional positivist insistence that there is no necessary connection between law and morality.<sup>6</sup> From the outset of the essay, Hart makes clear that his aim is not just to defend this position, but to do so in a manner that upholds the positivist commitment to clarity of analysis, in particular, "the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be".<sup>7</sup>

Hart's essay is a comprehensive achievement, traversing a variety of sites of jurisprudential inquiry which raise the question of whether law is in some sense necessarily moral. The six sections of Hart's essay reflect his attempt to deal with each of these inquiries in turn, and range from his explanation of how the version of legal positivism that he defends represents an abandonment of certain traditional features of legal positivist thought and a development of others, to his investigation of the law-morality connection in the context of interpretation, Nazi law, and the foundations of legal order.

---

<sup>5</sup> I undertake a more direct engagement with Hart's arguments in Chapter 5, below, as part of my discussion of the implications of my reading of Fuller for prevailing debates in legal philosophy on the relationship between law and legality.

<sup>6</sup> That Hart sees his project as clarifying the positivist position, as well as elaborating it in a novel direction, is apparent from how he complains expressly in the essay about the way that the term "positivism" tends to be used either indiscriminately, inaccurately, too widely or too narrowly, and generally in a manner that does not reveal anything meaningful about the theoretical position: Hart, "Positivism", *supra* note 1 at 601.

<sup>7</sup> *Ibid.* at 594.

In the pages to follow I provide a brief account of Hart's arguments with respect to each of these issues. As I foreshadowed above, I will pay special attention to his reasoning on the issues with which Fuller engages most deeply: namely, the question of whether the foundations of legal order are necessarily moral, and the question of how to navigate the jurisprudential quandaries presented by Nazi law.

## **2.1 On the history of the positivist insistence of the separation of law and morality**

Hart commences his essay with a brief account of the Utilitarian origins of legal positivism as it was developed by Jeremy Bentham and John Austin. As Hart explains it, the Utilitarians' motivation for defending the distinction between law as it is and law as it ought to be was twofold. First, they thought that to insist on this distinction would enable men to see steadily the precise issues posed by the existence of morally bad laws. Second, they thought that maintaining the distinction would also assist the project of explaining the authority of law.<sup>8</sup>

According to Hart, these motivations on the part of the Utilitarian thinkers flowed from their concern that, should the distinction between law as it is and law as it ought to be be blurred, the authority of law might dissolve in the face of individual conceptions of what the law morally ought to be, resulting in a state of "obsequious quietism" in which law itself escaped moral criticism.<sup>9</sup> Bentham and Austin thus insisted that "it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law" and, conversely, that "it could not follow from the mere fact that a rule was morally desirable that it was a rule of law".<sup>10</sup>

## **2.2 The seeds of Hart's novel account of legal positivism**

Hart continues his account of the history of positivist legal philosophy by pointing out that there was more to the Utilitarian conception of law than its insistence on the distinction between what law is and what it ought to be. The Utilitarians also thought that

---

<sup>8</sup> *Ibid.* at 597.

<sup>9</sup> *Ibid.* at 598.

<sup>10</sup> *Ibid.* at 599.

the study of legal vocabulary was essential to an understanding of the nature of law and, most significantly for Hart's purposes, embraced a view of law as a command.<sup>11</sup> Hart emphasizes that, within the Utilitarian position, these three doctrines were distinct. Thus, any deficiency that might be identified in the command conception need not demonstrate the falsity of some other aspect of the Utilitarian position, such as its commitment to the separation of law and morality.<sup>12</sup>

Hart's clarification of this point anticipates his own commitment to the argument that it is possible to reject the command conception without rejecting the positivist position on the relationship between law and morality. The command conception must be rejected, he explains, because "there is much, even in the simplest legal system, that is distorted if presented as a command".<sup>13</sup> Hart also makes clear that similar problems plague the traditional positivist tendency to identify law with compulsion because, as he famously puts it, "[l]aw surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion".<sup>14</sup>

These comments preface the passage in Hart's essay where he introduces the seeds of the position that has shaped the agenda of legal positivism since. As Hart explains it, absent from the history of positivist thought is any acknowledgment of how

... nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential lawmaking procedures. This is true even in a system having a simple unitary constitution like the British. These fundamental accepted rules specifying what the legislature must do to legislate are not commands habitually obeyed, nor can they be expressed as habits of obedience to persons. They lie at the root of a legal system, and what is most missing in the utilitarian scheme is an analysis of what it is for a social group and

---

<sup>11</sup> *Ibid.* at 601.

<sup>12</sup> *Ibid.* at 601-602.

<sup>13</sup> *Ibid.* at 602. Hart also distinguishes his own project from the utilitarian commitments of Bentham's positivism on the basis that his own is a descriptive, rather than a normative or political, project.

<sup>14</sup> *Ibid.* at 603, referring to a situation where a gunman says to a victim "give me your money or your life". A further deficiency of the command conception, Hart goes on to add, is how it ignores the difference between the various rules that constitute a legal order. These range from rules that are obeyed, such as the criminal law, to rules that have a distinctively facilitative orientation in how they enable individuals to make contracts, wills, or trusts. In this sense too, Hart therefore argues, a renewed positivist account of law must distance itself from the notion that "life under law is a essentially a simple relationship of the commander to the commanded, of superior to inferior, of top to bottom": at 604.

its officials to accept such rules. This notion, not that of a command as Austin claimed, is the “key to the science of jurisprudence”, or at least one of the keys.<sup>15</sup>

This passage is a crucial one in Hart’s essay because it represents the earliest formulation of the argument, that he went on to develop at length in *The Concept of Law*, that the concept of law must be understood principally in terms of the relationship of law to rules.<sup>16</sup> For the purpose of mapping the claims at issue in the 1958 exchange, however, the point to emphasize is that Hart here states that the “key to the science of jurisprudence” is to be found, in some critical way, in the conditions that make law possible. This, as we will come to see, is the element of Hart’s position that Fuller seizes upon when he suggests that Hart seems to concede a connection between law and morality in the very foundations of law.

As if anticipating this objection, however, Hart clarifies that just because it is correct to understand law as being born of rules that are not themselves law does not mean that these rules are necessarily moral in nature. This is because the rules that lie at the foundation of legal order, while clearly different from commands, are not in any necessary sense a reflection of morality, because “[r]ules that confer rights, though distinct from commands, need not be moral rules”.<sup>17</sup> Thus, Hart insists, to move away from the command conception as the basis of a positivist theory of law is not to concede any departure from the positivist insistence on the separation of law and morality.

### **2.3 The law-morality connection and the interpretation of particular laws**

Hart turns in the third section of his essay to confront the claim that when judges interpret and apply a rule whose meaning is in dispute, their tendency to refer to some notion of what the law ought to be effectively collapses the distinction between law and morality.<sup>18</sup>

---

<sup>15</sup> *Ibid.* at 603.

<sup>16</sup> See my account of Hart’s arguments in *The Concept of Law* in Chapter 3 at 67-69.

<sup>17</sup> Hart, “Positivism”, *supra* note 1 at 606.

<sup>18</sup> Hart here understands himself as responding to the view of the American legal realists that a necessary connection between law and morality is revealed in how judges decide cases where the meaning of the law is in dispute: *Ibid.* at 606.

That Hart sees this question as central to his wider project of renewing legal positivism is clear from how its discussion occupies the largest part of his essay. The position that he develops is that when a judge approaches the task of interpreting a legal rule, it is ordinarily possible to discern a “settled meaning”, or “core of standard instances” that apply to that rule.<sup>19</sup> Outside of this core, however, are a range of debatable cases which might be said to belong to the “penumbra” of law, because the existing law does not indicate the correct interpretation. In these cases, the judge must decide what the meaning of the rule will be.<sup>20</sup>

To illustrate the operation of this model of interpretation, Hart introduces the example of a legal rule that forbids the taking of a vehicle into a public park.<sup>21</sup> In most cases, he explains, the interpretation of such a rule will be decided by reference to a core of settled meaning as to what constitutes a vehicle for the purposes of the rule. Nonetheless, there will invariably be “a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.”<sup>22</sup> The challenge for legal philosophy, therefore, is to explain what goes on when judges decide these penumbral cases, and what implications this activity has for debates about the connection between law and morality.

Hart’s own response to this question is that when a legal rule falls within the penumbra of uncertain meaning, “judges must legislate and so exercise a creative choice between alternatives”.<sup>23</sup> Thus, when faced with a problem of the penumbra, judges exercise discretion and make new law. This means, in turn, that any moral considerations that might come into play in the exercise of this discretion do not disturb the positivist insistence of the necessary separation of law and morality, for the reason that there is no law, as such, in the penumbra. Instead, there is only discretion that, once exercised, creates new law.

---

<sup>19</sup> *Ibid.* at 607.

<sup>20</sup> *Ibid.*.

<sup>21</sup> *Ibid.*.

<sup>22</sup> *Ibid.*.

<sup>23</sup> *Ibid.* at 612.

Hart does readily concede, however, that when a judge decides a case which turns upon a legal rule of unclear meaning, some conception of what the legal rule ought to be will likely come into play. But, he argues, this does not mean that we should slide from that fact to the conclusion that any such considerations of “ought” implicate a moral judgment,<sup>24</sup> because the ought in question might merely reflect some standard of criticism that may or may not have any connection to moral standards.<sup>25</sup> Thus, Hart concludes, to say of a decision that it is “as it ought to be” may mean only that some accepted purpose or policy has been advanced through the law, a fact that may have no connection whatsoever to the moral propriety of any such purpose.

To emphasize his point, Hart goes on to explain that it would be possible to say that a legal decision is “as it ought to be” even inside a system that was “dedicated to the pursuit of the most evil aims”.<sup>26</sup> By way of illustration, he refers to how in the Nazi era men were sentenced by courts for criticism of the regime, and that the choice of sentence in these cases could be guided exclusively “by consideration of what was needed to maintain the state’s tyranny effectively”.<sup>27</sup> The prisoner of such a system would thus be regarded “simply as an object to be used in pursuit of these aims”.<sup>28</sup> Still, Hart suggests, a decision on these grounds could nonetheless be both intelligent and purposive and, at least from one point of view, “as it ought to be”.<sup>29</sup>

Hart’s motivation for offering this example seems merely to demonstrate how a judge’s view of what the law ought to be might depart significantly from purposes that one would objectively regard as moral. Still, as I will elaborate further throughout this thesis, the example reveals much about the underlying assumptions of Hart’s theoretical position, most notably, his apparent view that a regime can still be regarded as operating in a legal

---

<sup>24</sup> *Ibid.* at 608.

<sup>25</sup> *Ibid.* at 613. See also Hart’s comment that “[i]t does not follow that, because the opposite of a decision reached blindly in the formalist or literalist manner is a decision intelligently reached by reference to some conception of what ought to be, we have a junction of law and morals”: at 612.

<sup>26</sup> *Ibid.* at 613.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* at 614.

<sup>29</sup> *Ibid.*

manner when its courts treat the legal subject as a mere object for the pursuit of explicitly political aims.

Hart closes his account of how judges decide cases where the meaning of the law is in dispute by emphasizing that although it is clearly important for legal philosophy to be able to explain this practice, what is the more important point is to recognize that in any legal system there will exist a core of legal rules whose meaning is settled, and which capture, in the purest terms, the phenomenon of law.<sup>30</sup> This hard core of settled meaning, Hart argues, “is law in some centrally important sense”.<sup>31</sup> Thus, when we give our attention to the borderline cases, we must not forget that “there must first be lines”.<sup>32</sup>

## 2.4 The problem of Nazi law

Hart’s engagement in his 1958 essay with the jurisprudential quandaries presented by the legal system of Nazi Germany gravitates around the claim of the German legal philosopher, Gustav Radbruch, that when a law reaches a certain level of moral iniquity it can be refused the character of law.<sup>33</sup> As Hart tells it, prior to Nazism Radbruch was a devoted legal positivist who saw resistance to law as a matter for personal conscience.<sup>34</sup> Radbruch’s views shifted, however, upon living through the experience of Nazism.

According to Hart, Radbruch concluded from the ease with which the Nazi regime had exploited law, and the failure of the German legal profession “to protest against the enormities which they were required to perpetrate in the name of law”, that the positivist insistence on the separation of law and morality had powerfully contributed to the horrors of Nazism.<sup>35</sup> These reflections led him to argue for the view that “the fundamental

---

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> The actual text of what has become known as the “Radbruch formula” is as follows: “The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice”: Gustav Radbruch, “Statutory Lawlessness and Supra-Statutory Law (1946)”, translated by Bonnie Litschewski Paulson and Stanley Paulson, (2006) 26 Oxford J. Leg. Studies 1 at 7.

<sup>34</sup> Hart, “Positivism”, *supra* note 1 at 616.

<sup>35</sup> *Ibid.* at 617. Hart reacts against this suggestion on Radbruch’s part by commenting that whatever association positivist philosophy had with legal outcomes under Nazism must have been a peculiarly

principles of humanitarian morality were part of the very concept of *Recht* or Legality”, such that no positive enactment, however clearly it conformed with the formal criteria of legal validity with a given system, could be regarded as valid law if it contravened basic principles of morality.<sup>36</sup>

As Hart understands it, the application of this philosophy in postwar Germany required that “every lawyer and judge should denounce statutes that transgressed the fundamental principles not as merely immoral or wrong but as having no legal character”.<sup>37</sup> One such instance was a case that involved a woman who denounced her husband to the Nazi authorities for insulting remarks he had made about Hitler while home on leave from the German army. The wife was under no legal duty to report her husband’s acts, though what he had said, Hart explains, “was apparently in violation of statutes making it illegal to make statements detrimental to the government of the Third Reich”.<sup>38</sup> In 1949 the wife was prosecuted in a German court for illegally depriving her husband of his freedom: a crime of the pre-Nazi German criminal law that had apparently remained in force throughout the Nazi years. In her defence the woman pleaded that because her husband’s imprisonment was pursuant to a Nazi statute that was lawful at the time, she had not illegally deprived her husband of his liberty and thus had committed no crime. Although this defence succeeded at trial, a court of appeal ultimately rejected it on the basis that the statute under which she acted “was contrary to the sound conscience and sense of justice of all decent human beings”, and thus not entitled to the status of law.<sup>39</sup>

---

German phenomenon, as elsewhere the liberal and enlightened imperative of positivism to encourage moral criticism of and disobedience to unjust laws was well understood: see generally *Ibid.* at 617-618.

<sup>36</sup> *Ibid.* at 617.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* at 618-619. Although Hart does not include this fact, an additional aspect of the case that is noted in Fuller’s commentary is that the husband was sentenced to death for the relevant offences. In the result, however, he was not executed but returned to service in the German army. See Fuller, “Positivism and Fidelity to Law”, *supra* note 3 at 653.

<sup>39</sup> See generally Hart, “Positivism”, *supra* note 1 at 618-619.



Thus, as Hart recounts it, the jurisprudential dilemmas presented by the case of this “grudge informer”<sup>40</sup> were resolved by applying the Radbruch formula to strip a valid Nazi statute of its status as law. Hart is emphatic in his condemnation of the wisdom of the outcome, which he describes as having been “hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism”.<sup>41</sup> To turn to the Radbruch formula in this way must be condemned, he argues, because the postwar German legal system had other options available to it for dealing with cases of this nature, such as letting the woman go unpunished, or calling upon the legislature to enact a retrospective statute to declare actions taken under the morally impugned laws to be unlawful.<sup>42</sup>

Hart readily accepts that neither of these options is straightforward. Indeed, he sees the choice between them as presenting a moral quandary: that is, a moral quandary in which either the woman goes unpunished, thus sacrificing the moral value of her punishment, or her punishment is secured through resort to retroactivity, thus sacrificing “a very precious principle of morality endorsed by most legal systems”.<sup>43</sup> To resolve the grudge informer problem through the Radbruch formula, Hart insists, is not only to abandon legal principle, but also to hide this moral quandary. Thus for Hart, the best resolution of the dilemmas presented by Nazi law, as exemplified in the case of the grudge informer, is to take the path that best serves clarity: that is, to “speak plainly” and condemn valid laws as too evil to be obeyed,<sup>44</sup> rather than presenting “the moral criticism of institutions as propositions of a disputable philosophy”.<sup>45</sup>

One point to note for now is that some significance should be attributed to how Hart presents his discussion of Nazi law after his discussion of the connection between law and morality in the interpretation of particular laws, and before he turns to the question of whether there is a connection between law and morality in the foundations of a legal

---

<sup>40</sup> I put the term “grudge informer” in quotes because Hart himself does not use it. Fuller, however, does, and the case discussed in the Hart-Fuller debate has generally become known to students of jurisprudence as “the case of the grudge informer”.

<sup>41</sup> Hart, “Positivism”, *supra* note 1 at 619.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* at 620.

<sup>45</sup> This lesson, Hart claims, was one that “the Utilitarians were most concerned to teach”: *Ibid.* at 621.

system. Noting this structural place is important because it strongly suggests that Hart sees the jurisprudential quandaries presented by Nazi law as turning principally on the question of how lawyers, judges, and citizens ought to have related to the immoral content of particular Nazi laws. Indeed, it is precisely this choice on Hart's part, and the way that it leads to a corresponding neglect to consider the wider institutional conditions of Nazi legality, that constitutes the substance of Fuller's criticisms of Hart's treatment of Nazi law.<sup>46</sup>

## 2.5 The law-morality connection and the foundations of legal order

Hart begins his analysis of whether there is a connection between law and morality in the foundations of a legal system by considering whether a system of law which fails to satisfy certain moral minima can, or ought to, be considered a legal system. The first observation he makes in relation to this question is that the notion that there must be some minimum necessary moral content to any legal system is not entirely foreign to positivism. For instance Austin, Hart explains, argued that every developed legal system contains certain fundamental notions which are "necessary" and "bottomed in the common nature of man".<sup>47</sup>

Hart's own view, however, is that the only necessary content of a legal system that a positivist legal philosophy can defend is that content necessary to secure the aim of "survival in close proximity to our fellows".<sup>48</sup> This very thin conception of the minimum moral content of a legal system is the right one, Hart argues, because "the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is 'necessary'".<sup>49</sup>

---

<sup>46</sup> It is thus no surprise, as I will shortly highlight, that Fuller's response to Hart on this point is presented as an extension of his analysis of the moral foundations of legal order: a structural choice that itself indicates how, for Fuller, the crux of the jurisprudential quandary presented by Nazi legality lies here.

<sup>47</sup> Hart, "Positivism", *supra* note 1 at 621.

<sup>48</sup> For example, Hart explains, rules that forbid the free use of violence and which constitute the minimum rights and duties of property "are so fundamental that if a legal system did not have them there would be no point in having any other rules at all": *Ibid.* at 623.

<sup>49</sup> *Ibid.*

Still, Hart goes on to make some important concessions to the view that certain necessary connections between law and morality seem to be revealed in the idea of a legal system. Most notably, he observes that such a connection seems to be suggested in the idea that a legal system must be constituted by general rules:

If we attach to a legal system the minimum meaning that it must consist of general rules – general in both the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals – this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. It is, however, true that *one* essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of the law, not justice of the law. So there is, in the very notion of law consisting in general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles.<sup>50</sup>

Having made this statement, however, Hart goes on to clarify that this “certain overlap” between legal and moral standards ultimately does not compromise the positivist claim that law and morality are necessarily distinct, because

... a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between persons affected, laws which were hideously oppressive, and might deny to a vast rightless slave population the minimum benefits of protection from violence and theft ... Only if the rules failed to provide these essential benefits and protection for any one – even for a slave-owning group – would the minimum be unsatisfied and the system sink to the status of a set of meaningless taboos. Of course no one denied those benefits would have any reason to obey except fear and would have every moral reason to revolt.<sup>51</sup>

Hart’s position on the question of whether there is a necessary connection between law and morality in the foundations of a legal system might thus be summarized as follows. No such connection is revealed in the foundations of a legal system, including in the requirement that such a system consist of general rules, because such a requirement cannot, of itself, guarantee the substantive moral quality of the *ends* of law.<sup>52</sup> Nor,

---

<sup>50</sup> *Ibid.* at 623-24.

<sup>51</sup> *Ibid.* at 624.

<sup>52</sup> By “substantive” morality I mean to refer to the range of substantive values that are ordinarily associated with the term morality, such as equality, autonomy, justice, fairness, and so forth.

relatedly, can such a minimum requirement guard against the possibility that the laws of such a system might be used by one group to oppress another.

Whether this argument can be regarded as an adequate defence of the positivist separation thesis as it applies to the foundations of legal order is a matter that I will return to in Chapter 5. For now, the point to note is that Hart appears to readily accept the idea that a relationship in which one group uses law to disempower and deny all legal protections to another will nonetheless remain a legal relationship.

## **2.6 Other challenges to the law-morality connection in legal philosophy**

The final section of Hart's essay addresses the philosophical difficulties that plague debates in legal theory concerning what law is versus what it ought to be. Hart's point in this section, stated briefly, is that debates of legal theory should not presuppose the complex and controversial issues of meta-ethics that are the domain of moral philosophy, such as the question of whether there can be an objective idea of morality. Yet, to advance the claim – as natural law philosophers do – that the study of law requires that we accept a fusion of the “is” and “ought” is to invite precisely these questions into our theoretical deliberations. Against this approach, therefore, Hart argues that debates of legal philosophy can and should avoid such complex considerations, and that this can be done if we start from a position that rejects a purposive understanding of law.<sup>53</sup>

In sum, then, Hart's essay traverses a range of sites of jurisprudential inquiry where the question of the connection between law and morality is salient. His analysis, however, leans primarily towards the question of whether that connection manifests in the interpretation of laws whose meaning is in dispute, and to other questions concerning

---

<sup>53</sup> It is in this context that Hart criticizes Fuller's thinking on purposive interpretation, from the essay, “Human Purpose and Natural Law”, as an example of the kind of confused purposive inquiry that he thinks legal philosophers must avoid. As Hart summarizes it, Fuller's arguments in “Human Purpose and Natural Law”, *infra* note 76, can be reduced to the claim that

“... when rules are recognized as applying to instances beyond any that legislators did or could have considered, their extension to such new cases often presents itself not as a deliberate choice or fiat on the part of those who so interpret the rule ... Rather, the inclusion of the new case under the rule takes its place as a natural elaboration of the rule, of something implementing a “purpose” which seems natural to attribute (in some sense) to the rule itself rather than to any particular person dead or alive”: Hart, “Positivism”, *supra* note 1 at 627.

how judges and citizens ought to confront the problem of validly enacted but morally iniquitous laws. In his discussion of these points, we see in particular the extent of Hart's commitment to the view that positivist legal philosophy best serves the goal of clarity in legal analysis. This value, he argues, is important not only for its own sake, in the sense that positivism provides the clearest description of law, but also because it enables us "to see clearly the problems posed by morally bad laws".<sup>54</sup>

### 3 Fuller's "Positivism and Fidelity to Law – A Reply to Professor Hart"

The title of Fuller's reply is instructive of the issue that he sees as distinguishing his own view of how we should theorize about law from that advanced by Hart. The positivist project, Fuller states explicitly, has a distorting effect on the aims of legal philosophy because it fails to appreciate that its definitions of what law is "are not mere images of some datum of experience", but "direction posts for the application of human energies".<sup>55</sup> For Fuller, then, the work of legal philosophy must be directed to defining and explaining what it is about law that summons our fidelity to it. As he expresses it,

Law, as something deserving of loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials. The respect we owe to human laws must be something different from the respect we accord to the laws of gravitation. If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark.<sup>56</sup>

It is thus apparent from how Fuller sets up his reply that his goal is to reorient the agenda set by Hart towards considerations concerning the distinctive character of legal order and the reasons why law has a moral claim over us. More specifically, what becomes apparent over the course of Fuller's response is both his desire to tease out those aspects of Hart's position that betray a concern for the question of fidelity to law, as well as his

---

<sup>54</sup> *Ibid.* at 597.

<sup>55</sup> Fuller, "Positivism and Fidelity to Law", *supra* note 3 at 631, 632. Fuller adds: "[t]here is indeed no frustration greater than to be confronted by a theory which purports merely to describe, when it not only plainly prescribes, but owes its special prescriptive powers precisely to the fact that it disclaims prescriptive intentions": at 632.

<sup>56</sup> *Ibid.*

desire to generally challenge Hart on the question of how the positivist account understands the relationship of law to legality.

Fuller begins his reply by addressing the broad question of what positivists mean to exclude when they exclude morality from their account of law.<sup>57</sup> From this foundation, he turns to engage with each of the claims presented in Hart's essay. My aim in the discussion to follow is to outline Fuller's position with respect to each of these features of his reply to Hart. My primary focus, however, will be on those features that I read to be most fundamental to Fuller's objections to the positivist account of law: objections that gravitate consistently to how Hart's theory neglects the formal conditions that make law itself possible.

### **3.1 Re-orienting the agenda: challenging positivism on what it seeks to exclude when it excludes morality from its account of law**

The primary objective of positivist legal philosophy, as Fuller explains it, is to preserve the integrity of the concept of law.<sup>58</sup> Accordingly, positivists "have generally sought a precise definition of law, but have not been at pains to state just what it is they mean to exclude by their definitions".<sup>59</sup> Hart's particular version of legal positivism provides no exception to this tendency, in Fuller's view, because it also seeks to exclude "all sorts of extra legal notions about 'what ought to be'" out of an apparent concern for how if law is infused with some idea of morality, the morality so infused might be an immoral one.<sup>60</sup>

Fuller's response to these aspects of Hart's position provides a window – though not necessarily a clear one – into his view that there is something about the form of law that

---

<sup>57</sup> It should be noted that Fuller also replies briefly to Hart's account of the history of positivism. Fuller's main criticism in this context is expressed as a refusal to accept the idea that the command conception was not born out of some desire to keep law and morality separate in the philosophical analysis of law. In Fuller's view, that is, no mistake is committed by those who believe that "Bentham and Austin's error in formulating improperly and too simply the problem of the relation of law and morals was part of a larger error that led to the command theory of law", and that the connection between these two errors "can be made clear if we ask ourselves what would have happened to Austin's system of thought if he had abandoned the command theory". On Fuller's reading, therefore, the whole premise of the lectures in which Austin defended the command theory was to guard a "black-and-white distinction between law and morality": *Ibid.* at 639-640.

<sup>58</sup> *Ibid.* at 635.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.* at 635, 636.

works against its use for the pursuit of immoral aims. The window is unclear, that is, because Fuller's attempt to give expression to this idea rests on the naïve assertion that "coherence and goodness have more affinity than coherence and evil".<sup>61</sup> Still, and despite the inadequacy of this formulation, we gain somewhat more insight into the general orientation of the point that he is trying to convey when Fuller goes on to add that "when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions towards goodness, by whatever standards of ultimate goodness there are".<sup>62</sup>

### 3.2 On the moral foundations of legal order

Fuller begins his reply to Hart on the question of whether the foundations of legal order reveal a necessary connection between law and morality by noting Hart's commitment to the idea that the foundation of a legal system lies not in coercive power, but in certain "fundamental accepted rules specifying the essential lawmaking procedures".<sup>63</sup> The question he poses to Hart, therefore, is to explain the nature of these rules that furnish the framework within which the making of law takes place.<sup>64</sup>

From Fuller's perspective, these non-law rules that make law possible must be moral in character because they "derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary".<sup>65</sup> Law's reliance on these rules for its very possibility thus presents a challenge to the positivist claim that there is no merger of law and morality at the foundation of a legal order.<sup>66</sup> Indeed, Fuller argues, the way that positivist legal philosophy avoids any sustained inquiry into how law becomes possible only by virtue of rules that are not law not only indicates the essential

---

<sup>61</sup> *Ibid.* at 636.

<sup>62</sup> *Ibid.* Fuller also adds later in the same discussion that we must ask why it is that "even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law": at 637. See also his observation, when referring to the activity of building legality through constitutionalism, that "substantive aims should be achieved procedurally, on the principle that if men are compelled to act in the right way, they will generally do the right things": at 643.

<sup>63</sup> *Ibid.*, quoting Hart

<sup>64</sup> *Ibid.* at 639.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

incompleteness of the positivist account, but also how that account substantially disserves the ideal of fidelity to law.<sup>67</sup>

This, Fuller explains, is because positivists fail to take into account how fidelity to law “is something for which we must plan”.<sup>68</sup> For example, a new constitution cannot “lift itself unaided into legality”, but rather must rely on a general acceptance from those who will be both its agents and its subjects that it is “necessary, right, and good”.<sup>69</sup> Fuller’s point, then, is that it is necessary to see how the achievement of legal order is contingent on the cultivation of a certain moral viewpoint towards law, and that this viewpoint must itself be planned for and worked towards. Such recognition, however, seems to be absent from the positivist account of law.

A number of observations can be made about Fuller’s engagement with Hart on these points. The first relates to how Fuller’s primary challenge to Hart is to explain why he does not regard the “fundamental accepted rules specifying the essential lawmaking procedures” as moral in nature. That Fuller would approach Hart’s claims in this way seems logical, given that the question he seeks to raise is whether Hart has contradicted his own insistence that there is no necessary connection between law and morality in the foundations of a legal system.

Still, it is worth wondering why Fuller did not do more with this important statement of Hart’s, not least because that statement suggests a commonality between Hart and Fuller’s approaches that, as will be revealed in the chapters to follow, is far more evident in Hart’s 1958 essay than it is at any subsequent point in Fuller’s exchanges with him. For instance, Hart is explicit in his 1958 essay that a core aspect of the project of legal philosophy is to explain how legal order arises and is maintained, a view that Fuller clearly shares both in his reply to Hart as well as in many of the writings that he

---

<sup>67</sup> Fuller refers, by way of example, to Kelsen’s theoretical construction of a single, “basic” norm to regulate the making of law. This, according to Fuller, is the classic example of the positivist use of fictitious constructs to simplify reality into a form that can be absorbed into their chosen mode of legal analysis: *Ibid.* at 642.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*



published prior to the 1958 debate. Moreover, in his 1958 essay Hart states explicitly that a key aspect of this inquiry is the question of what it is for a social group *and* its officials to accept the rules that make lawmaking possible.<sup>70</sup> When Hart develops a much more sophisticated elaboration of this idea in *The Concept of Law*, this “social group” that he refers to in 1958 – presumably those subject to the law – disappears in the face of a virtually exclusive focus on how the attitudes and practices of legal officials create the phenomenon of legal order.<sup>71</sup> In 1958, however, Hart appears to grant some significance to the attitude of the legal subject towards the putative legal order when he explores the question of how legal order itself is made possible.

Instead of confronting Hart directly on this issue, however, Fuller focuses on Hart’s failure to explain the nature of the rules that lie at the foundation of a legal order. Yet, as I will explain shortly, a central element of Fuller’s criticism of Hart’s discussion of Nazi law relates to how that analysis fails to consider the position in which a debased legal order places its subjects, and whether this phenomenon has any bearing on the conditions of law’s existence.

### 3.3 On the morality of law itself

The fourth section of Fuller’s essay develops his claim that there is a twofold sense “in which it is true that law cannot be built on law.”<sup>72</sup> As he explains it, the authority to make law “must be supported by moral attitudes that accord to it the competency it claims”.<sup>73</sup> This “morality external to law” is the first morality that makes law possible, because if law is to have authority, it must secure the widespread acceptance of those who are subject to it.<sup>74</sup> The support of this external morality, however, is not of itself sufficient to

---

<sup>70</sup> Hart, “Positivism”, *supra* note 1 at 603 (my emphasis).

<sup>71</sup> See my discussion of Hart’s account of legal order in *The Concept of Law* in Chapter 3, below, at 67-69.

<sup>72</sup> Fuller, “Positivism and Fidelity to Law”, *supra* note 3 at 645.

<sup>73</sup> *Ibid.*

<sup>74</sup> Fuller’s arguments on this point echo his discussion of the “principle of legitimated power” in his 1949 materials, *The Problems of Jurisprudence*. In that context, he argues that power is ineffective as a principle of social organization unless it is legitimated: that is, unless it is accepted as right and proper by at least a substantial portion of those subject to it”; adding that power “is simply the reflex of acceptance”: Lon L. Fuller, *The Problems of Jurisprudence* (Temporary edition) (Brooklyn, The Foundation Press, 1949) at 701-702.

ensure the actual functionality of law. For this aspiration, Fuller argues, we must also respect the “internal” morality of law.<sup>75</sup>

Fuller’s elaboration of the idea that law is internally moral in his 1958 reply to Hart significantly develops the sketch that he provided in his essay, “Human Purpose and Natural Law”.<sup>76</sup> In that context, Fuller introduced the idea that the realization of any purposive activity, and the institutional form through which it is channeled, necessarily implicates the observance of certain requirements that can be understood as internal to the activity itself.<sup>77</sup> In his 1958 essay, however, Fuller elaborates this idea differently, with a view to contesting Hart’s denial of the necessary connection between law and morality in the foundations of legal order.

Fuller begins by suggesting that Hart’s arguments about the distinction between law and morality as it relates to the foundations of legal order are capable of being restated in terms of a distinction between order and good order. “Order”, Fuller explains, can be understood as designating “order *simpliciter*”,<sup>78</sup> while good order is order that has moral worth, such as by corresponding to “the demands of justice, or morality, or men’s notions

---

<sup>75</sup> Fuller, “Positivism and Fidelity to Law”, *supra* note 3 at 645. Fuller also observes that these two moralities are in a relationship of reciprocal influence, in the sense that “a deterioration of the one will almost inevitably produce a deterioration in the other”.

<sup>76</sup> Lon L. Fuller, “Human Purpose and Natural Law”, (1956) 53 J. of Phil. 697.

<sup>77</sup> Fuller introduces the idea that institutional forms have an internal morality in “Human Purpose and Natural Law” as part of his discussion of the deficiency of contemporary legal philosophy in giving attention to the “forms of social order”, other than in so far as these forms provide the “means to the realization of human ends”: *Ibid* at 704. The passage where he elaborates his idea suggests that, by “internal morality”, Fuller has in mind the requirements that are intrinsic to a social activity if it is to do what it purports to do. As he explains it,

“We may judge football by an external standard and say, “Football is a good game,” but we may also judge it by standards drawn from its own internal requirements and say, “Football will become impossible if this sort of thing is allowed to go on.” We may appraise adjudication as a means of settling disputes and compare it with alternative methods of accomplishing the same object. We may also analyze its intrinsic demands and recognize that any attempt to combine the functions of judge and mediator represents a dangerous undertaking. Finally, we may agree with Proverbs that, “The lot causeth contentions to cease, and parteth between the mighty,” though we may regret that the wisdom of Solomon was not applied to define more precisely for us the kinds of contentions that are most suited for disposition by a casting of lots. At the same time, deliberate resort to chance as a form of social order makes its own technical demands if it is to be in fact what it purports to be”: at 704-05.

<sup>78</sup> Fuller, “Positivism and Fidelity to Law”, *supra* note 3 at 644.

of what ought to be.”<sup>79</sup> In formulating his objection to this distinction, Fuller returns to the criticism that he stated at the outset of his reply, concerning how the positivist account overlooks a whole realm of demonstrable connections between law and something that is not law. These connections reveal themselves, he argues, once we consider how all attempts at order, even order *simpliciter*, must at least be good enough “to be considered as functioning by some standard or other”.<sup>80</sup> Thus, Fuller suggests, the notion of order itself contains “what may be called a moral element.”<sup>81</sup>

To illustrate his point, Fuller tells a brief story about a monarch lawmaker “whose word is the only law known to his subjects”, but whose attempt at creating workable legal order is compromised by his failure to respect the conditions that enable such order to be brought into being.<sup>82</sup> The monarch, for example, issues commands for which he promises rewards for compliance and threatens punishment for disobedience, but then “habitually punishes loyalty and rewards obedience”.<sup>83</sup> Such failures, Fuller argues, will cause the monarch to “never achieve even his own selfish aims until he is ready to accept that minimum self-restraint that will create a meaningful connection between his words and his actions.”<sup>84</sup> The monarch also becomes “slothful in the phrasing of his commands” such that “his subjects never have any clear idea what he wants them to do”.<sup>85</sup> Again, therefore, “it is apparent that if our monarch for his own selfish advantage wants to create in his realm anything like a system of law he will have to pull himself together and assume still another responsibility”: that is, the responsibility of clarity.<sup>86</sup>

---

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*: “A reminder that workable order usually requires some play in the joints, and therefore cannot be too orderly, is enough to suggest some of the complexities that would be involved in any attempt to draw a sharp distinction between order and good order”. For a reading of the pragmatist strains within this statement, see Kenneth Winston, “Is/Ought Redux: The Pragmatist Context of Lon Fuller’s Conception of Law”, (1988) 8(3) Oxford J. Leg. Studies 329.

<sup>82</sup> Fuller, “Positivism and Fidelity to Law”, *supra* note 3 at 644.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* at 645.

<sup>86</sup> *Ibid.*

Thus, Fuller suggests, from the lessons of the monarch's failures, we are able to see how, even if considered merely as order, law contains its own "implicit morality".<sup>87</sup>

This morality of order must be respected if we are to create anything that can be called law, even bad law. Law by itself is powerless to bring this morality into existence. Until our monarch is really ready to face the responsibilities of his position, it will do no good for him to issue still another futile command, this time self-addressed and threatening himself with punishment if he does not mend his ways.<sup>88</sup>

Fuller's primary complaint against Hart's analysis of the foundations of legal order thus lies in how Hart completely neglects this phenomenon of the internal morality of law, with the only departure from this neglect being Hart's brief consideration of the principle of treating like cases alike that arises from how a legal system must consist of general rules. Yet, Fuller observes, Hart quickly dismisses this phenomenon "as having no special relevance to his main enterprise",<sup>89</sup> choosing instead to treat law "as a datum projecting itself into human experience and not as an object of human striving".<sup>90</sup> Moreover, Hart's failure to see how "order itself is something that must be worked for" is what also compromises the capacity of the positivist account to understand how "the existence of a legal system, even a bad or evil legal system, is always a matter of degree".<sup>91</sup>

To illustrate this point, and in anticipation of the concerns of the next section of his essay, Fuller turns to the example of Nazi law. When we recognize the "simple fact of everyday legal experience" that the existence of a legal order is something towards which we must strive, Fuller argues, it "becomes impossible to dismiss the problems presented by the Nazi regime with a simple assertion: 'Under the Nazis there was law, even if it was bad

---

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.* at 646.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.* Moreover, Fuller adds, by failing to absorb the conditions of law's workability into its account, Hart's positivism also fails to provide guidance to those legal actors "who have responsible functions to discharge in the very order toward which loyalty is due": a responsibility which Fuller insists includes "making law what it ought to be": at 646, 647.

law”’.<sup>92</sup> Thus, when we approach the jurisprudential quandaries presented by Nazi law, we must begin by inquiring into “how much of a legal system survived the general debasement and perversion of all forms of social order that occurred under the Nazi rule, and what moral implications this mutilated system had for the conscientious citizen forced to live under it”.<sup>93</sup>

### 3.4 On the problem of Nazi law

The title of Fuller’s analysis of Nazi law – “The problem of restoring respect for law and justice after the collapse of a regime that respected neither” – is itself instructive of how Fuller sees the jurisprudential quandaries presented by Nazi law as having a distinctly practical bearing.<sup>94</sup> It is with this eye towards the “truly frightful predicament” that faced those charged with rehabilitating the postwar German legal system that Fuller elaborates his criticisms of Hart’s treatment of the grudge informer case and of Radbruch’s philosophy more generally.<sup>95</sup>

According to Fuller, the primary ill that plagues Hart’s analysis of Nazi law is Hart’s complete disregard of “the degree to which the Nazis observed what I have called the inner morality of law itself.”<sup>96</sup> This neglect, he argues, is reflected in Hart’s apparent assumption that “the only difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman”.<sup>97</sup> As a consequence of this attitude, Hart overlooks how derogations from the internal morality

---

<sup>92</sup> *Ibid.* at 646.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.* at 648.

<sup>95</sup> *Ibid.* Fuller however does acknowledge that Hart’s treatment of these cases is not devoid of awareness of the predicament in which the postwar German courts were situated. This, he observes, is apparent in Hart’s preference for resolving the dilemmas of the grudge informer cases by a retroactive statute; a recommendation that Fuller describes as “surely not lacking itself in a certain air of desperation”: at 649. Still, he is also deeply critical of this preference for a retroactive statute, because with this turn Hart’s position seems to Fuller to not be about whether what was once law can now be declared not to have been law, “but rather who should do the dirty work, the courts or the legislature”: at 649. This is clearly not a general criticism of the use of a retroactive statute in such a context because later in his essay Fuller states that he also would have chosen a retroactive statute so as to signify a “sharp break with the past, as a means of isolating a kind of clean-up operation from the normal functioning of the judicial process”: at 661. Rather, it is a specific criticism of the reasoning that underscores Hart’s condemnation of how the German courts took the task upon themselves of declaring such statutes invalid.

<sup>96</sup> *Ibid.* at 649-650.

<sup>97</sup> *Ibid.* at 650.

of law that in most societies are kept under control by “the tacit restraints of legal decency” occurred in monstrous form under Hitler.<sup>98</sup> These included the way that the Nazis took generous advantage of retroactive statutes to cure past legal irregularities,<sup>99</sup> attempted to legalize killings by secret statute and, over the course of their rule, tolerated and encouraged officials to ignore the letter of the law while terrorizing those who contemplated calling such officials to account.<sup>100</sup>

With this foundation of his response to Hart in place, Fuller proceeds to undertake a defense of why the decisions of the postwar German courts in the grudge informer cases “do not represent the abandonment of legal principle that Professor Hart sees in them”.<sup>101</sup> The first point to note about this aspect of Fuller’s analysis is that his own account of the grudge informer case is far more extensive than that provided by Hart. Most significantly, Fuller provides a lengthy explanation of the two statutes from the Nazi era upon which the accused woman rested her defence.

As explained by Fuller, one of these statutes, introduced in 1938, was part of a series of enactments that created special wartime criminal offences,<sup>102</sup> including one which rendered a person liable to be punished by the death penalty if he or she “publicly” incited a refusal to fulfill the obligations of service in the German army, or otherwise sought “to injure or destroy the will of the German people or an allied people to assert themselves stalwartly against their enemies”.<sup>103</sup> Recalling the facts of the case in question, most notably the fact that the husband’s remarks were made to his wife in private rather than in public, Fuller suggests that it is “almost inconceivable that a court of present-day Germany would hold the husband’s remarks to his wife ... to be a violation of the final catch-all provision of this statute”.<sup>104</sup> Thus, he argues, “the extent to which the interpretive principles applied by the courts of Hitler’s government should be

---

<sup>98</sup> *Ibid.* at 652.

<sup>99</sup> A general increase in resort to such curative statutes, Fuller argues, represents “a deterioration in that form of legal morality without which law cannot itself exist”: *Ibid.* at 650-651.

<sup>100</sup> *Ibid.* at 651, 652.

<sup>101</sup> *Ibid.* at 649-650.

<sup>102</sup> *Ibid.* at 653.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

accepted in determining whether the husband's remarks were indeed unlawful" is a question that must be considered.<sup>105</sup>

Fuller then turns to analyze the second statute on which the woman's defence rested, which was enacted in 1934 and threatened imprisonment for any person who publicly expressed "spiteful or provocative" statements that disclosed "a base disposition toward leading personalities" of the Nazi party.<sup>106</sup> Fuller explains that additional provisions within the statute further provided that malicious utterances not made in public "shall be treated in the same manner as public utterances when the person making them realized or should have realized that they would reach the public".<sup>107</sup> Another provision also gave the Minister of Justice a wide discretion to "determine who shall belong to the class of leading personalities" for the purpose of the statute.<sup>108</sup>

According to Fuller, this "legislative monstrosity" scarcely deserves comment, "overlarded and undermined as it is by uncontrolled administrative discretion".<sup>109</sup> In addition to its wide administrative discretion, Fuller also points out how the provisions of the statute appear to bear little relation to either the private nature of the utterance made by the husband, or the death penalty that was imposed – although not carried out – on him. Again, therefore, Fuller raises the question of whether it is possible to share Hart's indignant view that the postwar German courts abandoned legal principle when they apparently chose to declare this statute as lacking the character of law.<sup>110</sup>

Fuller's analysis of these two statutes deserves close attention, as it develops his idea of the internal morality of law in important ways. With respect to his analysis of the first statute, Fuller's point, as I understand it, relates primarily to the obviously perverse principle of interpretation that enabled the relevant Nazi court to determine that the statute made a private utterance of husband to wife unlawful. Thus, in this instance, it is

---

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.* at 654.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.* at 655.

not the text of the statute that Fuller condemns as not deserving the status of law, but rather the methods of its interpretation and application.<sup>111</sup>

Fuller's analysis of the second statute, however, is in my view still more revealing of the animating concerns of his legal philosophy. Fuller calls this statute a "legislative monstrosity" – suggesting a debased, or even false form of law – because of the level of uncontrolled administrative discretion that it empowers. Thus, even though the statute has the external appearance of a legislative enactment, Fuller's objection to it is based in the intuition that there is something distinctly not law-like about a statute that hinges upon an uncontrolled administrative discretion, and which of its nature represents an invitation to an exercise of arbitrary power. At the very least, such an enactment presents a pathology of clarity as to what the law asks of the subject, as well as a risk of retroactivity when the subject discovers, too late, that she has offended a previously undesignated leading personality of the Nazi party. The wider point to emphasize, then, is that by parodying this statute as a legislative monstrosity, Fuller clearly sees it as defying, in some important sense, what we ought to be able to expect from law. Consequently, its claim to be such must be questioned.

Fuller follows his analysis of the two statutes that were at issue in the grudge informer case by turning to Hart's criticisms of Rabruch's philosophy and of the actions of the postwar courts more generally. As will be recalled from above, Hart condemned the postwar German courts, in deciding that the statutes in question were too evil to be obeyed, for avoiding the moral dilemma they were faced with: that is, the dilemma of either letting the woman go unpunished, or sacrificing the precious moral principle that

---

<sup>111</sup> It must be noted, however, that in *The Morality of Law* Fuller indicates his retreat from this idea that one might look to the interpretive methods of the Nazi courts in order to determine whether the decisions in question deserve the status of law: see Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, first edition 1964) at 40, note 2. This follows from Fuller's consideration of an article by another scholar, H. O. Pappe that I discuss later in this chapter: see Pappe, *infra* note 128. This retreat on Fuller's part seems defensible, in the sense that it appears that he did not wish to rest his arguments about the ways that the Nazi legal order debased the internal morality of law on instances of interpretation. That Fuller would take this position seems supported by his argument, the context of which I explain further in Chapter 3, that it is in the domain of interpretation that the principle of congruence between official action and declared rule reveals its complexity most starkly. In making this retreat, moreover, Fuller also appears concerned to avoid any alliance with the idea that the modes of interpretation that were revealed in the grudge informer cases were the accepted modes of interpretation of the Nazi legal order.



laws should generally not be retroactive in application. For Fuller, Hart's position on this point betrays an internal contradiction. This is because Hart seems to suggest that when faced with an immoral law, courts are in essentially the same position as citizens, in the sense that they can refuse to apply a law, just as citizens might refuse to obey, on grounds of personal moral objection. If this is the thrust of Hart's position, Fuller argues, then it hardly resolves a moral dilemma, because "surely moral confusion reaches its height when a court refuses to apply something that it admits to be law".<sup>112</sup>

Fuller then turns in the final section of his analysis of Nazi law to defend Radbruch's view that the legal culture of positivism might have made some contribution to the atrocities committed in the name of law under Nazism.<sup>113</sup> Still, and while defending Radbruch on this argument and generally, Fuller makes clear that, in his view, a valid solution to the problem of the grudge informer cases could have been grounded in considerations pertaining to the Nazi's abuse of the internal morality of law. As he elaborates this point, if German jurisprudence had concerned itself more with the inner morality of law, it would not have been necessary to invoke any notion of higher law of the kind contained in Radbruch's solution.<sup>114</sup> Thus,

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort

---

<sup>112</sup> Fuller, "Positivism and Fidelity to Law", *supra* note 3 at 655. Fuller also adds that it is clearly unjust, on Hart's part, to suggest that Radbruch and the German courts ran away from the moral dilemma that they were confronted with, because Radbruch clearly appreciated that the application of his formula that extreme injustice is no law was problematic. Indeed, Fuller quotes Radbruch's own words that "[w]e must not conceal from ourselves ... what frightful dangers for the rule of law can be contained in the notion of 'statutory lawlessness' and in refusing the quality of law to duly enacted statutes". Yet, Fuller emphasizes, Radbruch and the German courts were faced with a situation of drastic emergency. Not only was the grudge informer problem a pressing one, but these legal actors also had to confront the fact that "if legal institutions were to be rehabilitated in Germany it would not do to allow the people to begin taking the law into their own hands, as might have occurred while the courts were waiting for a statute": at 655-656.

<sup>113</sup> *Ibid.* at 659. As Fuller observes, the exploitation of legal forms under Nazism started cautiously and became bolder as power was consolidated. The specific point that he thinks should be of concern to lawyers and legal philosophers, however, is that the first attacks on established order, which "fell almost without a struggle", were "on ramparts which, if they were manned by anyone, were manned by lawyers and judges": at 659.

<sup>114</sup> *Ibid.* at 659-660.

to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality, - when all these things have become true of a dictatorship, it is not hard, for me at least, to deny to it the name of law.<sup>115</sup>

This important passage is followed by some final comments that again gesture to the idea that the form of law necessarily implicates a certain quality of treatment towards the legal subject. This point emerges in the context of Fuller's observations about how the most serious debasements of legal morality under Hitler occurred in the domain of public law, with no comparable deterioration witnessed in the ordinary branches of private law.<sup>116</sup> Thus, Fuller concludes,

It was in those areas where the ends of law were most odious by ordinary standards of decency that the morality of law itself was most flagrantly disregarded. In other words, where one would have been most tempted to say, "This is so evil it cannot be a law", one could usually have said instead, "This thing is the product of a system so oblivious to the morality of law that it is not entitled to be called a law". I think there is something more than accident here, for the overlapping suggests that legal morality cannot live when it is severed from a striving toward justice and decency.<sup>117</sup>

### 3.5 On Hart's model of interpretation

Fuller's extended commentary on Hart's treatment of Nazi law is followed by a consideration of what Fuller calls Hart's "wholly novel" analysis of interpretation.<sup>118</sup> Fuller reads this analysis as standing for the claim that interpretation of a law whose

---

<sup>115</sup> *Ibid.* at 660.

<sup>116</sup> *Ibid.* at 660, 661. Fuller provides the example of the grudge informer cases by way of illustration.

<sup>117</sup> *Ibid.* at 661. A point to note is that it is in his elaboration of why the jurisprudential quandary presented by Nazi legality can, and should, best be understood in these terms that Fuller makes his only mention in the 1958 essay of the term "natural law". The term enters his analysis when he comments on how "it is chiefly in Roman Catholic writings that the theory of natural law is considered, not simply as a search for those principles that will enable men to live successfully together, but as a quest for something that can be called a 'higher law'. This identification of natural law with a law that is above human laws seems in fact to be demanded by any doctrine that asserts the possibility of an authoritative pronouncement of the demands of natural law": at 660. The inference, then, is that the idea of natural law as involving "a search for those principles that will enable men to live successfully together" is the only sense in which Fuller himself identifies with the idea of natural law.

<sup>118</sup> *Ibid.* at 662.

meaning is in dispute is an exercise of determining the meaning of the individual words within the legal rule.<sup>119</sup>

Valid questions must be raised about the extent to which Fuller properly appreciates the content of Hart's position on this point.<sup>120</sup> Even so, Fuller's responses to Hart on the issue of interpretation are still instructive of his commitment to a purposive approach to legislative interpretation, and a purposive conception of law more generally. For example, Fuller makes clear that his primary objection to Hart's account of interpretation is Hart's failure to acknowledge how – or at least in Fuller's view – the practice of interpretation always has regard to a rule's purposes.<sup>121</sup> Borrowing Hart's example, Fuller argues that if “a rule excluding vehicles from parks seems easy to apply in some cases”, this is because we can see clearly enough what the rule is aiming at in general.<sup>122</sup>

To illustrate his point, Fuller moves beyond Hart's example to a hypothetical statute that prohibits anyone to sleep in any railway station. As Fuller tells it, two men are brought before a judge for transgressing this rule, the first being a man who fell asleep sitting up while waiting for a delayed train, and the second being one who settled down for the night with a blanket and pillow, but who was not asleep at the moment he was arrested.<sup>123</sup> The challenge Fuller puts to Hart, therefore, is both to identify which of these cases presents the “standard instance” of the word “sleep”, as well as to explain how the ideal of fidelity to law is served if “the judge fines the second man and sets free the first?”<sup>124</sup>

Fuller then presents a more direct criticism of Hart's model of the core and the penumbra when he suggests that a purposive approach to interpretation is as indispensable to discerning meaning in core cases as it is in penumbral cases. This, he explains, is because

---

<sup>119</sup> *Ibid.* at 661-662.

<sup>120</sup> Frederick Schauer has recently analyzed Fuller's apparent misunderstanding of Hart's arguments in this context, specifically, Fuller's view that Hart was proposing a method of interpretation that turned upon the meaning of individual words in a legal rule: see Frederick Schauer, “A Critical Guide to Vehicles in the Park”, (2008) 83 N. Y. U. L. Rev. 1109.

<sup>121</sup> Fuller, “Positivism and Fidelity to Law”, *supra* note 3 at 662.

<sup>122</sup> *Ibid.* at 663. Fuller here gives the example of a World War II tank being placed as a monument in the park and asks: would the rule prohibiting vehicles in the park apply to such a “vehicle”?

<sup>123</sup> *Ibid.* at 664.

<sup>124</sup> *Ibid.*

purposive interpretation generally is a central part of the judicial obligation of fidelity to law:

The judge does not discharge his responsibility when he pins an apt diagnostic label on the case. He has to do something about it, to treat it, if you will. It is this larger responsibility which explains why interpretive problems almost never turn on a single word, and also why lawyers for generations have found the putting of imaginary borderline cases useful, not only “on the penumbra”, but in order to know where the penumbra begins.<sup>125</sup>

Fuller’s point, then, is that when judges treat a case, they do so with regard not only to the purposes of the rule or other legal material in question, but also to their larger responsibility for maintaining a responsive and workable legal order. Hart’s model, however, contains no acknowledgment of this judicial responsibility towards maintaining legal order itself, or to how it informs the judge’s task in both the so-called core as well as the penumbra of law.

### **3.6 On the moral and emotional foundations of positivism**

Fuller brings his reply to Hart to a close by returning to the wider issue with which he commenced it: namely, the impasse between him and positivism on the question of fidelity to law. Here, however, this question is considered as part Fuller’s response to Hart’s rejection of notions of purpose within legal philosophy. Fuller acknowledges that there is some cause for fear with respect to aligning the idea of law with notions of purpose, in the sense that a purposive interpretation of law, carried too far, may pose “a threat to human freedom and human dignity”.<sup>126</sup> The point that he seeks to convey in reply to Hart, however, is that the very phenomenon of fidelity to law is fundamentally bound up with a sense of law’s purpose.<sup>127</sup>

Fuller thus closes his reply by suggesting that the tightly defined agenda of legal positivism, despite the best efforts of Hart and his predecessors, invariably finds itself

---

<sup>125</sup> *Ibid.* at 666.

<sup>126</sup> *Ibid.* at 671.

<sup>127</sup> As he expresses it, fidelity to law can become impossible “if we do not accept the broader responsibilities (themselves purposive, as all responsibilities are and must be) that go with a purposive interpretation of law”: *Ibid.* at 670.

open to wider questions about the institutional conditions that make law possible. This point of closure captures well the underlying message of Fuller's reply to Hart: that is, a message about how, in his view, the positivist account of law either fails to absorb, actively sidesteps, or simply doesn't see a whole range of questions that are crucial to our understanding of law.

## 4 Conclusion

The first general, if obvious, observation that must be made about Fuller's reply to Hart in the 1958 *Harvard Law Review* is that Fuller's position is explicitly that of a respondent. This means that the arguments that Fuller advances in his reply are necessarily shaped by the objective of contesting both the general terms and specific claims of Hart's agenda. Still, it should be apparent from the preceding paragraphs that Fuller's attempt to shift that agenda into territory where Hart's position discloses certain tensions causes the 1958 debate to close with a sense that Hart's account needs to address more questions than Hart himself seems concerned to acknowledge. Most notable among these is the question of what it means to anoint law with the status of legality, and whether this should affect our philosophical deliberations about the conditions of law's existence.

The most crucial arguments that Fuller offers in development of his own position with respect to these questions are those which flow from his idea that law has an internal morality. Fuller does not provide any extended context for this idea in the 1958 essay. Rather, from the errors of his unnamed monarch, we learn only that the enterprise of lawgiving may lapse in the face of a flagrant failure in congruence between official action and declared rule, or through a failure to achieve clarity in the articulation of the law. When we turn to his analysis of Nazi law, however, we also learn that Fuller sees secret laws, ignorance of the letter of the law in favour of arbitrary acts of terror, illogical interpretive practices, and uncontrolled administrative discretion as equally pathological to the internal morality that he thinks lends law its law-like quality.

For a number of reasons, then, Fuller's analysis of Nazi law in his 1958 reply to Hart is crucial to gaining insight into the content and contours of his legal philosophy. This is because, first, Fuller's treatment of Nazi law shows the way in which his thinking readily traverses the divide between theory and practice, in the sense that examples of actual Nazi legal practice are offered not only to illustrate his theoretical claims, but also to give content to those claims. Second, we also see in this analysis just how far removed Fuller's thinking is from the idea that observance of the internal morality of law merely makes law a more effective instrument. This argument, as I will shortly explain in Chapter 3, is the response that positivists have consistently relied upon when rejecting Fuller's claim that, by virtue of its necessary association with certain principles of lawgiving, law is in some sense necessarily moral.

With respect to this last point, and as I will discuss further in the next chapter, there is no doubt that Fuller's elaboration of his eight principles of the internal morality of law in *The Morality of Law* has strong instrumental overtones, in the sense that Fuller communicates the idea that some observance of these principles is essential to producing law that is effective for the lawgiver's purposes. The point that I wish to emphasize in the present context, however, is that this reading is strongly called into question when we examine Fuller's 1958 analysis of Nazi law and see that there is nothing in this analysis to suggest that Fuller sees the pathology of Nazi legal order in terms of the problems of efficacy that it presented for the Nazi lawgivers. Quite the contrary, it is abundantly clear – especially from his concern for the implications that the mutilated Nazi legal system had for “the conscientious citizen forced to live under it”<sup>128</sup> – that Fuller regards Nazi law as pathological, *as law*, because of the confused, incoherent, and arbitrary position in which it placed those who were subject to it.

Fuller's analysis of Nazi law thus not only provides a concrete example of a problem of the internal morality of law, but also gives us crucial insight into *why* such is a problem. This suggests, in turn, that when Fuller challenges Hart to explain why positivism does not see law as answerable to legality, he is equally challenging Hart to explain why

---

<sup>128</sup> *Ibid.* at 646.

positivists are content to advance, as the best account of law and legal validity, an account that contains no significant concern for either the position of the legal subject or the conditions that make law workable.

Before I bring these comments on the 1958 Hart-Fuller exchange to a close, an important postscript must be added to the way that the dilemmas of Nazi law are discussed in that context. This postscript concerns how in an article published in 1960, another scholar, H.O. Pappe, pointed out that Hart's analysis of the grudge informer case was compromised by a significant misstatement of the reasoning of the court on the question of whether the accused could raise the defence that she had not illegally deprived her husband of his liberty because she had acted pursuant to a valid law.<sup>129</sup> As Pappe explains it, the actual reasoning upon which the finding that the woman's acts were unlawful was based was not grounded in any declaration of invalidity of the statute under which she acted, but rather in reasoning that held she was under no legal duty to inform, and must have realized that her action in reporting her husband was contrary to the sound conscience and sense of justice of all decent human beings.<sup>130</sup> Thus, Pappe explains, contrary to what is reported by Hart, the court did not deny the legal validity of the relevant Nazi statutes by application of the Radbruch formula.<sup>131</sup>

In making this clarification, Pappe readily acknowledges that the reasoning actually adopted by the court in the case discussed by Hart was somewhat dubious, as a matter of legal principle.<sup>132</sup> Yet he also points out that the case itself was a relatively unimportant one within the postwar experience with the grudge informer problem, in the sense that it was decided by a court that was not situated at a particularly high level within the German judicial hierarchy and, moreover, the decision itself was severely criticized at the

---

<sup>129</sup> H. O. Pappe, 'On the Validity of Judicial Decisions in the Nazi Era', (1960) 23 *Modern L. Rev.* 260 at 263. Pappe explains that Hart's error flowed from how he evidently relied on a misreport of the case in an earlier article in the *Harvard Law Review*.

<sup>130</sup> *Ibid.*

<sup>131</sup> It must however be noted that in that case, as well as in a further case that Pappe elaborates in his article and which I discuss below, the court did acknowledge that the Radbruch formula might apply if the statute in question was one that effected extreme injustice. The courts in both cases, however, did not consider the statutes under consideration to have attained such a high level of iniquity: *Ibid.* at 263, 266.

<sup>132</sup> *Ibid.* at 263.

time.<sup>133</sup> Pappe goes on to explain, however, that other cases with essentially the same facts as that discussed by Hart and Fuller dealt with the grudge informer problem through much more defensible legal reasoning.

The case that Pappe recounts by way of illustration is a judgment of a higher German court where the primary reason given for holding the relevant informer's actions to be unlawful was because the judicial and administrative abuses that characterized the application of the statutes in question were contrary to principles of German legality that remained in force throughout the Nazi era. These abuses included the broad interpretive discretion that enabled the court to declare a private utterance to be public for the purposes of the statute, as well as the grossly disproportionate punishment that was reflected in the imposition of the death penalty. The court also concluded, moreover, that ordinary citizens knew of these illegitimate practices and understood them as being unlawful, and yet in cases like the informer in question, sometimes used them for their own advantage.<sup>134</sup> Pappe's point, then, is that in neither of the grudge informer cases did any recourse to the Radbruch formula, and its appeal to a higher law, form the basis of the court's decision.

At least two important implications follow from Pappe's findings.<sup>135</sup> The first is that the factual misunderstandings that infect Hart's analysis are sufficiently serious to render the discussion of the grudge informer case in the Hart-Fuller debate as of hypothetical significance only.<sup>136</sup> The second and more important implication, however, is that in other grudge informer cases that presented essentially the same facts and legal questions as in the case discussed by Hart and Fuller, the actual reasoning of court was akin to the

---

<sup>133</sup> *Ibid.* at 262, 263.

<sup>134</sup> *Ibid.* at 265-267.

<sup>135</sup> For a much more extensive analysis of the lessons we might take from Pappe for our understanding of the Hart-Fuller debate, see David Dyzenhaus, "The Grudge Informer Case Revisited", (2008) 83 N. Y. U. L. Rev. 1000.

<sup>136</sup> Hart himself makes this acknowledgment in his book, *The Concept of Law*, after having become aware of Pappe's research, and counsels readers interested in the questions raised by the decisions of the postwar German courts to study Pappe's "careful analysis of a decision of the German Supreme Court in a similar case": H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, first edition 1961) at 208, note 1, and accompanying text at 303-304. Beyond this, however, Hart undertakes no further analysis of Pappe's corrections, or their implications.



argument, advanced by Fuller against Hart, that law in order to be such must evidence law-like qualities that go beyond questions of valid legal enactment.<sup>137</sup>

Pappe's research thus appears to vindicate the general orientation of Fuller's position, as well as to point to the viability of that position as a potential basis for assessing questions of legal validity. For present purposes, however, what we might learn about Fuller's legal philosophy from his 1958 reply to Hart need not rest on what we can learn from Pappe. The more important point is to recognize that when we read the 1958 Hart-Fuller debate from Fuller's perspective, we take away a message that might be stated in the following terms. To theorize about law, we need to take seriously the conditions that make law itself possible. Yet, once we take this step, we come to see that these formal features of the legal enterprise contain an inherent moral dimension through the way that they affect, in some crucial way, the position of those who live under the law.

Precisely what constitutes this moral dimension is a question that Fuller does not answer directly in his 1958 reply to Hart even if, as I have shown, we see him gesture to it in a number of different ways. For clearer insight into Fuller's arguments about the moral dimensions of the form of law, therefore, we need to look to his book, *The Morality of Law*. It is to this text that I now turn in Chapter 3.

---

<sup>137</sup> A further point to be noted concerns the difference between Hart and Fuller's respective understanding of Radbruch's position, and how, in turn, these understandings relate to their own positions. Hart's interpretation, as I noted above, is that Radbruch understood the fundamental principles of humanitarian morality as being part of the very concept law: Hart, "Positivism", *supra* note 1 at 617. Thus, Hart reads Radbruch as arguing that moral principles are internal and thus constitutive to law. Fuller, on the other hand, reads Radbruch's philosophy as suggesting that in the case of extreme injustice, there is a clash not between law and morality, but between two kinds of positive law, that is, between a higher law, and the state's positive law: Fuller, "Positivism and Fidelity to Law", *supra* note 3 at 659-660. On this reading of Radbruch, therefore, the moral demands to which positive law is accountable are external to law, and captured within a competing conception of law. The point to note for present purposes, then, is that Hart's reading of Radbruch aligns Radbruch's position much more closely to Fuller's than does Fuller's own reading of Radbruch.

## Chapter 3

### The Morality of Law

#### 1 Introduction

That the exchange between Hart and Fuller ever developed beyond the two essays published in the 1958 *Harvard Law Review* was clearly a product of Fuller's efforts rather than Hart's. Hart's *The Concept of Law*, published in 1961, contains only one indirect reference to the arguments advanced by Fuller in his 1958 reply.<sup>1</sup> Fuller, however, persisted in trying to draw Hart into a direct exchange, dedicating substantial space in his 1964 book, *The Morality of Law*, to criticizing Hart's arguments.<sup>2</sup> That he ultimately succeeded in this effort is reflected in the fact that Hart published a review of *The Morality of Law* in the 1965 *Harvard Law Review*.<sup>3</sup> In the result, however, Fuller's invitation to Hart to continue their engagement was double-edged, because the scathing nature of Hart's review contributed much to securing the marginalized position that Fuller's thought has since occupied within legal philosophy.

My primary objective in this chapter is to offer an analysis of what we might learn about Fuller's legal philosophy from his claims in *The Morality of Law*. In that book, we see Fuller significantly develop his idea that law is internally moral. Before turning to examine these developments, however, it is necessary to provide a brief sketch of those aspects of Hart's *The Concept of Law* to which Fuller responds in *The Morality of Law*.

Hart's central claim in *The Concept of Law* is that legal order arises from the union of two different types of rules: "primary rules" that regulate human action by imposing duties, and "secondary rules" that confer powers to enable the alteration of existing, or the introduction of new, primary rules.<sup>4</sup> In terms of establishing the existence of law, the

---

<sup>1</sup> H.L.A. Hart, *The Concept of Law*, (second edition), (Oxford: Oxford University Press, 1994) at 81 [Hart, *The Concept of Law*].

<sup>2</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) [Fuller, *The Morality of Law*].

<sup>3</sup> H.L.A. Hart, "Lon L. Fuller: *The Morality of Law*", (1965) 78 *Harvard L. Rev.* 1281, reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), at 343 [Hart, "Review"]. I examine this review in detail later in section 3, below.

<sup>4</sup> Hart, *The Concept of Law*, *supra* note 1 at 81.

most important of these secondary rules is the “rule of recognition”, which has the function of determining legal validity by enabling the “conclusive identification of the primary rules of obligation”.<sup>5</sup> Thus by providing this authoritative mark, the rule of recognition unifies the order of primary rules, and introduces the idea of a legal system.

Hart clarifies, however, that this union of primary and secondary rules cannot alone constitute a legal system. Rather, it must also be supplemented by a particular kind of relationship between the officials of the system and the secondary rules that concern them. This “internal point of view” on the part of legal officials is what recognizes and thus establishes the authority of the rule of recognition.<sup>6</sup>

This is the account of legal order to which Fuller responds at several points in *The Morality of Law*. In terms of its relevance to the major lines of contest that evolve over the course of Hart and Fuller’s exchange, a preliminary point to note about this account is how it appears to give little importance to the subjects of a legal system. Indeed, at one point in *The Concept of Law* Hart states explicitly that the attitudes of private citizens toward the legal order do not affect the question of whether a legal system exists, even if such a society “might be deplorably sheeplike”, and the “sheep might end in the slaughterhouse”.<sup>7</sup>

The other feature of *The Concept of Law* that is especially salient to the issues in dispute between Hart and Fuller is Hart’s discussion of the relationship between law and morals.<sup>8</sup>

---

<sup>5</sup> *Ibid.* at 95. “Rules of change” remedy the second defect of the static quality of a regime of primary rules by providing a means for the variation of existing, or the introduction of new, primary rules, while “rules of adjudication” complete the trinity of secondary rules by providing the powers and procedures through which disputes as to the meaning of primary rules are settled: *Ibid.* at 95, 97.

<sup>6</sup> *Ibid.* at 115. Thus, Hart summarizes, the minimum conditions “necessary and sufficient for the existence of a legal system” are that the rules of behavior which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and that its secondary rules of recognition must be effectively accepted as common public standards of official behavior by its officials: at 116.

<sup>7</sup> *Ibid.* at 117.

<sup>8</sup> Hart begins this discussion by noting – as he also did in his 1958 essay – that both law and morals are directed to the minimum aim of human survival. This means that both law and morality must be informed by certain human characteristics that make the pursuit of this modest aim possible, such as by giving recognition to the phenomena of human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding and strength of will: Hart, *The Concept of Law*, *supra* note 1 at 193-198.

The most important feature of this discussion is Hart's analysis of the ways in which legal validity might be connected to moral value, as it is here that we see Hart briefly engage with Fuller's claims about the internal morality of law. This engagement arises out of Hart's consideration of whether the conditions necessary for the functionality of any system of control by rule disclose a necessary connection between law and morals:

Further aspects of this minimum form of justice which might well be called 'natural' emerge if we study what is in fact involved in any method of social control – rules of games as well as law – which consists primarily of general standards communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. This means that, for the most part, those who are eventually punished for breach of the rules will have had the ability and opportunity to obey. Plainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality. Indeed, one critic of positivism has seen in these aspects of control by rules something amounting to a necessary connection between law and morality, and suggested that they be called 'the inner morality of law'. Again, if this is what the necessary connection between law and morality means, we may accept it. It is unfortunately compatible with great iniquity.<sup>9</sup>

This very brief response to Fuller tells us much about the commitments that Hart brings to his project. Above all, the response suggests that Hart draws a distinction between what might or could be meant by the necessary connection claim, and what he thinks is meant by that claim: namely, that no necessary connection between law and morality can be demonstrated so long as it is possible, as history has shown that it is, to produce laws of immoral content. For Hart, then, Fuller's idea of the internal morality of law seems at best to illuminate some important considerations relevant to the functionality of rule-based governance.<sup>10</sup> Beyond this, however, it has no apparent relevance for philosophical inquiry into whether there is a necessary connection between law and morality. Thus, Hart's analysis of the relationship between law and morals appears to proceed from

---

<sup>9</sup> *Ibid.* at 206-207. Jeremy Waldron makes an interesting observation when he notes that, across his writings, Hart tended to refuse to use the term "the principles of legality" in his own voice: see Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller", (2008) 83 N. Y. U. L. Rev. 1135 at 1145-1146 [Waldron, "Hart's Equivocal Response"].

<sup>10</sup> Hart, *The Concept of Law*, *supra* note 1 at 207

foundations that systematically exclude any consideration of the questions posed by the internal morality of law, beyond the parameters that Hart himself has defined.

I will return to both of these points below and in Chapter 5, where I reassess the contest between Hart and Fuller in light of the reading of Fuller's legal philosophy that I offer in this thesis. For now, however, I simply provide these points by way of background for my analysis of the central claims that animate Fuller's *The Morality of Law*.

## 2 *The Morality of Law*

When Fuller wrote *The Morality of Law* he was doing two interrelated things. First, he was elaborating his claim that law is internally moral through its connection to certain features of lawgiving that make law itself possible. At the same time, however, Fuller was also further defining and refining the lines of contest between his own views about law and the task of legal philosophy and those advanced by Hart. Accordingly, my goal in the following analysis is to draw out the themes of Fuller's book that illuminate his understanding of the moral dimensions of the formal features of law, and which provide a context for his arguments about how Hart's neglect of these dimensions fundamentally undermines the coherence of the positivist account.

I pursue this goal by building my analysis around what I consider to be the three most important sites of argument in *The Morality of Law*.<sup>11</sup> The first is Fuller's story of King Rex and his eight failures to make law. The second is the way that Fuller situates his views within legal philosophy generally, and particularly in relation to his contest with Hart. And the third is the crucial argument that Fuller advances – and which is often overlooked by his critics – about the conception of the person that is implicit in the very possibility of legal order.

---

<sup>11</sup> I take this approach as an alternative to outlining the content of *The Morality of Law* chapter by chapter, which each represent a developed account of the four Storrs Lectures on Jurisprudence that Fuller gave at Yale Law School in 1963. The titles of the chapters are "The Two Moralities" (Chapter 1), "The Morality That Makes Law Possible" (Chapter 2), "The Concept of Law" (Chapter 3), and "The Substantive Aims of Law" (Chapter 4).

Obviously, there is much more to *The Morality of Law* than Fuller's analyses of these three points. For example, in Chapter 1 Fuller provides the foundation of his inquiry by offering an analysis of the "morality of aspiration", which he describes as concerned with the qualities of human potential and striving, or with conceptions of proper and fitting conduct "such as beseems a human being functioning at his best", and the "morality of duty", which he describes as concerned with the basic rules without which an ordered society is impossible.<sup>12</sup> Later in the book, Fuller also addresses the important question of whether his eight principles of lawgiving ought to be regarded as a "one size fits all" formula for good governance, and suggests that "all institutions have an integrity of their own which must be respected if they are to function successfully".<sup>13</sup>

These and many other features of *The Morality of Law* shed valuable light on different aspects of Fuller's approach to the study of law. For the purposes of this chapter, however, I will focus principally on the three elements of Fuller's book just outlined, as they provide the most important resource for illuminating what I read to be his enduring concern for how the formal features of law instantiate respect for the legal subject as an agent.

---

<sup>12</sup> Fuller, *The Morality of Law*, *supra* note 2 at 5-6. Fuller's aim in Chapter 1 of *The Morality of Law* is to remedy the neglect of these two moralities in philosophical discussions about law, especially in so far as the morality of aspiration has been generally treated as less relevant to understanding law than the morality of duty. The lesson that Fuller seeks to convey, therefore, is that the task of lawgiving incorporates both of the morality of duty and the morality of aspiration as we try to strike the ever shifting balance "supporting structure and adaptive fluidity": at 29. According to his private correspondence with Hart, Fuller was not especially pleased with his analysis of the moralities of duty and aspiration. As Fuller observes in one such letter, "[m]y treatment of the relation between the moralities of duty and aspiration is full of open ends and your criticism of it is thus justified, though had I tried to trace out all the relationships implied ... I would never have got past the first lecture": Letter from Lon L. Fuller to H.L.A. Hart, 3 February 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 3, Folder 14 (Correspondence).

<sup>13</sup> Fuller makes clear, that is, that to emphasize the importance of the internal morality of law to the realization of successful law is not to suggest that its strict observance is appropriate to all situations. By way of example, he refers to the problems of "incongruity between procedure and assignment" that afflict administrative agencies who are forced by their institutional design to decide questions through mechanisms that may be essentially incompatible with the nature of their task: Fuller, *The Morality of Law*, *supra* note 2 at 171, 174. When such attempts at governance either fail or succeed, Fuller suggests, blame and praise tend to be directed at individuals when "they ought instead to be directed to the question of 'the aptness of the institutional design of the agency to perform the task assigned to it'": at 174. Fuller's point, therefore, is not only that the design and administration of institutions involves more than the problem of "weighing substantive ends against one another", but also that all institutions "have an integrity of their own which must be respected if they are to be effective at all", and that this is the general insight towards which his account of the internal morality of law has been directed: at 176, 180.

## 2.1 The story of King Rex

The story of King Rex is the story of a well-intentioned but ultimately hapless monarch who fails, in eight ways, to make law. Alongside his “Case of the Speluncean Explorers”,<sup>14</sup> the story of King Rex is perhaps Fuller’s most famous contribution to the canon of Anglo-American jurisprudence, and fundamental to understanding the message he sought to convey about the moral dimensions of the legal form.

The way that Fuller sets up Rex’s story is importantly suggestive of the arguments that he seeks to convey through the tale. We are told, for instance, about how Rex came to the throne with the zeal of a legal reformer and how, conscious of the fact that the greatest failure of his royal predecessors had been in the field of law, resolved to make his name in history as a great lawgiver.<sup>15</sup> Despite these good intentions, however, Rex ultimately never succeeded in creating any law at all, good or bad.<sup>16</sup>

Fuller crafts the tale in a manner that enables us to see the many ways in which Rex’s failure was a consequence of his struggle to meet the demands of the lawgiver’s role. For example, Rex struggles to achieve appropriate generality in his rules and to keep his decisions with respect to those rules consistent,<sup>17</sup> some of his laws are kept secret while others are applied retroactively,<sup>18</sup> his skills of legislative draftsmanship suffer too greatly from obscurity,<sup>19</sup> his laws perpetuate confusion and are changed too frequently,<sup>20</sup> and he renders judicial opinions that bear little relation to the enacted laws on which they are allegedly based.<sup>21</sup> Rex’s misery then ends when, deeply disillusioned with his subjects and facing revolt, he suddenly dies, leaving his minefield of a legal system to his successor, Rex II. The story concludes when Fuller tells us that, faced with this minefield, the first act of Rex II is to announce that he is taking the powers of government away

---

<sup>14</sup> Lon L. Fuller, “The Case of the Speluncean Explorers”, (1949) 62 Harvard L. Rev. 616.

<sup>15</sup> As Fuller tells it, “[p]rocedures of trial were cumbersome, the rules of law spoke in the archaic tongue of another age, justice was expensive, the judges were slovenly and sometimes corrupt”: Fuller, *The Morality of Law*, *supra* note 2 at 33-34.

<sup>16</sup> *Ibid.* at 34.

<sup>17</sup> *Ibid.* at 34.

<sup>18</sup> *Ibid.* at 35.

<sup>19</sup> *Ibid.* at 36.

<sup>20</sup> *Ibid.* at 37.

<sup>21</sup> *Ibid.* at 38.

from the lawyers and placing them in the hands of psychiatrists and experts in public relations, as this way “people could be made happy without rules”.<sup>22</sup>

In the analysis that follows the story, Fuller describes Rex’s fundamental errors in terms of (1) a failure to achieve rules at all, (2) a failure to publicize or make available the rules that citizens are required to observe, (3) the abuse of retroactive legislation, (4) a failure to make rules understandable, (5) the enactment of contradictory rules, (6) rules that require conduct beyond the powers of the affected party, (7) subjecting the rules to too-frequent change, and (8) a failure of congruence between the rules announced and their actual administration.<sup>23</sup>

Fuller immediately gestures to the implications of such failures for the existence of law when he states that a total failure in any one of them does not simply result in a bad system of law, but in something “that is not properly called a legal system at all”.<sup>24</sup> This, Fuller explains, is because “there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute”.<sup>25</sup> Fuller makes clear, however, that this release from moral obligation does not arise because it is necessarily impossible to obey a rule that is then disregarded by those charged with its administration, but rather because “at some point

---

<sup>22</sup> *Ibid.* at 38. The obvious irony of this statement is clearly intended to suggest that the stability of rules contributes much to human happiness. This idea is repeated by Fuller at many points in his writings. See, for example, his statement in his 1969 “Reply to Critics”, where Fuller criticizes the positivist account of law for how it overlooks the role legal rules play in making possible an effective realization of morality in the actual behavior of human beings. As Fuller puts it, “[m]oral principles cannot function in a social vacuum or in a war of all against all. To live the good life requires something more than good intentions, even if they are generally shared; it requires the support of firm base lines for human interaction, something that – in modern society at least – only a sound legal system can supply: Lon L. Fuller, “A Reply to Critics” *The Morality of Law* (second edition)(New Haven: Yale University Press, 1969) at 205 [Fuller, “Reply”].

<sup>23</sup> Fuller, *The Morality of Law*, *supra* note 2 at 39. Corresponding to these eight failures, Fuller argues, are “eight kinds of excellence toward which a system of rules may strive”: at 41.

<sup>24</sup> *Ibid.* at 39.

<sup>25</sup> *Ibid.* at 39.



obedience becomes futile – as futile, in fact, as casting a vote that will never be counted”.<sup>26</sup>

Thus, Fuller continues, to secure the subject’s fidelity to law, a lawgiver must enter into a relationship of reciprocity with the legal subject.<sup>27</sup> If this bond of reciprocity is finally and completely ruptured, nothing will be left to ground the citizen’s duty to observe those rules.<sup>28</sup> In his elaboration of this point, Fuller does admit that the situation is more complicated when there is a deterioration, rather than total failure, of legality, because in such cases there is no simple principle by which to test the citizen’s obligation of fidelity to law. Still, he is clear that “[a] mere respect for constituted authority must not be confused with fidelity to law”, noting that Rex’s subjects remained faithful to him even while they were not faithful to his law.<sup>29</sup>

Fuller also clarifies that because they concern “a relationship with persons generally”, the demands of the internal morality of law require more than forbearance on the part of a lawgiver.<sup>30</sup> Instead, being “affirmative in nature”,<sup>31</sup> these demands require the direction of human energies towards “a specific kind of achievement”.<sup>32</sup> Thus, Fuller suggests, the primary appeal of the inner morality of law must be to “a sense of trusteeship and to the pride of the craftsman”.<sup>33</sup>

---

<sup>26</sup> *Ibid.* at 39.

<sup>27</sup> As Fuller formulates it, this relationship is one in which the lawgiver says to the subject “[t]hese are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct”: *Ibid.* at 40.

<sup>28</sup> *Ibid.* at 40.

<sup>29</sup> *Ibid.* at 40, 41. This, Fuller says, is because Rex never made any law: at 41.

<sup>30</sup> *Ibid.* at 42.

<sup>31</sup> For example, the affirmative duty to “make the law known, make it coherent and clear, see that your decisions as an official are guided by it etc”: *Ibid.* at 42.

<sup>32</sup> *Ibid.* at 42. Fuller also makes clear that the eight principles are to be understood as standards to which lawmaking should rather than must achieve. Thus, his intention is not to portray the existence of legal order as achieved only in a utopia where each of the eight principles is realized to complete perfection because such a utopian conception is not, in his view, “a useful target for guiding the impulse toward legality”. Instead, the eight principles are intended to represent distinct standards against which excellence in legality may be tested, which in turn means that “the inner morality of law is condemned to remain largely a morality of aspiration and not of duty”: *Ibid.* at 41-42, 43.

<sup>33</sup> *Ibid.* at 43.

Fuller spends considerable space in *The Morality of Law* fleshing out the content of each of the eight standards. In relation to the requirements of generality,<sup>34</sup> promulgation,<sup>35</sup> clarity,<sup>36</sup> avoiding contradiction between laws,<sup>37</sup> avoiding impossibility,<sup>38</sup> and constancy through time,<sup>39</sup> this elaboration is relatively brief. A much more extended treatment, however, is given to the requirements of retroactivity, and congruence between official action and declared rule.

Non-retroactivity, Fuller explains, is a complex demand because its total prohibition may not necessarily always serve legality. This is because the retroactive statute can be an important curative measure in repairing the “various kinds of shipwreck” that a legal system might find itself immersed in.<sup>40</sup> If retroactivity is to be used appropriately, then, one must know when it is a tolerable sacrifice of legality and when it is an abuse of the feature of prospectivity that otherwise makes governance by rules possible at all.

According to Fuller, however, the most complex of all the desiderata that make up the internal morality of the law is the principle of congruence between official action and declared rule. This complexity arises from how such congruence may be destroyed or

---

<sup>34</sup> The requirement of generality is the requirement that there be general rules of general, rather than particular, application. Although this is the foundation of any system of law, Fuller suggests that the requirement of generality receives a “very inadequate treatment in the literature of jurisprudence”: *Ibid.* at 48.

<sup>35</sup> The demand of promulgation, or publicity, is similarly fundamental. Even though this demand does not of itself specify just how much information about the law needs to be conveyed to the citizen, or in what form, the bottom line of this principle is that the citizen is entitled to know the content of the law, and to criticize that content. Thus, for the citizen to have this opportunity, the law must be readily available to her: *Ibid.* at 51.

<sup>36</sup> The desideratum of clarity recognizes that obscure or incoherent law can make legality unattainable, whether that obscurity be committed by legislators or judges. Fuller, however, especially emphasizes the responsibility of legislators to make their objectives sufficiently clear so as to minimize the level of interpretation needed on the part of courts and administrative tribunals: *Ibid.* at 64.

<sup>37</sup> The problem of contradictory laws is portrayed as primarily a problem of poor draftsmanship, but which has the significant effect of rendering the law unable to be followed: *Ibid.* at 65-70.

<sup>38</sup> The gist of this requirement lies in how a rule that demands what is impossible contradicts “the basic purpose of a legal order”: *Ibid.* at 79.

<sup>39</sup> The requirement of constancy through time recognizes that too-frequent change in the law can amount to something akin to retroactivity, in so far as citizens are unable to know, or is at least are impaired in being able to know, precisely which laws apply to them at a given point in time: *Ibid.* at 80.

<sup>40</sup> *Ibid.* at 53. That is not to suggest, Fuller insists, that a retroactive statute will always be justified if its function is to cure irregularities of form: at 54.

impaired in a great variety of ways: from mistaken interpretation, to prejudice, to a lack of insight about what is required to maintain the integrity of a legal system.<sup>41</sup>

Fuller thus concludes his account of the morality that makes law possible by observing that “[n]o single concentration of intelligence, insight, and good will, however strategically located, can insure the success of the enterprise of subjecting human conduct to the governance of rules”.<sup>42</sup>

## 2.2 Situating his claims

Fuller’s purpose in Chapter 3 of *The Morality of Law* is to put his analysis of the inner morality of law into “its proper relation with prevailing theories of and about law”.<sup>43</sup> He turns first to the connection between his idea of the internal morality of law and the natural law tradition, and explains how his model of the internal morality of law reflects an attempt to “discern and articulate the natural laws of a particular kind of human undertaking, which I have called ‘the enterprise of subjecting human conduct to the governance of rules’”.<sup>44</sup> These natural laws, Fuller emphasizes, have “nothing to do with

---

<sup>41</sup> Fuller also lists inaccessibility of the law, bribery, indifference, stupidity, and the drive toward personal power as poisonous to the integrity of a legal system. The most subtle element in the task of maintaining congruence between law and official action, however, lies in the task of interpretation, because it is through this process that the declared rule is given meaning: *Ibid.* at 81, 82.

<sup>42</sup> *Ibid.* at 91. In his concluding comments to Chapter 2 of *The Morality of Law*, Fuller makes a number of further points that should also be noted. The first is his observation that “infringements of legal morality tend to be cumulative”: an observation that echoes the analysis of Nazi law that he offered in his 1958 reply to Hart. As Fuller elaborates it, “[a] neglect of clarity, consistency, or publicity may beget the necessity for retroactive laws. Too frequent changes in the law may nullify the benefits of formal, but slow-moving, procedures for making the law known. Carelessness about keeping the laws possible of obedience may engender the need for discretionary enforcement which in turn impairs the congruence between official action and enacted rule”: *Ibid.* at 92. The second is his comment that the stringency with which the eight desiderata as a whole should be applied, as well as their priority of ranking among themselves, will be affected by the branch of law in question as well as by the kind of rules that are at issue. The third is his clarification of how his detailed analysis of each of the eight demands of the internal morality of law has generally assumed the viewpoint of “a conscientious legislator, eager to understand the nature of his responsibility and willing to face its difficulties”. And yet, Fuller emphasizes, it must always be borne in mind that “each of the demands of legality can be outraged in ways that leave no doubt”, such as when the emperor Caligula reportedly respected the legal system of Rome by writing his laws in such fine print and posting them so high that no one could read them: at 93.

<sup>43</sup> *Ibid.* at 95.

<sup>44</sup> *Ibid.* at 96. While Fuller sees such an inquiry as having affinities with the natural law tradition, he also points out that few philosophers have ever attempted to expand upon the problems of legal morality: at 98, and generally from 96-98.

any “brooding omnipresence in the skies” but rather “remain entirely terrestrial in origin and application”:

They are not “higher” laws; if any metaphor of elevation is appropriate they should be called “lower” laws. They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it.<sup>45</sup>

Thus, Fuller argues, the internal morality of law should principally be understood as a form of procedural, rather than substantive natural law, because it is concerned with the ways in which “a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be”.<sup>46</sup>

Having contextualized his project within the natural law tradition, Fuller turns to consider its relation to opposing theories of law, most notably, the theory of legal positivism.

Fuller identifies the immediate point of departure between his view of law and that advanced by opposing legal philosophies as lying in how his conception “treats law as an activity, and regards a legal system as a product of a sustained purposive effort”.<sup>47</sup> This view can be distinguished from the positivist account of law, Fuller explains, by how the latter has historically seen the essence of law in “a pyramidal structure of state power”, and generally abstracts the idea of law from “the purposive activity necessary to create and maintain a system of legal rules”.<sup>48</sup>

Fuller identifies several possible objections to his conception of law as an activity that requires a sustained and purposive effort on the part of its participants. For example, the

---

<sup>45</sup> *Ibid.* at 96. Nor, Fuller also clarifies, referring to the common alignment of natural law with Catholic theology, “have they the slightest affinity with any such proposition as that the practice of contraception is a violation of God’s law”.

<sup>46</sup> *Ibid.* at 97. Fuller qualifies, however, that the word “procedural” should be understood in broad terms that are capable of embracing such demands as substantive congruence between official action and enacted law.

<sup>47</sup> *Ibid.* at 106.

<sup>48</sup> *Ibid.* at 110. Such theories, Fuller suggests, tend to “play about the fringe of that activity without ever concerning themselves directly with its problems”: at 118. He also compares his own position with Holmes’s predictive theory, in which law is nothing more than “the prophecies of what the courts will do in fact”: *Ibid.* at 106.

objection might be put that to speak of law as an enterprise is to imply that it may be carried on with varying degrees of success, and thus also that “the existence of a legal system is a matter of degree”.<sup>49</sup> Fuller responds to this objection by suggesting that of no other complex human undertaking would it ever be assumed “that it could meet with anything other than varying degrees of success”.<sup>50</sup> Indeed, he argues, the objection itself reveals the dominant, and in his view erroneous, assumption of modern legal philosophy that “law is like a piece of inert matter – it is there or not there”.<sup>51</sup>

It is against the background of these general comments that Fuller turns to his specific criticisms of Hart’s *The Concept of Law*. Fuller makes clear at the outset that he is in “virtually complete disagreement” with all aspects of Hart’s analysis in the book.<sup>52</sup> And, like in his 1958 reply to Hart, he explains that this is because of the way that Hart’s analysis proceeds in terms that systematically exclude any consideration of the problems of the internal morality of law.<sup>53</sup>

To illustrate his objection, Fuller refers to Hart’s account of the rule of recognition, and highlights how this account contains no provision for the authority of the rule of recognition to be withdrawn in the event of its abuse.<sup>54</sup> Instead, Fuller argues, Hart’s analysis seems to suggest that the power to recognize valid laws comes without limitation, adding that such a result seems ironic given that a key motivation for Hart’s project was his desire to rescue the concept of law from its identification with coercive power.<sup>55</sup>

---

<sup>49</sup> Correspondingly, this suggests that it is possible for both particular laws as well as whole legal systems to only half exist if the purposive effort necessary to bring them into being has only been half successful: *Ibid.* at 122.

<sup>50</sup> *Ibid.* at 122.

<sup>51</sup> *Ibid.* at 123, adding that “[i]t is only such an assumption that could lead legal scholars to assume, for example, that the ‘laws’ enacted by the Nazis in their closing years, considered as laws and in abstraction from their evil aims, were just as much laws as those of England and Switzerland”.

<sup>52</sup> *Ibid.* at 133. Alongside this polemical statement, however, Fuller applauds Hart’s book as “a contribution to the literature of jurisprudence such as we have not had in a long time”: *Ibid.* at 131.

<sup>53</sup> *Ibid.* at 133.

<sup>54</sup> *Ibid.* at 137.

<sup>55</sup> *Ibid.* at 139.

The thrust of Fuller's criticism of Hart's account of the foundations of legal order thus relates to how that account contains no suggestion of any element of reciprocity between lawgiver and the legal subject. Instead, as Fuller puts it, Hart's account seems "almost as if it were designed to exclude the notion that there could be any rightful expectation on the part of the citizen that could be violated by the lawgiver".<sup>56</sup> This suggestion that law must be treated as "a manifested fact of social authority or power, to be studied for what it is and does, and not for what it is trying to do or become" stands in stark contrast to Fuller's own view, which sees law as

... a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to always fall somewhat short of a full attainment of its goals.<sup>57</sup>

### 2.3 The conception of the person implicit in legality

Fuller's aim in the final chapter of *The Morality of Law* is to defend the reasons why the internal morality of law deserves the designation of a "morality". He begins this defense by stating that to recognize that observance of the internal morality of law may support and give efficacy to a wide variety of substantive aims is not also to accept "that *any* substantive aim might be adopted without compromise of legality".<sup>58</sup> Yet such a suggestion, Fuller observes, is what seems to be contained in Hart's statement that observance of the principles of legality is "unfortunately incompatible with very great iniquity".<sup>59</sup>

Fuller links Hart's denial of the interaction between the internal morality of law and law's substantive (or external) aims to his apparent view that the problem of achieving and

---

<sup>56</sup> *Ibid.* at 140.

<sup>57</sup> *Ibid.* at 145. Fuller also comments on how Hart accepts that some notion of purpose might have a role to play in the interpretation of particular laws, but otherwise rejects the idea that an overriding conception of purpose can, or should, be assigned to law as a whole. Fuller concedes that, to a certain extent, this attitude is sound, in so far that to ascribe some naïve teleology to a whole institutional complex has some "very unattractive antecedents in the history of philosophy". Still, he insists, such criticisms ignore the fact that the purpose that underlies his own insistently purposive view of law is "a very modest and sober one": namely, that of subjecting human conduct to the control of general rules: *Ibid.* at 146.

<sup>58</sup> *Ibid.* at 153 (Fuller's emphasis).

<sup>59</sup> *Ibid.* at 154, adding that Hart thus seems to consider it possible to conceive of a lawmaker "who pursues the most iniquitous ends but at all times preserves a genuine respect for the principles of legality".

maintaining legality deserves “no more than casual and passing consideration” within a positivist account of law.<sup>60</sup> In *The Concept of Law*, for example, Hart continues to examine the philosophical quandaries presented by Nazi legality without regard to “the drastic deterioration in legal morality that occurred under Hitler”.<sup>61</sup> To deepen his criticism of Hart on this point, Fuller refers to the then current regime of legalized apartheid in South Africa and argues that contrary to the common view that the South African system combined “a strict observance of legality with the enactment of a body of law that is brutal and inhuman”, the laws of apartheid in fact revealed “a gross departure from the demands of the inner morality of law”.<sup>62</sup>

These suggestions about how the internal morality of law interacts with and shapes the ends that might be pursued through law preface a further critical point that Fuller offers in defense of his view that the internal morality of law deserves its designation of “morality”. As he explains it, the most important respect in which observance of the principles of legality “can serve the broader aims of human life” lies in “the view of man implicit in the internal morality of law”.<sup>63</sup>

I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a

---

<sup>60</sup> *Ibid.* at 154-155. The first issue that Fuller turns to in elaborating his criticisms of Hart’s neglect of the problems of legality is the relationship between the principles of legality and the overall efficacy of law, which Fuller reads as absent from Hart’s analysis because of how Hart conceives of law entirely in terms of its formal source rather than as a complex human undertaking capable of various degrees of success: *Ibid.* at 155. Fuller notes how the affinity between legality and justice receives a comparably brief treatment by Hart for the same reasons, except in so far as Hart accepts the minimum form of justice that consists in the prescription to act by known rule: at 157.

<sup>61</sup> *Ibid.* at 155. Fuller also observes how Hart ignores the other important connections between the formal requirements of the internal morality of law and substantive justice that Fuller emphasized in his 1958 essay, such as the connection between justice and the requirement of law’s internal morality that laws be published and made available for public scrutiny. Fuller therefore repeats the conclusion that he stated in his 1958 reply to Hart that “even if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts”: at 158.

<sup>62</sup> This, Fuller explains, was especially so in the case of the apartheid race legislation, which was replete with anomalies and contradictions, and which put South African judges in a position of needing to decide a disproportionate number of cases where the meaning of the law was unclear. With respect to how South African judges navigated that task, Fuller suggests perhaps overly optimistically that such a judge, “must, if he respects the ethos of his calling, feel a deep distaste for the arbitrary manipulations this legislation demands of him”: *Ibid.* at 160.

<sup>63</sup> *Ibid.* at 162.

responsible agent, capable of understanding and following rules, and answerable for his defaults.

Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination. Conversely, when the view is accepted that man is incapable of responsible action, legal morality loses its reason for being. To judge his actions by unpublished or retrospective laws is no longer an affront, for there is nothing left to affront – indeed, even the verb “to judge” becomes itself incongruous in this context; we no longer judge a man, we act upon him.<sup>64</sup>

This is a crucial passage for understanding Fuller's vision of legality, because the idea conveyed is that respect for the legal subject as an agent is a constitutive feature of legal order.<sup>65</sup> Thus, Fuller argues, the form through which law is made possible necessarily gives expression to a certain respect for human dignity through this connection to the agency of the legal subject. It thus follows from this that if either the formal features of law are abused, or the subject is for some reason considered not capable of responsible action, then what purports to be governance through law may slide into something that, in merely acting upon the subject rather than respecting her as an agent, no longer has the character of law.

In this passage, therefore, we see Fuller arguing for a view of law's form as morally valuable in its own right, rather than for, or in addition to, any instrumental relationship it might have to the effective pursuit of a particular legal end. This moral value, moreover, is portrayed as constitutive, rather than external, to law. The suggestion, then, is that a necessary connection between law and morality consists in the form through which law itself is made possible.

---

<sup>64</sup> *Ibid.* at 162-163.

<sup>65</sup> It is also, notably, a passage that has historically been neglected by scholars who have sought to interpret Fuller's claims, and who have ordinarily focused in Chapter 2 of *The Morality of Law* and its elaboration of the eight principles of the inner morality of law. More recent scholarship that has shown an increasing interest in how the notions of autonomy and agency inform Fuller's position has, however, frequently included reference to this important passage. See especially Colleen Murphy, “Lon Fuller and the Moral Value of the Rule of Law”, (2005) 24 L. & Phil. 239, Jennifer Nadler, “Hart, Fuller, and the Connection Between Law and Justice”, (2007) 27 L. & Phil. 1 [Nadler, “Connection Between Law and Justice”], Evan Fox-Decent “Is the Rule of Law Really Indifferent to Human Rights?”, (2008) L. & Phil. 533, as well as Mary Liston, “Willis, ‘Theology’, and the Rule of Law”, (2005) 55 U. Toronto L. J. 767.



## 2.4 Observations

The three sites of argument that I have just reviewed reveal some of the most important ways in which *The Morality of Law* develops the arguments that Fuller sketched in his 1958 reply to Hart. Most strikingly, in *The Morality of Law* Fuller develops the idea that there is a relationship between the health of the form of law and fidelity to law into a more elaborate claim about the reciprocity between lawgiver and subject that is essential to the success of law. We also learn that the lawgiver's responsibility to properly observe these formal requirements is a responsibility towards the fate of persons, and not merely towards the effective realization of the lawgiver's desired ends.<sup>66</sup>

These ideas are taken to a higher level of clarity when Fuller argues that implicit in the very idea of the internal morality of law is a conception of the legal subject as a responsible agent. He further suggests, moreover, that if this status is disrespected through the abuse of legal form, we will witness a movement from legal governance into something else. In this idea, then, we can see the basis of Fuller's objection to how Hart's account of legal authority fails to make any provision for the withdrawal of the lawgiver's power in the event of its abuse. That is, Fuller objects to this failure, as I read him, because it represents the failure of the positivist analysis of law to concern itself, in any meaningful way, with the circumstances of the legal subject.

It thus seems that there are two separate but interrelated senses in which we might understand Fuller's claims about law's intrinsic morality in *The Morality of Law*. The first sense concerns Fuller's interest in the requirements of rightness associated with the endeavour of creating and maintaining a successful legal order. This sense of "morality" thus relates to the ethos of the lawgiver's role.<sup>67</sup> Indeed, Fuller's private correspondence reveals that he would have been happy to replace the term "morality" in this context with "ethos", or some other term that similarly captures the idea that certain moral

---

<sup>66</sup> This point, as I will explain in section 3.1, below, is one of the crucial aspects of Fuller's position that has been widely misunderstood or overlooked as a result of the efficacy reading of the internal morality of law that Hart advances in his review of *The Morality of Law*.

<sup>67</sup> In his "Reply to Critics" that I examine in Chapter 4, Fuller uses the term "role morality" to capture this idea: see Fuller, "Reply", *supra* note 22 at 193.

responsibilities attend the occupation of certain roles.<sup>68</sup> Questions of best terminology aside, however, Fuller remained insistent that law's connection to these demands of role designates a moral duty that must be fulfilled by the lawgiver, which in turn lends law itself a distinctly moral quality.<sup>69</sup>

The second sense in which Fuller suggests that law is intrinsically moral concerns his understanding of the moral value of legality, from the point of view of the legal subject. This sense of “morality” within Fuller's position has often been overlooked in favour of an exclusive focus on the question of whether the principles of the internal morality of law are merely amoral principles that aid law's efficacy.<sup>70</sup> Yet it is clear from his arguments about the conception of the person implicit in legality, and how this imbues the form of law with the moral value of respect for human agency and dignity, that Fuller himself sought to make a wider point about the intrinsic moral value of the form of law.<sup>71</sup>

In sum, then, the two senses of morality that are captured in Fuller's claims about the internal morality of law reflect the difference between the enterprise of lawgiving having

---

<sup>68</sup> This point is stated especially clearly in a letter to the sociologist Philip Selznick, where Fuller states: “As for the use of the expression ‘the internal morality of law’ nothing hinges on the word ‘morality’. I would settle for ethos, conscientious attitude, or trusteeship”: Letter from Lon L. Fuller to Philip Selznick, 18 August 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 7, Folder 6 (Correspondence), emphasis in original. That Fuller himself recognized the way that his chosen terminology of the internal morality of *law* might cause the reader to miss this sense of ethos is apparent in his correspondence with the British philosopher Dorothy Emmet, whose work on the ethics of roles Fuller admired greatly. In one letter to Emmet, Fuller refers to how “one of my students made the interesting suggestion that if I could have called my book, instead of The Morality of Law, The Morality of Lawing, much of the misunderstanding might have been avoided. The word ‘law’ calls to mind books lying inertly on shelves, and of course bound pieces of paper are amoral. ‘Lawing’, on the other hand, would call to mind people in interaction with one another, and that picture in turn would suggest reciprocal responsibilities if the interaction is to proceed properly”: Letter from Lon L. Fuller to Dorothy Emmet, 7 October 1966, The Papers of Lon L. Fuller, Harvard Law School Library, Box 2, Folder 16 (Correspondence).

<sup>69</sup> This is stated explicitly in a letter to Hart, where Fuller says that he stands firm on the question of calling the principles of legality the internal morality of law, adding that “the lawgiver who deliberately uses retroactive laws to frighten the populace into impotence ... has done something worse than merely impairing the internal morality of law and I would be glad to say that he violated a moral duty”: Letter from Lon L. Fuller to H.L.A. Hart, 3 February 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 3, Folder 14 (Correspondence).

<sup>70</sup> It is, however, a concern of more recent work on Fuller. See most notably Jeremy Waldron, “Hart's Equivocal Response”, *supra* note 9.

<sup>71</sup> This message also comes through in Fuller's writings on the subject of freedom, which I refer to briefly in section 3.1, below, as well as in his analysis of the form of managerial direction, which I examine at length in Chapter 4.

a moral *character* (the ethos reading) and that enterprise having moral *value* (the moral dimensions of how a legal order treats those who are subject to it). These are clearly two separate ideas, but the distinctive feature of Fuller's thought is how these two ideas inform, and relate to, each other. That is, we come to see the way that the two senses of morality join together within Fuller's position once we appreciate how the principles of right lawmaking instantiate a moral duty to recognize the legal subject as an agent.

This understanding of Fuller's claims is much more subtle than that which has most often been attributed to him since Hart's review of *The Morality of Law*. Thus, it is to this review, and to an analysis of how and why it has so decisively shaped the prevailing scholarly memory of Fuller, that I now turn.

### 3 Hart's review of *The Morality of Law*

For though the main positions which the author wishes to defend are clearly and frequently stated ... it is none the less often difficult amid the author's firm and clear assertions of what is right and wrong in jurisprudence to identify any equally firm and clear argument in support of these assertions. Yet in saying this I am haunted by the fear that our starting-points and interests in jurisprudence are so different that the author and I are fated never to understand each other's works.<sup>72</sup>

This early comment in Hart's review of *The Morality of Law* furnishes a good indication of the tenor of his appraisal of Fuller's book.<sup>73</sup> Hart is critical of the breadth of Fuller's conception of law,<sup>74</sup> of how Fuller "speaks throughout as though the notion of a rule were unambiguous and otherwise unproblematic",<sup>75</sup> as well as of the polemical way in which Fuller engages with other, non-purposive, theories of law. Hart's main criticism however, which he advances repeatedly, is that Fuller fails to provide any compelling argument in support of the assertions he makes about the moral significance of the internal morality of

---

<sup>72</sup> Hart, "Review", *supra* note 2 at 343.

<sup>73</sup> According to Nicola Lacey, Hart elsewhere described *The Morality of Law* as a "very bad book": Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream*, (Oxford: Oxford University Press, 2004) at 263.

<sup>74</sup> According to which, Hart explains, Fuller "admittedly and unashamedly, includes the rules of clubs, churches, schools, 'and a hundred and one other forms of human association'": Hart, "Review", *supra* note 3 at 343.

<sup>75</sup> *Ibid.*

law. Hart thus makes clear that he has no objection to the content of Fuller's eight principles, which he describes as "principles of good craftsmanship".<sup>76</sup> Instead, his objections relate to how, whether qualified by the term inner or not, Fuller's designation of these principles as a morality perpetrates "a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality".<sup>77</sup>

To illustrate this objection, Hart offers the example of the purposive activity of poisoning. The activity of poisoning, he claims, may also contain internal principles relevant to the pursuit of its objects.<sup>78</sup> Yet, Hart argues, to call these principles of the poisoner's art the "morality of poisoning" is "to blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned".<sup>79</sup>

Hart then comments on how Fuller's statement that the appeal of the internal morality of law is to the "pride of the craftsman" seems to sit awkwardly with Fuller's analysis of the moralities of duty and aspiration, given that what makes a morality of aspiration into a morality is that the end aspired to is "some ideal development of human capacities which is taken to be of ultimate value in the conduct of life".<sup>80</sup> Hart makes clear, however, that in his view only if the purpose of subjecting human conduct to the governance of rules was itself considered to be an ultimate value, irrespective of the content of those rules, would it be viable to both classify the principles of rule-making as a morality.<sup>81</sup>

---

<sup>76</sup> *Ibid.* at 347. Hart compliments Fuller's elaboration of the content of each principle in Chapter 2 of *The Morality of Law* as "presenting some old issues in a welcome new light": at 348.

<sup>77</sup> *Ibid.* at 350

<sup>78</sup> *Ibid.* Hart, in parentheses, offers the examples of 'Avoid poisons however lethal if they cause the victim to vomit', or 'Avoid poisons however lethal if their shape, color, or size is likely to attract notice'.

<sup>79</sup> *Ibid.*

<sup>80</sup> As Hart explains it, principles of craftsmanship can be formulated as either peremptory rules or in terms of an indication of a direction of effort, but this "has surely nothing to do with the distinction between a morality of duty, carrying with it accusation and blame, and a morality of aspiration, carrying with it praise and disdain". He then asks, by way of illustration, whether a legislator who wantonly uses retrospective laws to terrify his subjects can be accused only of violating a morality of aspiration. Fuller's conclusions are thus in Hart's view unsupportable, with the root cause of this, in his view, being the way that Fuller confuses purposive activity with morality: *Ibid.* at 350, 351.

<sup>81</sup> And so classified, Hart adds, to determine whether those principles are best described in the moral language of duty or aspiration: *Ibid.* at 351.

After addressing these objections to Fuller's use of the term morality, Hart moves on to his criticism of Fuller's suggestion that there are important if not necessary connections between the substantive moral ends that might be pursued through law and the procedural demands of the internal morality of law.<sup>82</sup> As Hart sees it, there is nothing in Fuller's analysis of this issue that amounts to "a cogent argument in support of his claim that these principles are not neutral as between good and evil substantive aims".<sup>83</sup> Moreover, he continues, Fuller's example of South African Apartheid law illustrates only that the principle that laws must be clearly and intelligibly framed is incompatible with the pursuit of vaguely defined substantive aims, irrespective of whether they are morally good or evil.<sup>84</sup>

Hart understands Fuller's confusion on this point as deriving from a misunderstanding of his own statement, in *The Concept of Law*, that the internal morality is compatible with iniquitous law. This "modest remark", Hart clarifies, was not intended to suggest that Fuller's principles of legality are "compatible with every sort of iniquitous aim, vague or specific",<sup>85</sup> adding that the Nazi government did indeed frequently violate the principles of legality in pursuit of its monstrous aims and that such violations did likely aid the pursuit of those aims. Hart insists, however, that this is not itself evidence of any "necessary incompatibility between government according to the principles of legality and wicked ends", but rather merely reveals what a government might do to guard itself against the contingent support of its population, or the possibility of external criticism of its actions.<sup>86</sup>

As for Fuller's polemical treatment of theories that do not take a purposive view of law, Hart accuses Fuller of recommending an exclusive view of legal philosophy in which "there is one right way in which law may be studied".<sup>87</sup> This attitude of exclusivity, he

---

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* Hart is especially critical of this argument, describing it as "patently fallacious".

<sup>84</sup> *Ibid.* at 352.

<sup>85</sup> *Ibid.* at 352.

<sup>86</sup> *Ibid.* at 353.

<sup>87</sup> Hart is particularly perturbed by what he reads to be Fuller's suggestion that positivist thinkers are committed to the notion that the moral obligation of the German citizen to obey the Nazi laws was in no way fettered by either the monstrous procedural or substantive character of those laws. To respond to this

adds, is also detrimental to Fuller for how it causes him to not recognize the elements within other theories that might be sympathetic to his model of the eight principles of legality.<sup>88</sup> Indeed, from the very beginning of the review Hart insists that his and Fuller's projects are "complementary forms of jurisprudence", rather than intrinsically opposed.<sup>89</sup> Nonetheless, he concedes that there is a fundamental difference between Fuller's views and his own, and this lies in how where Fuller values the principles of legality for their own sake, while utilitarians and other positivist thinkers have historically valued those same principles "only so far as they contribute to human happiness or other substantive moral aims of the law".<sup>90</sup>

In the final section of his review, Hart adds some comments on Fuller's treatment of the concept of law and, specifically, Fuller's suggestion that the account of the rule of recognition provided by *The Concept of Law* contains no provision for the revocation of the rule's authority in the event of its abuse.<sup>91</sup> Hart responds to this complaint by arguing that his account of the rule of recognition places no logical restriction on the content of the rule, which could provide explicitly or implicitly for such a condition should its

---

allegation, Hart again returns to the Nazi grudge informer example, and this time seems to fully embrace Pappe's corrections to the effect that the postwar German courts did not declare the informers' actions illegal by virtue of a clash between the iniquitous content of the law under which they acted and some higher law, but rather because those statutes had been misinterpreted by the Nazi courts (see further my discussion of Pappe in Chapter 2 at 63-65). Hart's point in making this acknowledgment, however, is only to reject any inference that "the decent German citizen had a moral obligation to obey Nazi statutes with all their iniquities of form and content", adding that the grudge informer cases at best imply that such citizens were legally – but by no means morally – required to obey the law. To attribute any other view to a positivist analysis of those cases, Hart therefore concludes, would be to undermine the basic commitment of the positivist creed that obedience to law is a matter of personal moral choice. The point to note, then, is that although he engages more extensively with Pappe's corrections, Hart continues to either not acknowledge or not recognize the implications of those corrections for the major point of dispute between him and Fuller: *Ibid.* at 355-356.

<sup>88</sup> *Ibid.* at 357. In fact, Hart urges, the principles of legality, or what Fuller calls the internal morality of law, were argued by Bentham in the name of utility, and yet there is nothing in Bentham's philosophy that suggests that other approaches to the study of law are illegitimate.

<sup>89</sup> *Ibid.* at 344.

<sup>90</sup> *Ibid.* at 357.

<sup>91</sup> With respect to Fuller's charge that Hart's own analysis of the concept of law neglects the idea of purpose, Hart responds by stating that his aim in *The Concept of Law* is complementary to and in no way exclusive of Fuller's investigation of "purposes", but that his own project addresses the significance of rules in a way that Fuller seems to simply take for granted: *Ibid.* at 358. Hart also comments that Fuller's criticism of the rule of recognition as a flawed account of legal authority generally is especially unsatisfactory given the lack of specificity in Fuller's own argument that the foundations of legal authority are derived from tacit expectations and acceptances: at 361.

designers so choose.<sup>92</sup> Moreover, the rule of recognition does contain a limit on legal authority, even if a limited one, in its requirement that its authority be accepted by legal officials. Thus, Hart argues, if Fuller is to successfully assert that legal authority necessarily contains implicit moral limitations, a much more coherent argument must be advanced to support that proposition than any found in *The Morality of Law*.<sup>93</sup>

Hart concludes his review of *The Morality of Law* by commenting on how Fuller's book ends with "some admirable pages on what the author terms 'the problems of institutional design'".<sup>94</sup> His final comment, however, makes clear that Hart's ultimate attitude towards Fuller's book is one of strong criticism: a view that comes through especially clearly in his comment that Fuller "has all his life been in love with the notion of purpose and this passion, like any other, can both inspire and blind a man."<sup>95</sup>

### 3.1 Observations

In terms of explaining prevailing scholarly memory of Fuller's claims, the most crucial element of Hart's review of *The Morality of Law* is his insistence that Fuller's eight principles should be regarded only as principles of craftsmanship that serve the efficient pursuit of specified legal ends. Thus, by suggesting that no principled distinction can be made between Fuller's arguments about the internal morality of law and his own arguments about the internal morality of poisoning, Hart makes clear that he views the idea of law's purposiveness in purely instrumental terms. He then supports this view when he states that the principles of legality are valuable "so far only as they contribute to human happiness or other substantive moral aims of the law".<sup>96</sup>

This site of contest between Fuller and Hart on the question of the value of the internal morality of law deserves a closer look, because its causes are in fact more complex than

---

<sup>92</sup> *Ibid.* In any event, Hart continues, Fuller's analysis misses the main point of the account of the rule of recognition: namely, how it is offered to support the claim that it is necessary "to distinguish the general acceptance of the legally ultimate rule of a system of law which specifies the criteria of legal validity from whatever moral principles individuals act upon in deciding whether and to what extent they are morally bound to obey the law": at 361-362.

<sup>93</sup> *Ibid.* at 362.

<sup>94</sup> *Ibid.* at 363.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.* at 357.

simply a foundational disagreement about whether any purposive character might be attributed to law. The first issue to highlight with respect to this point concerns the polemics of scholarly argument. That is, Fuller's obviously polemical approach to Hart in *The Morality of Law* is met by Hart in his review with an equally polemical response.<sup>97</sup> These polemics, moreover, are especially strong in Hart's argument that the internal morality of law has everything to do with efficacy and nothing to do with morality.

Polemics aside, however, certain foundational commitments held by Hart do seem to blind him to the meaning of Fuller's position, or at least to the implications of that position for his own account. For instance, Hart's interpretation of Fuller's eight principles as principles of craftsmanship that serve the efficient pursuit of particular legal ends suggests that Hart has in mind how particular laws might be used as instruments for the efficacious pursuit of specific goals. That Hart would approach his evaluation of the internal morality of law in this way might make sense for reasons internal to the positivist account of law, given how that account starts with the unit of the legal rule and moves to the idea of a legal system, within which particular rules may or may not be a part.<sup>98</sup>

The problem, however, is that none of this speaks directly to Fuller's concern to discern the nature and constitutive features of *legal order*. Thus, there seems to be a significant gap between Hart and Fuller on this point because for Fuller, a legal order is not just any system of rules, but a system of rules of a certain quality.<sup>99</sup> Indeed, it is worth noting that at no point in his review of *The Morality of Law* does Hart ever make mention of Fuller's argument about the respect for agency that is implicit in the very idea of legal order, and

---

<sup>97</sup> In my view, however, Hart and Fuller's ongoing exchange has an identifiable impact on the extent to which both scholars soften some of their claims. This is especially notable in the transformation of Hart's claim in *The Concept of Law* that his analysis of a legal system as subsisting in the union of primary and secondary rules holds "the key to the science of jurisprudence" (see Hart, *The Concept of Law*, *supra* note 1 at 81), into the much more modest claim that in the union of these two sorts of rules we have "an effective tool for the analysis of much that constitutes the framework of legal thought": Hart, "Review", *supra* note 3 at 358.

<sup>98</sup> That is, according to the relevant criteria of that system.

<sup>99</sup> Indeed, Fuller seems to pick up on this point in his "Reply to Critics" when he comments on how the positivist account is unclear about what exactly is meant by the idea of efficacy, and how this criteria is to be applied "to the creation and administration of a thing as complex as a whole legal system": see Fuller, "Reply", *supra* note 22 at 202, and my discussion of this point in Chapter 4, below, at 103.



which speaks directly to the notion that legal order, by virtue of its association with respect for agency, is order of a certain quality.<sup>100</sup>

A further important issue to highlight with respect to the sources of Hart's efficacy interpretation of the internal morality of law is that when Hart refers to Fuller's own description of how the appeal of the morality of law is to "the pride of the craftsman", he omits any reference to the phrase "a sense of trusteeship" that precedes this comment.<sup>101</sup> Fuller's published reply to his critics in the second edition of *The Morality of Law*, which I discuss at length in Chapter 4, makes no reference to this omission. His private correspondence with Hart however,<sup>102</sup> as well as his working papers for his reply to his critics,<sup>103</sup> reveal that Fuller was quite distressed by this move on Hart's part. Moreover,

---

<sup>100</sup> Fuller, *The Morality of Law*, *supra* note 2 at 43. One of the most curious aspects of this omission on Hart's part is the fact that his own arguments about the minimum content of natural law in *The Concept of Law* seem to at least hint at the idea that law is only possible by virtue of the moral capacities, including agency, of its participants. For example, Hart speaks in that discussion of how the fact of human vulnerability makes obvious the need for "a system of mutual forbearance and compromise which is the base of both legal and moral obligation": Hart, *The Concept of Law* at 195. It follows from this that Hart must accept that law is not possible unless those who seek its protection as a form of social control are capable of such mutual forbearance and compromise. This concession is revealed even more strongly in Hart's discussion, in the same context, of how any method of social control "which consists primarily of standards of conduct communicated to classes of persons", including "rules of games as well as law", involves the expectation that those who receive such communication can "understand and conform to the rules without official direction": at 207. Again, the conclusion implicit in this observation is that the enterprise of subjecting human conduct to the governance of rules relies, as a matter of necessity, on the capacity of the legal subject to be or to become "a responsible agent, capable of understanding and following rules, and answerable for his defaults": Fuller, *ibid.* at 162.

<sup>101</sup> *Ibid.*

<sup>102</sup> Fuller's first response to Hart upon reading Hart's review of *The Morality of Law* in advance of its publication is generally very warm, and expresses delight to see "such a sharp joinder of issue" in their exchange. With respect to Hart's omission, Fuller refers only to how Hart's treatment of the responsibilities of the legislator leaves out the words "a sense of trusteeship", adding that Hart was "quite entitled" to do this: see Letter from Lon L. Fuller to H.L.A. Hart, 3 February 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 3, Folder 14 (Correspondence). In a letter dated 18 October 1965, however, Fuller speaks of how he is "really puzzled" by the level of criticism of his use of the term morality, and rhetorically asks Hart whether "peace could be had by substituting for 'morality' some word like 'trusteeship' (which you so rudely snatched from my mouth in your quotation)": Letter from Letter from Lon L. Fuller to H.L.A. Hart, 18 October 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 3, Folder 14 (Correspondence).

<sup>103</sup> For example, in one document from the working papers for his "Reply to Critics", Fuller speaks of how Hart's partial quotation makes it appear like "in a moment of absent-mindedness I had tacitly admitted that the question was one of efficacy", adding that "[i]f Hart will let me restore the whole sentence, I would be willing to make my peave [sic] with him": Untitled and undated document, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Notes for the "Reply to Critics"). In another document from the same archive, Fuller comments that "there are moral dilemmas and temptations in creating and the administration of a legal system, and that these hinge about what I have called principles of legality", and that "[t]o try to convert into efficacy is, I submit, a serious and dangerous perversion". As is the case with

these archival materials make clear that the reasons for this distress are precisely because Hart's portrayal of his position in terms of craftsmanship suggests that Fuller, like his critics, ultimately understood his idea of the internal morality of law in instrumental terms.<sup>104</sup> Fuller makes this concern especially clear in a letter to Philip Selznick, where he observes that:

... In one passage of my book I speak of an "appeal to a sense of trusteeship and the pride of the craftsman." In his review of my book H. L. A. H. cuts out the reference to trusteeship, and uses my reference to "the pride of the craftsman" as a kind of admission by me that the whole thing is a matter of "efficacy".<sup>105</sup>

---

many of Fuller's working papers relating to these issues, the words "Trusteeship Hart" also appear on the document: Untitled and undated document, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Notes for the "Reply to Critics").

<sup>104</sup> This portrayal of Fuller as speaking of the internal morality of law in terms of efficacy, and thus potentially contradicting himself, has been remarkably resilient. This is even the case among those scholars, like Jeremy Waldron, who are openly sympathetic to Fuller's thought. In a 1994 essay, for example, Waldron observes that the primary appeal of the internal morality of law, according to Fuller, "is to the legislator's pride in his own craft": see Jeremy Waldron, "Why Law? Efficacy, Freedom or Fidelity?", (1994) 13 L. & Phil. 259 at 267 [Waldron, "Why Law?"]. Thus by saying that Fuller sees the primary appeal of the internal morality of law "is to the legislator's pride in his own craft", Waldron joins Hart in ignoring Fuller's statement, in the same sentence, about how the internal morality of law also appeals to a "sense of trusteeship". Curiously, given the otherwise clear movement towards acknowledging Fuller's concern for the position of the subject that characterizes Waldron's more recent writings, he again speaks in those writings of how Fuller's analogy about craftsmanship encourages an efficacy reading of the value of the principles of legality, and thus again ignores the possible and opposing implications of Fuller's reference to a "sense of trusteeship": see Waldron, "Hart's Equivocal Response", *supra* note 9 at 1154.

<sup>105</sup> Letter from Lon L. Fuller to Philip Selznick, 18 August 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 7, Folder 6 (Correspondence). Fuller then expands upon this point in his letter to Selznick by offering the following illustration (emphases in original):

"A model I have used in debates recently is this: A traffic cop stands in his box in the middle of a busy intersection. He is, as it were, a minor legislator. He can do his job badly: he can give ambiguous signals, he can make it uncertain while he talks with a friend whether he is still giving signals or has temporarily resigned from his job, his signals may be changed so fast no one can follow them, they may be ambiguous, etc. Now here is a certain kind of failure. Is it moral? Certainly if he is an imbecile who has no idea of the implications of his actions we can excuse him from moral censure. But if he is just plain sloppy and indifferent, surely we need some way of condemning him that has at least a "moral" flavor. Some of my critics seem to say that a moral question would be presented only if the cop were giving ambiguous signals for a bad end, such as causing an accident that would injure an enemy. They seem to reject anything like a procedural or institutional morality. I would say the sloppy cop is injuring an institution which consists in a cluster of reciprocal expectations between motorists and cops. ... The cop's sloppiness injures not only the institution represented by himself and his uniform and box, but also the extension of that institution to the next street corner, where the conscientious cop may have his efforts partially nullified by a carry over of confusion."

These points are clearly important to gaining a sense of why Hart either misunderstands or falsely portrays Fuller's position on the source of the moral value of the internal morality of law. The more important question, however, is whether Fuller's arguments in *The Morality of Law* do actually invite this efficacy reading.

The most obvious way in which Fuller's analysis does invite an interpretation of the internal morality of law in terms of efficacy lies in how he tells the story of King Rex from Rex's – that is, from the lawgiver's – perspective.<sup>106</sup> Moreover, Fuller also speaks elsewhere in *The Morality of Law* of how the internal morality of law should principally be understood as a form of procedural, rather than substantive natural law, because of how it is concerned with the ways in which “a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be”.<sup>107</sup> Both of these features of *The Morality of Law* thus seem to invite an interpretation of the value of the internal morality of law in terms of efficacy.

Still, and although Fuller does seem to tell the story of Rex from the lawgiver's perspective, that story is clearly *not* directed to explaining the ways in which Rex failed to successfully use law as an instrument of his own will. Quite to the contrary, we are told at the outset that Rex wanted to be a great lawgiver and to achieve a legal system that remedied the confusion, expense, and corruption of those of his predecessors.<sup>108</sup>

Moreover, when Fuller leaves the tale of Rex to elaborate the basic content and character of each of the eight principles in the remainder of Chapter 3 of *The Morality of Law*, he

---

<sup>106</sup> Jennifer Nadler makes an insightful observation to this effect when she notes that “adopting the perspective of the lawgiver was a rhetorical strategy of Fuller's, for it was an attempt to refute the positivist theory on its own terms”, but that this subsequently caused problems for Fuller's position because “in ceding the question of perspective, Fuller seemed to cede the whole argument to the positivists because perspective was the very issue in dispute”: [Nadler, “Connection Between Law and Justice”], *supra* note 65 at 25.

<sup>107</sup> Fuller, *The Morality of Law*, *supra* note 2 at 97. Fuller qualifies, however, that the word “procedural” should be understood in broad terms that are capable of embracing such demands as substantive congruence between official action and enacted law.

<sup>108</sup> Indeed, even when he loses patience with his subjects in light of their persistent grievance against him, and chooses to become more tyrannical in his governing, Rex fails still further because his subjects respond by flouting the provisions of his impossible laws: *Ibid.* at 36-37.

makes two additional observations that speak strongly against any such efficacy reading. The first is his comment about how the demands of the internal morality of law “concern a relationship to persons”.<sup>109</sup> The second is his statement, which I have just reviewed at length, that the primary appeal of the internal morality of law, in terms of the demands that it places on the lawgiver, must be to “a sense of trusteeship and to the pride of the craftsman”. Thus, in its reference to trusteeship, this statement again implies a relationship between the internal morality of law and the fate of persons.<sup>110</sup>

My point, then, is that surely the dominant message we receive from *The Morality of Law* is that, for Fuller, the value in how observance of the principles of the internal morality of law instantiates a relationship of respect from lawgiver to legal subject is prior, or at least equal, to the instrumental benefits of such observance. That Fuller’s position should properly be read in this way is further supported by another tale about an imaginary lawmaker that he tells in a 1968 essay on the subject of freedom. Fuller’s writings on freedom, which typically receive no attention from his critics, are another source to which we can look to see his deep interest in the ways that the form of law supports the realization of human agency.<sup>111</sup> This interest is illuminated especially strongly in how the

---

<sup>109</sup> *Ibid.* at 42.

<sup>110</sup> *Ibid.* at 43.

<sup>111</sup> Fuller’s interest in the subject of freedom has a history that shares much in common with that of his economics project, in the sense that although he commenced writing and speaking about the subject in the mid-1950s, and although he intended to elaborate his thinking into a book, the record reveals what is at best a preliminary sketch of what might have become a much larger project. The animating themes of the freedom writings are, first, a desire to challenge the philosophical neglect of affirmative conceptions of freedom and the alleged contradiction between affirmative and negative conceptions of freedom, and second, a concern to theorize about the type of social arrangements that enable freedom to be actually experienced in the world: see especially Lon L. Fuller, “Freedom: A Suggested Analysis”, (1955) 68 Harvard L. Rev. 1305. Indeed, Fuller seemed to think that if we addressed the second concern, we would be able to resolve the tensions of the first. Although he never made any direct reference to his thinking on freedom in his exchanges with Hart, it is nonetheless apparent that Fuller’s writings on the subject help us to illuminate the content of his legal philosophy in key ways. In addition to the story of the tyrant lawmaker that I now review, this is also evident in the following comment from his working papers for the freedom project, where Fuller explains why he always included J S Mill’s essay, “On Liberty”, in his class materials for the study of jurisprudence:

“My reason for including Mill’s essay in courses ostensibly devoted to the training of lawyers lay in an increasing conviction that the most fundamental problem of law – and indeed of all human organization – was that of freedom. If the object of the law is to impose “those wise restraints that make men free,” then the thoughtful lawyer must be concerned, not merely with restraints, but with the ways in which what appear to be

imaginary lawmaker of Fuller's 1968 essay on freedom succeeds rather than fails in his lawgiving activities, with the key to this success lying in his recognition of the extent to which the practice of lawgiving necessitates respect for the agency of the legal subject.

The protagonist of the story is not a monarch like his predecessors but a tyrant who, "bent entirely on pursuing his own interests" and planning to "employ his subjects as tools for the realization of his purposes", sets out to govern his subjects through law.<sup>112</sup> Although he commences his lawgiving project with entirely selfish intentions, the tyrant soon arrives at the insight that in choosing to pursue his project of governance through law, "he does not necessarily increase his own freedom of action by restricting that of those under his rule", because he "cannot effectively use another human being as a tool without according him some power of choice, some opportunity to use his own discretion".<sup>113</sup> Thus, as Fuller tells it, the tyrant realizes that from the standpoint of efficiency in achieving a goal, "some discretion and choice must ... be accorded the human agent".<sup>114</sup>

On still further reflection, however, the tyrant comes to realize that beyond minimum choice and discretion,

... a human being will serve as a more effective tool if he is happy and satisfied with his role. To be happy and satisfied he must feel that he is serving not only the ends of another, but his own as well. When this consideration is taken into account, our tyrant may be led to enrich still further the choices open to his subjects.<sup>115</sup>

---

restraints may be made to serve human freedom": Undated and untitled note, The Papers of Lon L. Fuller, Harvard Law School Library, Box 16, Folder 2 ("Notes on Freedom").

<sup>112</sup> Lon L. Fuller, "Freedom as a Problem of Allocating Choice", (1968) 112(2) Proceedings of the American Philosophical Society 101 at 105 [Fuller, "Freedom as a Problem of Allocating Choice"]. Fuller comments, however, that his tyrant is an uncommon one, in so far as he seeks to establish new social institutions rather than to pervert and exploit those in existence: at 105.

<sup>113</sup> *Ibid.* This line of reasoning is very similar to Fuller's argument, advanced in his 1965 essay "Irrigation and Tyranny", about the minimal but nonetheless essential reciprocity that characterizes the managerial relationship: Lon L. Fuller, "Irrigation and Tyranny", (1965) 17 Stanford L. Rev. 1021. See further my discussion of Fuller's account of managerial direction in Chapter 4.

<sup>114</sup> Fuller, "Freedom as a Problem of Allocating Choice", *supra* note 113 at 105-106.

<sup>115</sup> *Ibid.* at 106.

Fuller goes on to suggest that it might yet further occur to the tyrant that “it would be well to accord some opportunity to his subjects to enhance and expand their powers beyond those demanded by the immediate job they are doing for their master”, because it seems “reasonable to suppose that they will be happier and more efficient if they are given a chance to improve themselves”.<sup>116</sup> Fuller then concludes the story with the following comment:

Our tyrant, you will observe, has found himself caught in a kind of progression. He started by seeking efficiency, he then moved at least some way toward doing what is essential for human happiness, and he may end by fostering the conditions most conducive to human development. If he traverses fully the three steps of this progression he will, of course, finish by ceasing to be a tyrant. How far he moves toward that outcome will depend less on the balance of good and evil in his soul than it does on the power of his brain to discern the conditions essential for the success of what is, by its very nature, a cooperative enterprise.<sup>117</sup>

The most striking feature of this story, in my view, is how it seems to recast the lessons learned from Rex about the essential conditions of lawgiving into lessons about the imperatives of treatment that inhere in legality. To fully appreciate how and why this move is so suggestive for our understanding of Fuller’s legal philosophy, it is helpful to retrace the key points of development between the three tales of lawgiving that emerge from Fuller’s writings over the period of his exchanges with Hart.

In his 1958 reply to Hart, as will be recalled from Chapter 2, Fuller’s unnamed absolute monarch is “utterly selfish” and seeks “solely his own advantage” in purporting to establish a relationship of law with his subjects. This relationship fails, however, because the monarch does not properly understand the responsibilities that attend the creation and administration of a successful legal system. By contrast, King Rex in *The Morality of Law* is not portrayed as bent on pursuing his own selfish aims, but rather on making his name in history as a great lawgiver. In Rex, therefore, we meet a lawgiver who meant well – at least initially – but who, like his predecessor, did not fully appreciate that to

---

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.* Rather than reproducing an apparent error in the above quote, I have removed the term “engineering” from the sentence that commences with the words “[h]e started by seeking engineering efficiency...”.

bring about legal order one must discipline one's lawgiving activities with an understanding of the principles of lawmaking.<sup>118</sup>

In a number of ways, then, the story of the tyrant completes the message that Fuller sought to convey through the stories of Rex and his unnamed predecessor. The tyrant, being a tyrant, is not benevolently motivated like Rex, and that his story is meant to be a different one than Rex's is clear from this fact alone. His attitude towards law is purely instrumental. But once the tyrant enters the province of legality, he finds that his instrumental motivations can occupy only one part of the picture of what he must understand in order to govern successfully through law. Most importantly the tyrant finds, to his apparent surprise, that certain demands of treatment, of lawgiver towards subject, qualify the pursuit of his instrumental aims through law. He also learns that these demands ask more and more of him, by way of respect for the agency of his subjects, as his legal order improves its position along the continuum that marks the journey from a minimally constituted legal order to a perfectly constituted one.

Thus a crucial difference between the stories of Rex and the tyrant is the explicit message that we receive from the latter about how the demands of actually instantiating legal order qualify the instrumental potential of law *because* of how such instrumental intentions do not always correspond with the respect for agency that is intrinsic to the success of legal order. In crafting the tale of the tyrant in this way, Fuller places the agency of the legal subject at the centre of the story of how legal ordering arises, is sustained, and made successful. In doing so, moreover, he shows us how we can and should look at the phenomenon of legal order from both the perspective of the lawgiver and the perspective of the subject.<sup>119</sup> Through the story of the tyrant, therefore, we are left with the suggestion that a true tyrant cannot be a true lawgiver, because of how the essence of

---

<sup>118</sup> That is, after his various failed attempts to introduce a code of law, none of which satisfied the needs of his subjects, Rex "decided to teach them a lesson" and instructed his experts to stiffen all the requirements of his laws and to add a new, long list of crimes for such acts as not arriving at the throne within ten seconds of being summoned: see Fuller, *The Morality of Law*, *supra* note 2 at 36.

<sup>119</sup> Indeed, one of the most valuable aspects of the story of the tyrant is how it brings the legal subject into the centre of the analysis, even though that analysis seems to be speaking to the needs of the lawgiver.

tyranny consists in an ambition to control human agency in a way that law, by virtue of its form, renders unattainable.

## 4 Conclusion

Imaginary tales of lawmaking monarchs and tyrants can obviously only take us so far. They are merely stories and, as such, can only be suggestive of what we need to understand about the modes of restraint that attend the enterprise of lawgiving. A turn towards practice to test Fuller's claims about the normative commitments that a legal order is thus clearly needed.<sup>120</sup>

Still, the three stories about lawgiving that I have just reviewed highlight certain key features of the message that Fuller sought to convey about the relationship between a functioning legal order and the quality of the social position occupied by those who are subject to it. Above all, the stories suggest that if you wish to govern in a manner that respects the agency of the subject, you will need to govern through law. But, by the same token, the stories also suggest that if you choose law – regardless of your motivation for doing so – you will find it necessary to respect the legal subject as an agent.<sup>121</sup>

These three stories thus also teach us something important about the content of Fuller's objections to the positivist project. They suggest that an instrumental conception of law

---

<sup>120</sup> I elaborate this point further in my concluding comments in Chapter 5.

<sup>121</sup> This idea that the lawgiver's motivation for using law is not important in Fuller's account is something that is largely overlooked by his critics. Fuller's point, that is, is that to opt into the distinctive enterprise of lawgiving is also to take on an obligation to respect the legal subject as an agent. The lawgiver's motivation for conveying this respect might be anything but benevolent. For example, the lawgiver might simply convey that respect for no other reason than to secure the fidelity necessary to succeed in her pursuit of a given aim through law. Still, by opting to pursue those ends through law, rather than through some other means of ordering, the lawgiver confronts the necessity of treating the legal subject with respect. This point is captured especially well by Jeremy Waldron who, when interpreting Fuller's thought, has suggested that from the point of view of a lawgiver, respect for the circumstances of the legal subject is "a natural price to pay to secure loyalty from people who have a fairly robust sense of themselves as agents": see Waldron, "Why Law", *supra* note 104 at 280-281. Waldron has reiterated this point more recently in his suggestion that law itself "may be an enterprise unintelligible apart from the function of treating humans as dignified and responsible agents capable of self-control", and that "unscrupulous rulers must make what they can of that fact when they decide, for reasons of their own, to buy into the 'legal' way of doing things": Waldron, "Hart's Equivocal Response", *supra* note 9 at 1167. See also my own account of how respect for agency simply comes with the territory of legality in Kristen Rundle, "The Impossibility of an Exterminatory Legality: Law and the Holocaust", (2009) 59 U. T. L. J. 65 at 107.



fails, by its very nature, to adequately interrogate the relationship that exists between the form of law and the agency of the legal subject. From this we might also extrapolate, as indeed is suggested throughout Fuller's responses to Hart, that an instrumental conception also necessarily avoids the question of what it is, morally, that distinguishes law from other modes of ordering.

This question of what distinguishes law from other modes of ordering, and how this distinctiveness relates to law's moral quality, is a central theme of Fuller's 1969 "Reply to Critics". Thus, it is to this important text to which I turn in Chapter 4 so as to complete my reading of how Fuller conveys the message of his legal philosophy in his exchanges with Hart.

## Chapter 4

### Fuller's replies

#### 1 Introduction

Hart's review was not the only sharply critical response that met *The Morality of Law*. Marshall Cohen and Ronald Dworkin also weighed in against Fuller's claims in writings associated with a symposium at Villanova Law School in 1965 that was dedicated to Fuller's book.<sup>1</sup> Like Hart, Cohen and Dworkin criticized *The Morality of Law* for how Fuller's position confused questions of morality with questions of efficacy. Equally like Hart, Cohen and Dworkin also suggested that Fuller offered no compelling argument in support of his contention that observance of the internal morality of law is somehow connected to the moral quality of legal ends.

Fuller's reply to Cohen and Dworkin is rarely considered among commentaries on his legal philosophy. This is unfortunate, as the essay gives us further insight into how Fuller developed and clarified his understanding of the moral dimensions of the form of law in response to his critics' objections. For example, Fuller responds to Cohen and Dworkin's charge that his arguments confuse efficacy and morality by asking whether it really is the case that morality has no place in an analysis of means, or that one cannot act morally in a given context unless one is in a position "to pass some *final* judgment on the

---

<sup>1</sup> See generally (1965) 10 Villanova L. Rev. 623-678. Dworkin's response to *The Morality of Law* requires special attention, as this response traverses two separate essays: see Ronald M. Dworkin, 'The Elusive Morality of Law', (1965) 10 Villanova L. Rev. 631 [Dworkin, "Elusive Morality"], as well as Ronald Dworkin, 'Philosophy, Morality and Law – Observations Prompted by Professor Fuller's Novel Claim', (1965) 113 U. Penn. L. Rev. 668 [Dworkin, "Observations"]. These responses are striking for how, unlike Hart, Dworkin does explicitly mention Fuller's argument about the conception of the person implicit in legality when he explains that Fuller's eight canons assume a view of man as a "responsible agent", and that observance of these requirements upholds "man's dignity as a responsible agent": Dworkin "Observations" at 672. Dworkin's reading of this claim, however, is clearly limited by how he understands it as a reply to Hart on the assertion that observance of the internal morality of law is compatible with great iniquity. The consequence of this is that he is able to dismiss the importance of Fuller's claims about the conception of the person implicit in legality because they "do not involve any assertion of a necessary connection between law and substantive morality", nor conflict "with the classic or prototypical positivist position that law and morals are conceptually distinct": *ibid.* at 671, 673. Like Hart, moreover, Dworkin ultimately chooses to evaluate the moral significance of the internal morality of law in instrumental terms in his description of Fuller's eight canons as "strategic in the sense that some level of compliance is necessary to achieve whatever governmental purpose a legislator might have in mind": Dworkin, "Elusive Morality" at 632. For a discussion of Cohen's review and Fuller's reaction to it, see Chapter 1, above, at 27, note 90.

implications and ultimate consequences of my act?”<sup>2</sup> Even if the principles of legality may be regarded “simply as a means for achieving a certain kind of order”, Fuller argues, it is nevertheless the case that, once attained, this order “commands a moral force in the lives of men that is subject to abuse”.<sup>3</sup> Thus, even if these principles are regarded as merely a means for achieving a certain kind of order, they will still implicate a commitment on the part of the legislator “not to frustrate or undermine” the citizen’s faithful observance of their duty toward the law.<sup>4</sup> This, Fuller argues, is why the “special morality that attaches to the office of law-giver and law-applier” is one that is meant to keep the occupant of that office “from undermining the integrity of the law itself”.<sup>5</sup>

As for the suggestion that he offers no compelling argument in support of his claims that there is a connection between the internal morality of law and the moral quality of legal ends,<sup>6</sup> Fuller replies to Cohen and Dworkin by first noting that he has never asserted “that there is any logical contradiction in the notion of achieving evil, at least some kinds of evil, through means that fully respect all the demands of legality”.<sup>7</sup> Indeed, he acknowledges that it is clearly possible, by stretching the imagination, to conceive the case of “an evil monarch who pursues the most iniquitous ends but at all times preserves

---

<sup>2</sup> Lon L. Fuller, “A Reply to Professors Cohen and Dworkin”, (1965) 10 Villanova L. Rev. 655 at 657 (Fuller’s emphasis) [Fuller, Reply to Cohen and Dworkin].

<sup>3</sup> *Ibid.* at 657.

<sup>4</sup> *Ibid.* This comment is echoed in one of Fuller’s working notes for the “Reply to Critics”, where Fuller observes that

“... law to be effective must project itself into a situation where there is a general expectation that there are rules and they will be applied with moderate faithfulness to their conduct. Whether people obey through moral duty, fear, or habit is in this sense immaterial. Still the obligation of the role of lawgiver is not to exploit expectations, habits, attitudes ... to take advantage of them, while undermining them”: Undated document titled “Is there such a thing as legal morality?”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Notes for the “Reply to Critics”).

In his reply to Cohen and Dworkin Fuller elaborates this point by referring to the work of the child psychologist Piaget, so as to argue that just as when children play a game they become aware that the possibility of the game depends on a moral commitment to their reciprocal dependence, the same can be said about law: that is, that its very possibility lies in “an interaction between law-giver and law-subject, in which each has responsibilities toward the other”: Fuller, “Reply to Cohen and Dworkin”, *Ibid.* at 661. See further my discussion of Fuller’s essay “Irrigation and Tyranny” in section 2.1, below.

<sup>5</sup> Fuller, “Reply to Cohen and Dworkin”, *ibid.* at 660. Fuller continues to explain how “that undermining can come about in many ways, through conscious abuse, through sloth and indifference, and even through reading books on jurisprudence that depict law as a one-way projection of power downward *and overlook the man at the bottom*”: at 660-661 (my emphasis).

<sup>6</sup> *Ibid.* at 661.

<sup>7</sup> *Ibid.* at 664.

a genuine respect for the principles of legality”.<sup>8</sup> Instead, Fuller responds, the actual claim that he advanced in *The Morality of Law* involves the much more humble contention that when we regard “the prosaic facts of human life”, we will not only see that coherence tends “to have more affinity with goodness than with evil”,<sup>9</sup> but also that in an ordered system of law, formulated and administered conscientiously, there is “a certain built-in respect for human dignity”.<sup>10</sup> Hence his suggestion that it is reasonable to suppose that this respect for human dignity that is inherent to the internal morality of law “will tend to carry over into the substantive ends of law”.<sup>11</sup>

I have offered this brief review of Fuller’s “A Reply to Professors Cohen and Dworkin” as a way of introducing the inquiry of the present chapter because that essay provides a good sense of how engagement with his critics helped Fuller to bring his ideas to clearer expression. Most importantly, in his reply to Cohen and Dworkin lies in how we see Fuller begin to join the threads of his argument that the pursuit of oppressive aims through law will ordinarily be accommodated by debasement of the formal features of law, with his argument that these formal features convey a “built-in” respect for the legal subject.

In the “Reply to Critics” that Fuller appended to the second edition of *The Morality of Law* in 1969, and through which he sought to bring his exchange with Hart and others to close, we gain a much richer sense of where Fuller was heading with this idea.<sup>12</sup> This is because, in the “Reply to Critics”, we see Fuller turn more explicitly to the question of the distinctiveness of the legal form, and the relationship between this distinctiveness and law’s intrinsically moral quality. My primary focus in this chapter, therefore, is to set out

---

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* at 664, citing his previous comments in “Positivism and Fidelity to Law: A Reply to Professor Hart”, (1958) 71 *Harvard Law Review* 630 at 636 [Fuller, “Positivism and Fidelity to Law”]. Fuller formulates the equivalent point in *The Morality of Law* as “[e]ven if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts”: Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) at 159 [Fuller, *The Morality of Law*].

<sup>10</sup> Fuller, “Reply to Cohen and Dworkin”, *supra* note 2 at 665-666.

<sup>11</sup> *Ibid.*

<sup>12</sup> Lon L. Fuller, “A Reply to Critics” in *The Morality of Law* (revised edition), (New Haven: Yale University Press, 1969) [Fuller, “Reply”].

a summary of the claims that Fuller develops in the “Reply to Critics” with a view to showing how these claims consolidate the arguments that he advanced in the writings that I have reviewed in the preceding chapters.

## 2 Fuller’s “Reply to Critics”

As critical reviews of my book came in, I myself became increasingly aware of the extent to which the debate did indeed depend on ‘starting points’ – not on what the disputants said, but on what they considered in unnecessary to say, not on articulated principles but on tacit assumptions.<sup>13</sup>

These opening comments from Fuller’s “Reply to Critics” provide an indication of why his exchange with Hart over the period of 1958-1969 ultimately ended less in an exploration of points of fine detail than in a return to the foundations of thought, stated or unstated, that both sides brought to their exchange.

Fuller begins this evaluation by sketching his own understanding of the basic structure of Hart’s positivism.<sup>14</sup> He commences this analysis by observing that Hart’s project seems to find more satisfaction “in taking things apart than in seeing how they fit and function together”, and thus shows little interest in “discerning the elements of tacit interrelatedness that infuse – though always somewhat imperfectly – what we call, by no accident, a *legal system*”.<sup>15</sup> Thus, the primary problem with the positivist account of law, from Fuller’s perspective, arises from how “the positivist recognizes in the functioning of a legal system nothing that can truly be called a *social dimension*”.<sup>16</sup>

Fuller goes on to suggest that this neglect of the social dimensions of law arises from five basic assumptions, or “starting points”, that shape the positivist creed. The first of these relates to how the positivist sees law as “a one-way projection of authority, emanating

---

<sup>13</sup> *Ibid.* at 189.

<sup>14</sup> *Ibid.* at 191.

<sup>15</sup> *Ibid.* Fuller suggests that this term captures, amongst others, the thought of Hart, Ronald Dworkin, Marshall Cohen and Robert Summers, whose criticisms of *The Morality of Law* reveal “an amazing uniformity in their reactions”, with “whole paragraphs” capable of being transferred “from one discussion to the next without any perceptible break in continuity of thought”: *Ibid.*

<sup>16</sup> *Ibid.* at 193 (Fuller’s emphasis).

from an authorized source and imposing itself on the citizen”,<sup>17</sup> with the consequence that positivist legal philosophy does not perceive as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen.<sup>18</sup> The second relates to the positivist preoccupation with the source of law and how, being oriented principally to the question of who commands legal authority, positivist legal philosophy generally neglects the question of whether there might be limitations contained in the actual enterprise of making and administering that law.<sup>19</sup>

The third and fourth starting points of the positivist creed concern how the positivist account of law does not view the lawgiver “as occupying any distinctive office, role or function”, with the result that the positivist recognizes “nothing that could be called a “role morality” as attaching to the performance by the lawgiver of his or her functions.”<sup>20</sup> According to Fuller, however, the fifth and most central article of faith in the credo of positivism is the positivist’s apparent belief that “clear thinking is impossible unless we effect a neat separation between the purposive effort that goes into the making of law and the law that in fact emerges from that effort”.<sup>21</sup> Thus, as he suggests later in the “Reply”, the positivist quest for analytical clarity necessarily resists consideration of “the general problem of achieving and maintaining legality”.<sup>22</sup>

This account of the foundational assumptions of positivism provides the background for Fuller’s examination of the enduring impasse between him and his critics concerning the place of the idea of purpose within an account of law. Fuller begins this aspect of his reply by noting that he and his critics appear to share the view that the declaration that

---

<sup>17</sup> *Ibid.* at 192.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* Fuller adds that intramural disputes within the school of legal positivism “relate almost entirely to the problem of defining the principle or principles by which the right to create law is allocated”, whether caught by Austin’s “sovereign one or many enjoying the habit of obedience”, Kelsen’s postulated “Grundnorm”, or Hart’s “empirically” grounded “Rule of Recognition”.

<sup>20</sup> *Ibid.* at 192, 193. This “role morality”, Fuller explains, can be thought of as a type of code of ethics that attends the task of lawgiving, and which sets forth “special standards applicable to the discharge of a distinctive social function”: at 193. This discussion of role morality and its absence within the positivist clearly develops Fuller’s criticism of how positivism overlooks law’s connection to notions of ethos and trusteeship that I discussed in Chapter 3, above, at 82.

<sup>21</sup> *Ibid.* at 193.

<sup>22</sup> *Ibid.* at 242.

law exists is contingent, in some important sense, on that putative law conforming to “certain standards that will enable it to function meaningfully in men’s lives”,<sup>23</sup> or what Fuller calls the internal morality of law. Where he and his critics differ greatly, however, is in their understanding of “*to what end* law is being so defined that it cannot exist without some minimum respect for the principles of legality”.<sup>24</sup>

The contest between him and positivism thus defined, Fuller moves to address his critics’ suggestion that his designation of the principles of the internal morality of law as a morality “betrays a basic confusion between efficacy and morality”.<sup>25</sup> The first remark that Fuller makes in response to this recurring criticism is that the criticism itself contains some significant obscurities, most notably, a lack of clarity about what exactly is meant by the idea of efficacy, and how this criteria is to be applied “to the creation and administration of a thing as complex as a whole legal system”.<sup>26</sup> Thus, with a view to navigating the apparent obscurity of the positivist position on the question of how the idea of efficacy relates to a legal system, Fuller suggests two possible explanations for why his critics reject his argument that the eight principles of lawgiving are moral in nature.

The first possible explanation, according to Fuller, lies in his critics’ apparent belief that the existence or not of law is a matter of neutral moral significance. This view, he observes, is also the likely cause of why positivists equally ignore the relationship between the stability afforded by legal order and moral conduct more generally.<sup>27</sup> As he explains it,

---

<sup>23</sup> *Ibid.* at 198.

<sup>24</sup> *Ibid.* (Fuller’s emphasis).

<sup>25</sup> *Ibid.* at 200-201, adding that, according to these critics, if there is such a thing as an internal morality of law-making and law-administering, then “there must also be an internal morality of even the most disreputable and censurable of human activities”. With respect to these “censurable activities”, Fuller refers to Cohen’s example of a lapse in morality when a would-be assassin forgets to load his gun, Dworkin’s similar example of an inept attempt at blackmail, and Hart’s example of the ‘morality of poisoning’: at 201.

<sup>26</sup> *Ibid.* at 202. Fuller thus describes his own position as confronting “the most unwelcome task of demonstrating that my critics’ rejection of an internal morality of law rests on premises that they have not themselves brought to expression in their writings”: at 204.

<sup>27</sup> *Ibid.* at 205. Fuller acknowledges, however, that positivists do pay some attention to the converse influence of morality on law: at 204.

What is generally missing in these [positivist] accounts is any recognition of the role legal rules play in making possible an effective realization of morality in the actual behavior of human beings. Moral principles cannot function in a social vacuum or in a war of all against all. To live the good life requires something more than good intentions, even if they are generally shared; it requires the support of firm base lines for human interaction, something that – in modern society at least – only a sound legal system can supply.<sup>28</sup>

Thus, Fuller goes on to argue, this link between the “existence and conscientious administration of a legal system” and “the realization of moral objectives in the affairs of life” clearly militates against the view that the existence or not of a legal system is a matter of neutral moral significance.<sup>29</sup> Moreover, the principles of legality assume their moral significance precisely because they constitute the “special morality” relevant to the design, creation, and maintenance of these stabilizing structures.<sup>30</sup> Or, at least, and alluding to the example provided by Hart in his review of *The Morality of Law*, the office of the lawgiver “deserves some more flattering comparison than that offered by the practices of the thoughtful and conscientious poisoner who never forgets to tear the chemist’s label off before he hands the bottle to his victim”.<sup>31</sup>

The second reason that Fuller thinks underpins his critics’ rejection of the designation of the eight principles of the internal morality of law as a morality arises from how these critics give no recognition to the relationship of reciprocity between lawgiver and subject that is constitutive to a functioning legal order. Instead, Fuller suggests, his critics seem to think that law “should not be viewed as the product of an interplay of purposive

---

<sup>28</sup> *Ibid.* at 205. As I observed in Chapter 2, Fuller also advances this point – though humorously – in the closing lines of his allegory of King Rex. There he says that the first act of Rex’s successor, Rex II, “was to announce that he was taking the powers of government away from the lawyers and placing them in the hands of psychiatrists and experts in public relations. This way, he explained, people could be made happy without rules”: Fuller, *The Morality of Law*, *supra* note 9 at 38. See also Fuller’s observation in his working notes for the “Reply”, where he suggests that “law provides the minimum of security and stability essential for the realization of any moral idea, makes moral conduct possible”: Undated document titled “Such a thing as legal morality?”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Notes for the “Reply to Critics”)(Fuller’s emphasis).

<sup>29</sup> Fuller, “Reply”, *supra* note 12 at 206.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*



orientations between the citizen and his government” but rather as “a one-way projection of authority, originating with government and imposing itself on the citizen”.<sup>32</sup>

Fuller’s elaboration of this last point forms the background for his analysis of the distinction between law and managerial direction that represents that most important development of his position in the “Reply”. Fuller begins this analysis by noting how managerial direction and law share much in common, most notably, a shared concern to direct human activity.<sup>33</sup> He then explains, however, that the two forms can nonetheless be readily distinguished when it is realized that the law-abiding citizen does not, like the managerial subordinate, “*apply* legal rules to serve specific ends set by the lawgiver, but rather *follows* them in the conduct of his own affairs”.<sup>34</sup> The distinction between law and managerial direction can equally be seen in how the directives of a managerial system primarily regulate the relations between the subordinate and his superior, while the rules of a legal system “normally serve the primary purpose of setting the citizens’ relations with each other and only in a collateral manner his relations with the seat of authority from which the rules proceed”.<sup>35</sup>

Fuller then develops these general observations into a much more illuminating argument when he compares the implications of the eight principles of legality for managerial direction as opposed to law. Five of the eight principles of the internal morality of law, Fuller suggests, find a logical home in the managerial context. For example, some principle of publicity must apply to the managerial relation if “the superior is to secure what he wants through the instrumentality of the subordinate”.<sup>36</sup> Moreover, the manager’s directives must be reasonably clear, free from contradiction, possible of

---

<sup>32</sup> *Ibid.* at 204.

<sup>33</sup> Fuller also explains how the two forms of ordering share a common vocabulary in their association with terms like “authority”, “orders”, “control”, “jurisdiction”, “obedience”, “compliance” and “legitimacy”: *Ibid.* at 207.

<sup>34</sup> *Ibid.* at 207.

<sup>35</sup> *Ibid.* at 207-208 (Fuller’s emphasis). A few pages later in the “Reply”, Fuller describes the distinction between law and managerial direction in terms of how law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but rather a matter of “providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as guardian of the integrity of this system”: *ibid.* at 210.

<sup>36</sup> *Ibid.* at 208.

execution and not changed so often as to frustrate the efforts of the subordinate to act on them. Otherwise, the efficacy of the managerial enterprise in the pursuit of its desired ends might be seriously impaired.<sup>37</sup>

Fuller then explains, however, that the same compatibility between the internal morality of law and managerial direction cannot be established for the remaining principles of generality, non-retroactivity, and congruence between official action and declared rule. With respect to the principle of generality, this is because while this requirement might serve expediency in the managerial context, “the subordinate has no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order”.<sup>38</sup> It follows from this that the principle that the actions of the superior conform to previously announced rules is equally inapplicable, because there can be no expectation on the part of the subordinate that the managerial enterprise will be informed by a commitment to governance through general rules in the first place.<sup>39</sup> As for the principle against retrospectivity, Fuller suggests that the incompatibility of this principle with managerial direction can be readily explained by the fact that “no manager retaining a semblance of sanity would direct his subordinate today to do something on his behalf yesterday.”<sup>40</sup>

It seems, then, is that what is *not* required to produce a functioning managerial relation on Fuller’s account is observance of those of the eight principles of the internal morality of law that protect an expectation on the part of the subordinate that the actions of the superior will be consistent with – and thus also constrained by – previously declared intentions that are generally applicable to all. Fuller clarifies, however, that this does not mean that there are no elements of interaction or reciprocity within the managerial relation.<sup>41</sup> A superior who overburdens those under his direction, for example, may find himself faced with a problem of morale, and thus might find it necessary to introduce a certain level of reciprocity of interaction between himself and his subordinate if he is not

---

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* at 208-209.

<sup>40</sup> *Ibid.* at 209.

<sup>41</sup> *Ibid.*

to jeopardize the pursuit of his goals. Yet this kind of “tacit reciprocity of reasonableness and restraint”, Fuller argues, is not reciprocity in the proper sense, but rather merely something “collateral to the basic relation of order-giver and order-executor”.<sup>42</sup>

The relatively insignificant place of reciprocity within the managerial form thus stands in clear contrast to the implications of the eight principles for a system of law, precisely because “the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order”.<sup>43</sup> This can be seen, above all, when the underlying rationales for the requirements of generality, non-retroactivity and congruence between official action and previously announced rule – requirements that hold no relevance for the form of managerial direction – are considered. Among these three principles, Fuller places particular emphasis on how the distinction between law and managerial direction is revealed in the principle of congruence, given that the very essence of the rule of law consists in a commitment by government to faithfully apply those rules that it has previously declared as determinative of the citizen’s rights and duties.<sup>44</sup>

It is against this background that Fuller brings his analysis of the distinction between law and managerial direction to his criticisms of legal positivism. The positivist vision of law, Fuller argues, aligns much more closely with the idea of managerial direction than it does with law because of how it overlooks the “horizontal element” that constitutes a functioning legal order.<sup>45</sup> Hart’s analysis of the foundations of legal order in *The Concept of Law*, he suggests, is a case in point, because the only departure from a managerial frame of reference to be found in that analysis lies in Hart’s discussion of the “germ of

---

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> “If the Rule of Law does not mean this, it means nothing: *Ibid.* at 209-210. Fuller also adds that it is equally necessary that the rules upon which this law depends take the form of general declarations if they are to do their work in furnishing “baselines for self-directed action”: at 210. As for his explanation of the significance of the requirement of non-retroactivity to a model of law, as opposed to its irrelevance to a model of managerial direction, Fuller essentially restates the argument put in Chapter 2 of *The Morality of Law* with respect to how retrospective lawmaking can in some instances serve the cause of legality, such as by remedying “abuses and mishaps in the operations of a legal system” that may impair the principle of treating like cases alike: at 211.

<sup>45</sup> *Ibid.* at 233.

justice” that is contained in the procedural desideratum that like cases be given like treatment.<sup>46</sup> Otherwise, Fuller argues, there is nothing in Hart’s account of the foundations of legal order to suggest that government has any obligation towards the citizen to realize this germ of justice in the way it makes and administers law.<sup>47</sup> Nor, relatedly, is there any suggestion that the citizen’s voluntary cooperation in obeying law, which Hart also concedes to be essential to the functionality of a legal system,<sup>48</sup> must be “matched by a corresponding cooperative effort on the part of government”.<sup>49</sup> Thus, Fuller concludes, what is absent from Hart’s positivism, and what causes it to represent the form of managerial direction more than the form of law, is any acknowledgment of how maintaining a legal system in existence “depends upon the discharge of interlocking responsibilities – of government toward the citizen and of the citizen toward the government”.<sup>50</sup>

The thrust of Fuller’s response to positivism in the “Reply”, then, is that the very idea of law cannot be explained without taking into account the elements of reciprocity that constitute and maintain a legal order:

The commitment implied in lawmaking is not, then, simply an element in someone’s “conceptual model”; it is a part of social reality. I have been emphasizing that obedience to rules loses its point if the man subject to them knows that the rulemaker will himself pay no attention to his own enactments. The converse of this proposition must also be kept in mind, namely, that the rulemaker will lack any incentive to accept for himself the restraints of the Rule of Law if he knows that his subjects have no disposition, or lack the capacity, to abide by his rules; it would serve little purpose, for example, to attempt a juristic ordering of relations among the inmates of a lunatic asylum. It is in this sense that the functioning of a legal system depends upon a cooperative effort – an effective and responsible interaction – between lawgiver and subject.<sup>51</sup>

---

<sup>46</sup> *Ibid.* at 215.

<sup>47</sup> *Ibid.*

<sup>48</sup> As evidence of Hart’s position on this point, Fuller quotes a passage from *The Concept of Law* in which Hart claims that “if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary cooperation, thus creating *authority*, the coercive power of law and government cannot be established”: *Ibid.* at 216, citing the first edition of Hart’s *The Concept of Law* at 196.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* at 219. Fuller adds that a complete failure in this interaction “is so remote from ordinary experience that the significance of the interaction itself tends to be lost from our intellectual perspective”, and goes on to illustrate the “numberless ways in which the success of law depends on a voluntary collaboration

In a footnote to this discussion of why the distinction between law and managerial direction illuminates the basis of his contest with Hart, Fuller also raises the question of whether Hart's account of law actually succeeds – as Hart himself clearly thinks it does – in moving the positivist position away from its historical basis in coercion. As Fuller recalls from the way that Hart introduced his project in 1958, the major premise of that project is its rejection of Austin's command theory of law in favour of an account that recognizes the importance of rules, and especially the construct of the rule of recognition, to the way in which legal authority comes into being. Fuller's suggestion, then, is that if Hart really wishes to distance his theory of legal positivism from the command conception, then he should equally reject a managerial theory of law. Yet, Fuller observes, there is no recognition of this idea in *The Concept of Law*.<sup>52</sup>

These and the other claims that I have just reviewed connect to a number of other observations about the moral dimensions of a stable legal order that Fuller makes in the "Reply". For example, Fuller comments at one point that even if both lawgiver and subject must contribute to the possibility of a functioning legal order, the heaviest responsibility lay on the lawgiver to do their job right in the first place,<sup>53</sup> and that it is this "onerous and complex responsibility" that he has tried to describe in the phrase "the internal morality of law".<sup>54</sup> At another point, and developing this idea further, Fuller comments on how even if disregard of the principles of legality might cause no immediate harm to any individual, such derogations might nonetheless "inflict damage on the institution of law itself" and, through such infringements, "undermine men's confidence in, and respect for, law generally".<sup>55</sup>

This sense that the stability provided by law connects in some important way to the moral affairs of life more generally is also echoed in the observations that Fuller makes in

---

between the citizen and his government, as well as upon a coordination of effort among the various agencies of government concerned with the making and enforcing of law": at 219-220.

<sup>52</sup> *Ibid.* at 215-216, note 29.

<sup>53</sup> *Ibid.* at 223.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at 221, 222.

response to Hart's contention that the principles of the internal morality of law should be valued only in so far as they contribute to human happiness and other substantive aims of the law.<sup>56</sup> As Fuller explains it, what is missing in this utilitarian position is any acknowledgment of how its meaningful application presupposes "some stability of interactional processes within a society", with this stability itself "heavily dependent upon guidelines furnished by a conscientiously administered legal system".<sup>57</sup>

Finally, much also can be learned about how Fuller understood his contest with his critics from the way that he brings the "Reply" to a close. These closing comments refer directly to the sharp division of opinion between him and his critics with respect to whether "the general problem of achieving and maintaining legality" ought to command the attention of legal philosophers.<sup>58</sup> Thus, with a view to how this question might be explored by others in the future, Fuller concludes his "Reply to Critics" with the hope that

Perhaps in time legal philosophers will cease to be preoccupied with building "conceptual models" to represent legal phenomena, will give up their endless debates about definitions, and will turn instead to an analysis of the social processes that constitute the reality of law.<sup>59</sup>

## 2.1 Observations

---

<sup>56</sup> And that "the utilitarian principle is itself largely capable of taking over all of the functions assigned to the eight principles of legality": *Ibid.* at 237-238.

<sup>57</sup> *Ibid.* at 238. Fuller follows this point with the observation that none of his critics seems willing to pass an adverse moral judgment on the legislator who, through "indifference to the demands of his role, confuses or misplaces the guideposts by which men coordinate their actions": *Ibid.* at 238. This comment echoes a point that Fuller makes to Hart directly in their private correspondence, when he comments that "the lawgiver who deliberately uses retroactive laws to frighten the populace into impotence ... has done something worse than merely impairing the internal morality of law and I would be glad to say that he violated a moral duty": Letter from Lon L. Fuller to H. L. A. Hart, 3 February 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 3, Folder 14 (Correspondence). For a similar formulation of this point see Fuller's letter to Philip Selznick dated 18 August 1965, quoted at page 90, note 106 in Chapter 3, above.

<sup>58</sup> *Ibid.* at 242.

<sup>59</sup> *Ibid.* at 242. Fuller's working notes for the "Reply" reflect some alternate formulations of this point. For example, one document includes a note about how one must "[h]old to the imperfect insights we have attained instead of importing ... specious clarities", adding the comment "[b]e suspicious of philosophies that leave no loose ends for the reader to pick up; that give us whole answers to truncated questions". The document also includes the inscription "good" in handwriting, next to these comments: see undated document titled "Conclusion" (plus, in hand, "What is at stake?"), The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Notes for the "Reply to Critics").

Fuller clearly wrote his “Reply to Critics” with an acute sense of the conflicting conceptions of the value of legal order held by him and his critics. As he understands their position, his critics see the only inherent value of legal order as arising from how it serves the efficacy needs of the lawgiver, with the *moral* value of this efficacy being wholly contingent on the moral quality of the ends being pursued through it. Throughout the “Reply”, however, Fuller holds firmly to his view that the very existence of legal order instantiates moral value, quite apart from its contribution to the efficacy through which legal ends are pursued. This, it is suggested, is because the existence of legal order secures a certain quality of position for the legal subject, vis-à-vis her relationship with the lawgiver. Thus, like the understanding of “good order” that animated his economics project, Fuller presents a view of law in the “Reply” as necessarily bound up with a quality of order that is “just, fair, workable, effective, *and* respectful of human dignity”.<sup>60</sup>

In the “Reply”, Fuller conveys this view principally by emphasizing the way that a functioning legal order implicates a relationship of reciprocity between lawgiver and legal subject. This relationship between lawgiver and subject means that the efforts of both are necessary to create and maintain legal order. Equally, however, Fuller makes apparent in the “Reply” that this collaboration benefits both the lawgiver and the subject: that is, the relationship of reciprocity does not just serve the lawgiver’s position, but also that of the subject. Fuller’s analysis in the “Reply” thus also deepens our understanding of the extent to which the legal subject’s capacity for responsible agency is inherent to the very form of law, because to even enter into a relationship of reciprocity with the lawgiver, the legal subject must be capable of being a responsible agent, able to follow rules, and answerable for her defaults.

We also see in the “Reply” how Fuller’s criticisms of Hart’s positivism are phrased in terms that return repeatedly to the way that Hart’s account of law gives no place to the interaction between lawgiver and subject that is “an essential ingredient of the law

---

<sup>60</sup> Fuller, “Means and Ends” in Kenneth I. Winston, *The Principles of Social Order – Selected Essays of Lon L. Fuller*, (revised edition) (Portland: Hart Publishing, 2001) 61 [Fuller, “Means and Ends”] (my emphasis).

itself.”<sup>61</sup> Moreover, Fuller’s working papers for the “Reply” also criticize Hart’s account of the rule of recognition for the way that it neglects any consideration of how such a rule comes into existence. As he expresses it,

This rule of recognition, the acceptance of “it” is regarded as a sociological datum on which law rests. It eliminates any “becoming”. But this is an illusion. The rule of recognition comes into existence, and is kept in existence by purposive human element. Maintaining the unity and internal coherence of a legal system is a constant problem faced by those who have the responsibility for creating and administering a legal system. They cannot simply look about for some social datum called a rule (or rules) of recognition. They strive to achieve the result it is thought by Hart to impose. Much of their success will rest on tacit or explicit relationships of reciprocity between the different organs concerned with making and administering law.<sup>62</sup>

Fuller’s explicit resort in the “Reply” to this imagery of interaction is what makes his analysis of the distinction between law and managerial direction so illuminating. This, above all, is because that analysis sends a clear message about the way that the subject of a legal order experiences the power of a superior: that is, in a manner that is qualitatively different from a similarly positioned subject within a managerial relation. Fuller’s criticism of the positivist account of law as best understood as an account of managerial direction is thus not just a criticism of how the positivist fails to properly describe the legal reality. It is also a criticism of how the positivist view of law fails to attribute any conceptual importance to the way that the agency of the legal subject contributes to a functioning legal order: or, at least, no conceptual importance beyond the level of agency necessary to convey obedience.

Fuller’s message, then, seems to be that we should refuse to recognize, as a theory of *law*, any account which focuses exclusively on the circumstances of those who wield power to the neglect of those whose lives are affected by it. It thus follows from this that Fuller sees the failure of the positivist account of law as both conceptual and moral in nature: a

---

<sup>61</sup> Fuller, “Reply”, *supra* note 12 at 193 (Fuller’s emphasis).

<sup>62</sup> Document titled “The Rule of Recognition”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (“Notes for the Reply to Critics”).



failure, that is, not only to properly describe legal reality, but also, as he put it in a working note for the “Reply”, to be “animated by a concern for the other fellow”.<sup>63</sup>

Indeed, much can be learned about what Fuller sought to convey by comparing law and managerial direction by visiting these working notes, because some of these notes arguably convey his position more effectively than the final text that he ultimately published. One of the most striking examples of this is a document in which Fuller argues that

A legal system does not succeed or achieve “efficacy” simply because the citizen is willing to obey orders. It succeeds if it creates a stable order by which the citizen can orient his conduct toward his fellows ... a functioning society is its goal, not a subservient populace ready to do what they are told to do. This is not some extra-legal purpose assigned to law from without; it is intrinsic to the very notion that government should act towards the citizen only in compliance with previously announced general rules.<sup>64</sup>

This passage is followed by another in which, invoking the imagery of the managerial relation, Fuller elaborates his understanding of how the requirement of generality that is the defining feature of legal rules affects the social position of the legal subject:

Advance notice not to prepare the subject to be ready to jump, but to enable him to plan his life, and to adjust his relations with his fellows. Generality not a matter of reducing the superior’s work load, but of giving the subject baselines for the conduct of his own affairs.<sup>65</sup>

I highlight these archival notes because they further develop Fuller’s suggestion that the distinctiveness of law lies in the way that its formal features qualify the superior’s power, as that power is experienced by the subject. This intuition is expressed even more explicitly in other archival notes, such as in one where Fuller comments on how his critics “have difficulty in seeing that meeting the demands of legal morality is a difficult thing”.<sup>66</sup> Meeting these demands, Fuller argues, requires “a real effort at identification

---

<sup>63</sup> Undated note titled “External morality relation”, The Papers of Lon L. Fuller, Harvard Law School Library Box 12, Folder 1 (Notes for the “Reply to Critics”).

<sup>64</sup> Undated and untitled document, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Notes for the “Reply to Critics”). The underlining is included in the original.

<sup>65</sup> *Ibid.*

<sup>66</sup> Undated document titled “External morality relation”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (“Notes for the Reply to Critics”).

with the subject of the law”, or, at least, “sufficient concern for the other fellow to be willing to spend the time and energy necessary to take him into account”.<sup>67</sup>

More still can be learned about the message Fuller sought to convey through opposing law and managerial direction by turning to writings that lie outside of his exchanges with Hart. The most striking of these is his 1965 essay “Irrigation and Tyranny”.<sup>68</sup> This essay, with its explicit interest in questions of institutional design, is often associated with the economics project,<sup>69</sup> or with Fuller’s interest in sociology,<sup>70</sup> and thus is rarely, if ever, considered in analyses of Fuller’s legal philosophy. Certainly, given its apparent inquiry into the limits of despotic power and the social conditions that foster or inhibit its growth, “Tyranny” at first glance appears to have little affinity with the criticism of legal positivism found in the “Reply”. Nonetheless, what is common to Fuller’s analysis in both “Tyranny” and the “Reply” is a concern to highlight how all forms of social ordering involve some relationship of reciprocity, and that this reciprocity places limits on the way that power can be exercised.

---

<sup>67</sup> *Ibid.*

<sup>68</sup> Lon L. Fuller, “Irrigation and Tyranny”, (1964) 17 Stanford L. Rev. 1021 [Fuller, “Tyranny”]. Fuller scholars are indebted to Kenneth Winston for including “Tyranny” in his compilation of Fuller’s essays on the themes of economics in *The Principles of Social Order* as an example of Fuller’s thinking on managerial direction.

<sup>69</sup> There is evidence among Fuller’s working papers that suggests that he was thinking about the distinction between law and managerial direction much earlier than when he addressed it explicitly in his 1969 “Reply”, and that this engagement was part of his intended revision of Chapter VI (“The Principles of Order”) of his text, *The Problems of Jurisprudence* into “The Principles of Economics”. The archive of Fuller’s papers for this project contains several pages of rough notes, each of which is annotated in hand at the top with ‘L/MD’, and contains content relevant to his inquiry into the distinction between law and managerial direction. The following comment from these notes is especially instructive:

“If we think of law after model of military command or managerial direction, then to accomplish the task set by the commander, the subjects must obey and this duty of obedience derives from the fact that someone must be in command, from the fact that all must pursue effectively a single general goal. But if ‘law’ serves to organize men’s interactions with one another, then the moral force of law lies, not in that it comes from above as a command directed toward some ‘social’ goal, but from its necessity as an organizing principle of men’s interrelations.”

Undated and document titled “Re ‘anarchism’ of my views”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 10, Folder 12 (“The Problems of Jurisprudence”).

<sup>70</sup> In correspondence with Philip Selznick, Fuller describes “Irrigation and Tyranny” as “the most explicitly ‘sociological’ thing I have yet written”: Letter from Lon L. Fuller to Philip Selznick, 24 May 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 7, Folder 6 (Correspondence).

Fuller begins “Tyranny” with an overview of the thesis that he seeks to challenge and reject: that if one surveys the history of mankind and examines the archeological evidence from prehistoric times, one will find that the achievement of a system of irrigation is normally accompanied by a political order of tyranny.<sup>71</sup> Fuller sees this thesis as presenting an occasion to examine “certain fundamental problems of method and of theory that are shared by law, sociology, economics, political science and social psychology” relating to an alleged distinction between “formal” power, such as rules of law, property rights, and other “formal aspects of social structure”, and “real” power, by which Fuller means the power that inheres in human beings, and not in the fragile forms of legal or political entitlement.<sup>72</sup> The problem with this alleged distinction, as Fuller sees it, is that it overlooks the structural elements that are present in real as well as in formal power.<sup>73</sup> His elaboration of this point invokes an image of a relationship between a superior and a subordinate which is designed to show how every kind of social power “is subject to an implicit constitution limiting its exercise”:<sup>74</sup>

When we say that A has power over B we do not mean simply that it lies within A’s capacity to destroy B; even a lunatic with an axe may have this pointless power. When we speak of power as an aspect of social relations, we mean that the power-holder, A, while allowing B to continue to function in some sense as a human being, has the capacity to control B’s actions in certain respects. In other words, A is in a position to take advantage of B’s capacity for self-direction and to shape B’s exercise of that capacity for purposes of his own, which may of course include that of benefiting B. The fact that A must leave in the addressee of his power some remnant at least of his capacity for self-direction introduces into every power relation an element of interaction or reciprocity, though the reciprocity in question may be most unwelcome to A and so attenuated as to afford B little consolation for his position of subservience. Nevertheless, this element of reciprocity is always present and may under changing conditions grow in force.<sup>75</sup>

---

<sup>71</sup> That thesis is advanced by Karl Wittfogel in *Oriental Despotism – A Comparative Study of Total Power* (New Haven: Yale University Press, 1957), and Fuller summarizes it as follows: “The situation in Wittfogel’s book then comes to this: successful irrigation requires constructions on a scale so large that no one can accomplish them but the government. The government, accordingly, brings into being and then itself operates the whole vast machinery of dams, canals, and aqueducts by which water is collected and then brought to the cultivated fields. This is the situation in which Wittfogel asserts that we may normally expect the government to be despotic”: Fuller, “Tyranny”, *supra* note 68 at 1023.

<sup>72</sup> *Ibid.* at 1025.

<sup>73</sup> *Ibid.* at 1026.

<sup>74</sup> *Ibid.* at 1027.

<sup>75</sup> *Ibid.*

The idea conveyed in this passage is that there is a continuum of possibilities that define different relationships of power, with the lower end of this continuum reflecting something akin to the paradigm case of managerial direction.<sup>76</sup> Although Fuller suggests that some minimal reciprocity between participants is necessary if this managerial form is to function, the position remains that the very design of managerial direction is oriented solely to the needs and circumstances of the superior. Like his arguments in the “Reply”, then, Fuller here presents the form of managerial direction as envisaging those on the receiving end of its governance as no more than a means for effecting a superior’s purposes. If the agency of the subject is to be respected under such a model, therefore, the superior must be benevolently motivated to secure this end. Otherwise, these actors are to be acted upon and directed towards another’s purposes, with this use of their capacity for self-direction limited only by the “tacit reciprocity of reasonableness and restraint” necessary for the success of the superior’s endeavour.<sup>77</sup>

We know from the “Reply”, however, as well as from the writings that precede it, that in Fuller’s view a *legal* order, in order to be such, must envisage its subjects in a rather different way. This is not because the ruler of a legal order is by definition more benevolently motivated than the superior in the managerial relation, but rather because the form through which legal order is expressed depends on this view of, and treatment towards, the legal subject.<sup>78</sup> In “Tyranny” we see Fuller take this point further when he

---

<sup>76</sup> A note in Fuller’s working papers for his “Problems of Jurisprudence” project also captures this point about the necessity of limiting power in order to effectuate it:

“Moment of military victory.

Cf. prison, or work camp, Minimum reciprocity necessary to make men want to live.

Cf. A has power over B, C, D, and E.

To effectuate it must limit it: May say to B, cut this wood, if you do a good job, all right; if a bad job, I’ll cut your head off.

If this rule is mere words, means nothing, A does not have any effective power over B, C, D etc, Must impose rules on himself.

Sources of power, complex, and trace back to shared ends and reciprocity”:

Undated and untitled note containing an observation on “power”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 10, Folder 12 (“The Problems of Jurisprudence”).

<sup>77</sup> Yet, as we learned from the “Reply”, this tacit reciprocity must at least be sufficient to avoid a situation where the superior undermines morale to such an extent as to thwart his endeavor entirely: Fuller, “Reply”, *supra* note 12 at 209.

<sup>78</sup> This idea is captured especially powerfully in a note from Fuller’s working papers for the “Reply to Critics” which states:

“When government becomes law, reciprocity becomes explicit ... not the dim, tacit reciprocity ... if you hurt me too much, I may rebel”:

situates his discussion of the alleged distinction between real and formal power within the debates of legal philosophy. This analysis is striking for how it echoes his criticism, in *The Morality of Law*, of Hart's failure to make any provision within the positivist account for the withdrawal of power in the event of its abuse. Yet in "Tyranny", this point is linked directly to the formal features of law, rather than to the more general statement we receive in the "Reply" about Hart's neglect of the interlocking responsibilities between citizen and government that constitute a functioning legal order. As Fuller elaborates it, in literature of jurisprudence

... law is generally defined as consisting of those rules that emanate from some human source that is itself regarded as formally authorized to enact or declare law. In the absence of explicit constitutional limitations, this human source can enact anything it sees fit into law. Its laws may be wise or foolish, intelligible or obscure, just or unjust, prospective or retrospective in effect, general or specific in their coverage, published or unpublished etc. In all this variety, it is assumed, there is no structural constancy, except that imposed by the formal rule which identifies the authorized source of law. But this view overlooks the fact that there are what may be called informal limitations implicit in any attempt to subject human conduct to the control of general rules. For example, if rules are to be followed they must in some manner or other be published or made available to their addressees. Again, if control by rules is to be established there must be at least some general rules, and not a haphazard and patternless rain of discrete interventions by government in the life of its citizens. (Neither of these 'informal' compulsions, it may be remarked, finds any explicit expression in the formal charter of our national government, the Constitution of the United States.)<sup>79</sup>

That the achievement of such order must itself require experience of a moral environment conducive to the commitments necessary to sustain it is an idea that Fuller also gestures to later in "Tyranny", when he observes that

... if humanity has over the centuries shown some slight capacity to outgrow its inclination towards and its dependence on despotism, this growth reflects not only the increasing availability of social alternatives to despotic rule, but also an

---

Undated document titled "Is there such a thing as legal morality?", The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1, ("Notes for the Reply to Critics").

<sup>79</sup> Fuller adds in a footnote that "I have attempted an analysis of the 'informal' compulsions that are explicit in 'the enterprise of subjecting human conduct to the governance of rules' in Fuller, *The Morality of Law*": see "Tyranny", *supra* note 68 at 1029, note 12. See also Fuller, *Anatomy of the Law* (New York: Encyclopaedia Britannica, 1968) at 99-110, with respect to the informal elements of constitutional order.

increasing moral disposition, nurtured by actual experience, to employ these alternatives.<sup>80</sup>

In sum, then, we know from Fuller's analysis of managerial direction, in both "Tyranny" and the "Reply", that relationships of social ordering that are not sufficiently reciprocal cannot be capable of realizing either the responsible agency of their participants, or of securing the development, and stability over time, of institutions that respect that agency. We also know from Fuller's arguments about the moral conception of the person implicit in the internal morality of law, that I discussed in Chapter 3, that the formal features of law depend on the capacity of the legal subject to be, or to become, a "responsible agent, capable of understanding and following rules, and answerable for his defaults."<sup>81</sup> It seems then, that we are left with a message about symbiosis: a message, that is, about how the form of law requires its subjects to be responsible agents if it is to function at the same time as this capacity requires a certain quality of supporting structure for its realization and development.<sup>82</sup> Again, therefore, we are left with a message about how legal form and agency are inextricably intertwined in Fuller's thinking about law.

---

<sup>80</sup> "Tyranny", *ibid.* at 1034. The context of this point is Fuller's exploration of how the design of the social structures within which we interact can either promote or undermine the development of the moral dispositions necessary to create and sustain institutions that can prevent tyranny. This idea emerges from a discussion that borrows from the research of developmental biologist, Jean Piaget, concerning the moral growth that children experience through the playing of games. To enjoy a game, Fuller explains, a child "must have the moral insight to see the necessity for rules and must possess the self-control that will enable him to abide by the rules". Participation in the game, Fuller explains, thus enables the child to learn how working with the institutional forms of the game "generates the moral qualities necessary to make the game playable": *Ibid.* at 1033. For a similar discussion, see Fuller's "Reply to Cohen and Dworkin" above note 2 at 661. Elsewhere in his writings, and under the label "creeping legalism", Fuller writes about how over-prescribing human behavior through formal rules can have an atrophying effect on the self-directed agency that mobilizes shared commitment. He suggests that a type of centrifugal pull towards formality tends to accompany associational life as it responds to the demands of increasing time and scale, with the consequence that prescribed rules replace shared commitment as the unifying theme of associational life: See Fuller, "Two Principles of Human Association", reproduced in Kenneth I. Winston, *The Principles of Social Order – Selected Essays of Lon L. Fuller*, (revised edition) (Portland: Hart Publishing, 2001) at 81.

<sup>81</sup> Fuller, *The Morality of Law*, *supra* note 9 at 162.

<sup>82</sup> These questions were also a central concern of Fuller's writings on the subject of freedom, where he was especially concerned to investigate what the ideal of freedom demands of us "when we are called upon to act formatively toward society, when we have the responsibility for establishing, changing, or taking steps to preserve particular forms of social order, meaning, by that phrase, laws, agreements, institutions, and every kind of social arrangement that may shape men's relations with one another": See Lon L. Fuller, "Freedom – A Suggested Analysis", (1955) 68 *Harvard L. Rev.* 1305 at 1310. This essay is especially clear about what, in Fuller's view, the realization of freedom requires: (1) the absence of nullifying restraints, (2) the presence of some appropriate form of order that will carry the effects of the individual decision over into the processes of society, and (3) a congenial environment of rules and decisions: at 1314. See additionally a similar discussion of these points in Fuller, "Means and Ends", *supra* note 60 at 72-74.

### 3 Conclusion

Frederick Schauer has observed that as we look back at the Hart-Fuller debate and recognize who was clearly the better debater and more rigorous philosopher, “we are far less certain as to who was actually right”.<sup>83</sup> Fuller’s “Reply to Critics” does not necessarily leave us with any clear answer to this question, and it has not been my intention in the preceding analysis to suggest otherwise. My aim has simply been to illuminate how, in this last word of the Hart-Fuller exchange, Fuller returns consistently to the idea that law takes its distinctiveness from how its formal features instantiate respect for the legal subject as an agent. While noticing this may not necessarily give us a clearer sense of which of the two protagonists of that debate was “right”, it does in my view raise the question of whether this core of Fuller’s position has been adequately appreciated by his critics.

If I am right in saying that this concern for the relationship between legal form and human agency within Fuller’s position has remained largely unrecognized among his critics, it would seem that this is more than just a product of how Hart was a better debater and more rigorous philosopher than Fuller. It is also, I think, a product of how certain foundational barriers complicated the possibility of a fruitful exchange between them. Both Hart and Fuller clearly recognized this, as both referred explicitly to the fundamentally different starting points from which they each approached the study of law.

These differences are brought into especially sharp focus when we examine the vocabulary and terms of Hart and Fuller’s exchange. Hart set those terms in his Holmes lecture, and they concern such questions as what makes law valid, and whether any necessary connection could be established between law and the final judgments that are the province of morality. The problem with such terms, however, or at least from Fuller’s

---

<sup>83</sup> Frederick Schauer, “A Life of H.L.A. Hart: The Nightmare and the Noble Dream” (Book Review) (2006) 119 *Harvard L. Rev.* 852 at 864-865.

perspective, is that to emphasize the question of legal validity as the point around which the conceptual connection between law and morality is to be analyzed is to keep the questions under consideration hovering around something of a crisis point. This is because to focus on the question of legal validity, and its concern for what law is and is not, does not necessarily invite consideration of the question of how law itself is brought into being and maintained *as* law.

My point, then, is that the very terms of Hart's agenda were largely uncongenial to Fuller, who saw the existence of law as a matter of degree, who claimed that observance of procedural morality has an affinity with substantive morality, and who described legal ordering as finding its foundations in a collaborative enterprise of interrelated elements. One of the most significant barriers to an effective exchange between Hart and Fuller, then, lies in how Fuller was required, or at least expected, to answer to this agenda on its own terms. Fuller, however, mostly refused to do this, and in doing so illuminated the extent to which the terms of Hart's agenda closed off any serious consideration of the problem of achieving and maintaining legality. Yet, the prevailing scholarly memory suggests that rather than being credited for highlighting the limits of positivist legal philosophy in this way, Fuller is simply remembered as having been unable to answer Hart.

In emphasizing these differences between how Hart and Fuller understood their respective projects, I do not mean to suggest that Fuller's approach to legal philosophy is incapable of dealing with the kind of questions that preoccupied Hart, especially the question of how to determine legal validity. That Fuller's position is capable of settling such questions is apparent from his first reply to Hart in 1958, where he suggests that "there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system".<sup>84</sup> The point to emphasize, however, is that he reaches this conclusion upon assessing the extent to which the formal features of law align with the content of the internal morality of law. Thus, for Fuller, that which does

---

<sup>84</sup> Fuller, "Positivism and Fidelity to Law", *supra* note 9 at 660.



not meet the requirements that make law workable *as* law, does not exist, and therefore is not valid, as law.<sup>85</sup>

It should be clear, then, that when Fuller suggested in his first reply to Hart in the 1958 *Harvard Law Review* that the kind of order designated by law must be “good order”,<sup>86</sup> he was clearly not suggesting that law’s ends must necessarily be moral. Instead, a review of the writings of the Hart-Fuller exchange suggests that Fuller regarded legal order as good order because of how it is a particular way of governing through rules that necessarily conveys a certain level of respect for the position of all of its participants. The way that Fuller defends his position in the “Reply”, emphasizing law’s form in this way, greatly consolidates this message about how law is distinctive and distinctively moral for the way that its constitutive features envisage and treat those who are subject to it. This position does not deny that law might be attractive to a lawgiver for instrumental reasons, or that such a lawgiver may not necessarily hold a benevolent view of her subjects. Rather, the message is simply that the form through which law is expressed has moral significance for reasons beyond its instrumental value.

In the “Reply”, moreover, we are equally left with the message that we will not see this non-instrumental moral dimension of law unless we concern ourselves with the social reality that the existence of legal order creates. This is why we see Fuller insist – as, indeed, he did when he sought to craft a new jurisprudential inquiry through his economics project – that legal philosophers must turn to practice if they are to understand what is involved in achieving and maintaining a condition of legality. Or, at the very least, the message we receive from the “Reply” is that much is lost if the project of legal philosophy invests its efforts, as Fuller thinks legal positivism does, in consciously diverting our attention from how law works in practice in favour of abstract claims about what is logical or necessary for its existence.<sup>87</sup>

---

<sup>85</sup> Fuller, *The Morality of Law*, *supra* note 9 at 91.

<sup>86</sup> Fuller, “Positivism and Fidelity to Law”, *supra* note 9 at 644.

<sup>87</sup> Fuller speaks in an archival note, for example, of how his critics like to invoke “the romantic figure of the fiendishly evil legislator, who delights to chase down his victims with an exquisite respect for legality” when responding to his arguments: Undated document titled “Legal morality”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (“Notes for the Reply to Critics”).

In the “Reply”, then, we can see how the positivist disregard for practice might explain why the position of the legal subject plays such a small role in their account of law. Indeed, with respect to this point, it is worth noting that the context of the archival note where Fuller rebukes his critics for their failure to recognize how meeting the demands of the internal morality requires “real effort at identification with the subject of the law” is his attempt to respond to the “incredulity displayed” toward his suggestion that, in practice, there seems to be a link between the internal morality of law and the moral quality of the external aims that might be pursued through it.<sup>88</sup>

Obviously, this claim falls far short of one that seeks to establish a connection between the internal morality of law and moral treatment of the legal subject that is logically or universally true. In any event, at no point did Fuller suggest that he sought to advance such a claim. Instead, as I read the writings of the Hart-Fuller exchange, Fuller sought simply to put forward the idea that what makes law law-like is the way that it envisages and treats its subjects, and that the debasements of legal form that have historically accompanied a lawgiver’s attempts to diminish the agency of the legal subject suggest that this idea deserves more serious consideration.

Still, this suggestion is certain to invite challenge from positivists, who might respond by saying that the necessary respect for the agency of the legal subject that Fuller claims is inherent to law is no greater than that which is necessary to produce any system of rules from which legal order, through the union of primary and secondary rules, might emerge. Moreover, as Hart insisted in 1958, that very system might then be used to oppress or enslave one section of the population, if the lawgiver so chooses. Thus, positivists might argue, there is ultimately no significant difference between their account of law and that advanced by Fuller, in terms of the moral value that accrues to the legal subject, because law is only contingently connected to the robust requirements of the internal morality of law.

---

<sup>88</sup> Undated document titled “External morality relation”, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (“Notes for the Reply to Critics”).

Whether positivists can actually raise this objection, or at least successfully, is a question that requires closer attention. It is a question, moreover, that is crucial to determining whether Fuller did in fact contribute insights to legal philosophy that, although either neglected or sidelined by his critics, nonetheless invite more serious consideration. I turn now, then, to complete this thesis by assessing where the reading of Fuller that I have offered leaves our understanding of the major sources of contest in the Hart-Fuller debate. The remarkable endurance of that debate is a testament to how the two legal philosophies there represented continue to be drawn into an engagement with each other. The point to clarify, therefore, is precisely how those terms of engagement should now be best understood, and how they also might be developed so as to open up new avenues of inquiry.

## Chapter 5

### Defending the picture

#### 1 Introduction

To bring this thesis to a close, it is helpful to begin by restating what I have not sought to do in the preceding chapters. I have not offered a comprehensive analysis of Fuller's scholarly contribution across all of his intellectual interests, which were diverse, eclectic, and extensive. Nor, although I have emphasized its importance, have I offered a reconstruction of a completed theory of economics. Moreover, I have not attempted to elaborate a conceptual claim about what law is: a claim, for instance, that starts with the idea of the agent and moves from this to the necessity of law.

Instead, I have done two things. First, I have provided an exposition of Fuller's legal philosophy that, alongside his most well-known writings on the morality of law, also incorporates writings from outside of that canon. Second, I have elaborated the claim that, aided by this wider view, we gain insight into how Fuller's legal philosophy is made coherent by its consistent attention to the way that the form of law communicates respect for the legal subject as an agent.

Thus, as I foreshadowed in my concluding comments in Chapter 4, my task in this final chapter is to turn to the question that follows naturally from the territory that has been the primary focus of the preceding chapters: namely, the question of the significance of my reading of Fuller for our understanding of the questions at issue in the Hart-Fuller debate.<sup>1</sup>

---

<sup>1</sup> I do not in this chapter consider the implications of my reading of Fuller for Ronald Dworkin's legal philosophy. Instead, I restrict my discussion to Hart and Raz, who have directly engaged with Fuller on the specific question of the relationship of law to legality. It is worth noting, however, that Dworkin's own position on the question of whether legality, or the rule of law, has independent value is somewhat unclear. Historically, the issue of legality features little in Dworkin's work, yet more recently he seems to be leaning towards the idea that legality is a site of theoretical and moral interest in its own right: see, for example, R. Dworkin, "Hart's Postscript and the Character of Political Philosophy", (2004) 24 *Oxford J. Leg. Studies* 1 at 23-31, and "Introduction: Law and Morals" in R. Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006) at 1-35, and especially at 1-5. The point to note for present purposes, however, is that even though Dworkin seems to be moving towards an interest in legality, he continues to sideline Fuller in his investigation of this subject. For example, Dworkin has recently suggested a taxonomy of rival

I begin this investigation by restating the convictions about the nature of legality and its relationship to law that lend Fuller's legal philosophy a coherence that has so far been insufficiently acknowledged. Against this background, I pay much closer attention than I have in the previous chapters to how Hart responded to this account, in order to assess whether those responses amount to an adequate answer to the question that Fuller repeatedly implored him to answer: that is, the question of whether the positivist account of law can explain the relationship between law and legality.

The argument I will elaborate is that Hart's responses to this question remain inadequate for the very reasons that Fuller identified, and point to persistent tensions within his account that Hart himself did not seek to resolve. By then turning to the work of Hart's leading positivist successor, Joseph Raz, I show how and why these tensions remain unresolved, even though Raz gives far more attention and credit to Fuller's claims than Hart ever did. Indeed, at various points Raz comes very close to addressing the relationship between law and legality in a manner that is distinctly Fullerian. This strongly suggests that, as a result of their engagement with Fuller, legal positivists have moved the agenda of legal philosophy on to the territory of legality, even if, having done so, they are not entirely sure how to reconcile this move with the fundamental tenets of their theory.

To reveal the ambivalence of legal positivists on the question of legality and its moral value is a key part of recasting the memory of Fuller's contribution to legal philosophy, as well as the standard reading of the Hart-Fuller debate more generally. This is an important move, because in the fifty years that have passed since the commencement of that debate, the attention that legal philosophers have given to Fuller has been focused almost exclusively on the question of whether he answered the criticisms raised against

---

conceptions of law, in which he describes his own conception of law as "aspirational". By contrast, he describes Fuller as offering a "sociological" rather than aspirational conception of law: that is, as offering a social scientific test of whether law exists. Dworkin also suggests that little normally turns on whether or how the boundaries of the sociological conception are resolved: see "Introduction: Law and Morals" at 2-4. At the very least, then, the place that Dworkin accords Fuller within his taxonomy of rival conceptions of law suggests that he does not yet appreciate the insights that Fuller offered about the independent value of the form of law.

his claims by Hart. Far less attention has been paid to the question of whether Fuller's critics ever properly confronted and answered the questions that he posed to them. My task in the pages to follow, therefore, is to show why we should see that certain key questions of the Hart-Fuller debate – namely, those put by Fuller to Hart concerning the relationship of law to legality – remain open to further debate.

## 2 Fuller's consistency

Throughout the preceding chapters I have shown how a particular vision of law is developed consistently over the course of Fuller's writings. First and above all, Fuller never sways from the view that the idea of law designates a particular mode of governance: a distinctive way of creating and communicating norms that instantiates a certain quality of social ordering. Governance through law is thus a recognizable alternative to governance through personal rule, or rule by men.

Fuller makes clear that this difference holds particular importance for the subjects of a legal order because their position under law is not, as the archival note that I emphasized in Chapter 4 captures especially well, that of “a subservient populace ready to do what they are told to do”.<sup>2</sup> It is instead a social condition in which they are respected as agents, and in which this agency is enabled in both relations with the lawgiver as well as with other individuals.

At the centre of this vision of law is the claim that this respect for the legal subject is enabled through the distinctive formal features of law that Fuller translates into eight principles of lawgiving. In articulating his account of these principles in *The Morality of Law*,<sup>3</sup> Fuller remains committed to the view that they are moral in nature. They are moral because they articulate an ethos of lawgiving that gives practical expression to the

---

<sup>2</sup> Undated and untitled document, Box 12, Folder 1 (Notes for the “Reply to Critics”), The Papers of Lon L. Fuller, Harvard Law School Library.

<sup>3</sup> Lon L. Fuller, *The Morality of Law* (revised edition), (New Haven: Yale University Press, 1969)[Fuller, *The Morality of Law*].

particular moral idea that distinguishes rule through law from rule by men: a commitment to respecting the subject as an agent.

From his first response to Hart in 1958, Fuller never departs from the view that the extent to which these features are observed is decisive for the existence of law. We also come to understand over the course of Fuller's writings that these principles work together to instantiate the respect for agency that secures the existence of law. That Fuller understands the conditions necessary for law's existence in this way is clear from his argument in *The Morality of Law* that a total failure to realize in any one of the eight principles does not simply result in a bad system of law, but in something "that is not properly called a legal system at all".<sup>4</sup>

It is apparent, then, that Fuller's account of the conditions necessary for the existence of law sets the bar high for the lawgiver. Yet Fuller also readily acknowledges that it is precisely because the possibility of legal order depends on a commitment on the part of those charged with creating and maintaining legal order to uphold its specific demands that the enterprise of legality is a chronically vulnerable one. It is vulnerable, that is, not only because this commitment may lapse,<sup>5</sup> but also because of the way that the responsibility of lawgiving ordinarily sees power over many concentrated into the hands of the few, and thus becomes vulnerable to abuse.<sup>6</sup>

Fuller was clearly alive to these political realities and to how they introduce contingency into the possibility of legal order. Still, he insisted that the question of whether one is in fact governing through law will always be measurable by the extent to which the distinctively moral demands of lawgiving are met. For Fuller, then, the abuse of law

---

<sup>4</sup> *Ibid.* at 39.

<sup>5</sup> As Fuller expresses it, law is a "purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals": *Ibid.* at 145.

<sup>6</sup> As Fuller puts it in a working note for his "Reply to Critics", "[t]he restraints of the Rule of Law have been found by governments of all times, democratic and autocratic, irksome and as impairing their "efficacy" in accomplishing tasks they would like to attack directly": Undated and untitled document, The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Notes for the "Reply to Critics").

holds decisive implications for the existence of law because to abuse law is, at a certain point, to lose law.

The internal coherence of Fuller's position is further revealed by how he links this position on the implications of the abuse of law to his understanding of the phenomenon of fidelity to law. This link is made most clearly in *The Morality of Law*, where he argues that a failure on the part of the lawgiver to observe the requirements of the internal morality of law will justify withdrawal of fidelity to law on the part of the legal subject. The reason, as Fuller explains it, is because an important bond of reciprocity between lawgiver and legal subject is ruptured when the lawgiver departs from observance of the internal morality of law. With this rupture, the very possibility of law as a mode of governance that relies only minimally on coercion breaks down, because in the face of such disrespect for her status as an agent, the legal subject cannot be expected – at least for reasons that flow from her respect for the lawgiver's authority – to comply with the lawgiver's demands.<sup>7</sup>

In advancing these arguments, however, Fuller is making a wider point than simply one about why a legal subject would choose to obey, or give her fidelity, to law. He is also arguing for the view that a relationship of reciprocity between lawgiver and legal subject is a constitutive feature of law itself, such that if reciprocity disappears, so too must law. In sum, Fuller's writings give expression to a legal philosophy that unites the conditions that make legal ordering possible with the idea, and existence, of law itself.

In bringing this picture to bear on the landscape of legal philosophy, it is helpful to begin by sketching the major points of commonality and difference between the assumptions that underlie this vision of law and those that inform legal positivism. First, it is apparent that both sides of the philosophical divide share the view that for individuals to comply with the law, the law itself must be capable of being complied with. Thus, both sides agree the law must address itself to its subjects in a way that respects certain formal

---

<sup>7</sup> Fuller, *The Morality of Law*, *supra* note 3 at 40.



criteria. In this sense, then, Fuller and legal positivists share a common project in advancing a formal conception of law.

It also appears to be the case that both sides see the very possibility of governance through law as linked in some important way to the legal subject's capacity for agency. This is apparent from how, at different points, Fuller, Hart, and Raz each speak of law as presupposing the rational agency of its subjects.<sup>8</sup> Again, therefore, there seems to be a common view of the idea of law as relating, in some important way, to the connection between its formal features and human agency.

Thus the real point of contest between the two camps seems to relate to a third proposition: namely, that law necessarily respects and makes possible a richer conception of agency than simply the capacity to follow rules. Fuller's legal philosophy, as we have seen, clearly supports this proposition. For him, it is law's inherent respect for the legal subject as a robust agent – a person capable of purposive action who, in this capacity, is much more invested with agency than a member of a subservient populace ready to do what they are told to do – that both distinguishes law from other forms of rule and gives it a distinctively moral character. This is the message we receive, among many other sources, from the story of the tyrant, from the argument in *The Morality of Law* about the conception of the person implicit in legality, from his analysis in the "Reply" of the distinction between law and managerial direction, as well as from the concern of the eunomics project for order that is effective *and* respectful of human dignity.

For there to be a debate between Fuller and positivism on this point, then, positivists must be understood as advancing an account of law that rejects the idea that law is necessarily bound up with a level of respect for the agency of the legal subject that surpasses the minimum necessary to secure obedience to law. This means, in turn, that positivists must be understood as advancing an account of law that denies any connection to moral value, as such value is assessed from the perspective of the legal subject. As I will now show,

---

<sup>8</sup> I will provide evidence of this point with respect to both Hart and Raz's work in the analysis to follow.

however, there is considerable cause to question whether positivists do succeed in advancing such an account.

This cause for doubt arises from how positivists acknowledge at various points that the form through which legal governance proceeds yields non-instrumental moral value for the legal subject, because of how that form respects the legal subject as an agent. To maintain their position that there is no necessary connection between law and morality, therefore, positivists must somehow disconnect this acknowledgement of the moral value of the legal form from their concept of law. This, as I will show below, is precisely what they attempt to do, and via a number of different routes. The problem, however, is that when called upon to justify this disconnect, positivists generally choose either to sidestep the question, to address it through terms that are ambiguous at best, or – in Raz’s case – to arrive at a position that comes very close to Fuller’s.

### 3 Revisiting Hart’s responses to Fuller

The thrust of Hart’s response to Fuller’s claims about the internal morality of law is that the principles of the internal morality of law do not evidence any necessary connection between law and morality because they are merely principles of efficacy that are indifferent to the moral quality of the ends pursued through law. Thus, according to Hart, because the principles of legality are unfortunately compatible with great iniquity, and indeed may assist the pursuit of such iniquity, Fuller failed to demonstrate any necessary connection between law and morality.

Hart holds solidly to this position in both sites where he directly engages with Fuller’s work: in his book, *The Concept of Law*,<sup>9</sup> and in his 1965 review of Fuller’s *The Morality of Law*.<sup>10</sup> This suggests that, for Hart, the fact of law’s demonstrable connection to

---

<sup>9</sup> H.L.A. Hart, *The Concept of Law*, (second edition), (Oxford: Oxford University Press, 1994)[Hart, *The Concept of Law*].

<sup>10</sup> H.L.A. Hart, “Lon L. Fuller: *The Morality of Law*”, (1965) 78 *Harvard Law Review* 1281, reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) at 343 [Hart, “Review”].

iniquitous ends at various points throughout history resolves all questions of philosophical significance with respect to the relationship between law and morality.

The problem with this position, however, is that it is not, in itself, an answer to the challenge Fuller put to Hart to explain the nature of the conditions that make lawmaking possible: conditions that Hart described in 1958 as “fundamental accepted rules specifying the essential lawmaking procedures”.<sup>11</sup> That Fuller might have expected an answer from Hart to this question seems supported by Hart’s explicit statement in his 1958 essay that law is surely not “the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion”.<sup>12</sup> This statement presumably gave Fuller cause to think that there was a large measure of common ground between Hart’s account of the foundations of law and his own. This impression on Fuller’s part was no doubt augmented by Hart’s concession, when addressing the argument that important connections between law and morality exist in the foundations of legal order, that a germ of moral value lay in the very idea of a legal system as consisting of general rules. As Hart stated with respect to this last point,

If we attach to a legal system the minimum meaning that it must consist of general rules – general in both the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals – this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. It is, however, true that *one* essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of the law, not justice of the law. So there is, in the very notion of law consisting in general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles.<sup>13</sup>

As I explained in Chapter 2, this is a critical passage for understanding the issues in dispute between Hart and Fuller. This is because Hart identifies the very idea of a legal system with “the minimum meaning that it must consist of general rules”, and recognizes how conditions of equal administration give meaning to this idea at the point of its

---

<sup>11</sup> H.L.A. Hart, “Positivism and the Separation of Law and Morals”, (1958) 71 *Harvard Law Review* 593 at 603 [Hart, “Positivism”].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* at 623-24.

application to actual persons. Thus, Hart seems to advance the view that the enterprise of law is distinctive for how it treats those subject to it. Moreover, he also suggests that this treatment is of moral significance. Yet Hart then goes on to argue that this feature of legal order reveals no basis for disturbing the positivist separation thesis, because

... a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between persons affected, laws which were hideously oppressive, and might deny to a vast rightless slave population the minimum benefits of protection from violence and theft.<sup>14</sup>

In short, Hart's argument is that the conditions that give minimum meaning to the concept of a legal system reveal no connection between law and morality because they provide no apparent guarantee of moral ends (or, to borrow Hart's words, of "justice of the law"), *and* because a legal system that satisfied these conditions of lawgiving in relation to only one group of persons within it would, in Hart's view, still qualify as a legal system.<sup>15</sup>

These arguments carry through to Hart's book, *The Concept of Law*. From the point of view of Hart's engagement with Fuller, the most important discussion in that book is to be found in Hart's analysis of the different ways in which the relationship between law and morals might be understood. As I explained in detail in Chapter 3, Hart's treatment in this context of Fuller's argument that a connection between law and morality exists in the foundations of legal order is as brief as it is dismissive. Significantly for present purposes, however, this response appears to be equally dismissive of Hart's own apparent suggestion that there is moral significance to how law must address its subjects as rational agents. To revisit the relevant passage again in full:

Further aspects of this minimum form of justice which might well be called 'natural' emerge if we study what is in fact involved in any method of social control – rules of games as well as law – which consists primarily of general standards communicated to classes of persons, who are then expected to

---

<sup>14</sup> *Ibid.* at 624.

<sup>15</sup> For additional points about Hart's treatment of the subject of legality in his 1958 essay, see Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller", (2008) 83 N. Y. U. L. Rev. 1135 at 1148-1149 [Waldron, "Hart's Equivocal Response"].

understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. This means that, for the most part, those who are eventually punished for breach of the rules will have had the ability and opportunity to obey. Plainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality. Indeed, one critic of positivism has seen in these aspects of control by rules something amounting to a necessary connection between law and morality, and suggested that they be called ‘the inner morality of law’. Again, if this is what the necessary connection between law and morality means, we may accept it. It is unfortunately compatible with great iniquity.<sup>16</sup>

This response to Fuller – the “one critic of positivism” in question – tells us much about the commitments that Hart brings to his analysis. Above all, and affirming the argument of his 1958 essay, it is clear that Hart draws a distinction between what might, or could, be meant by the necessary connection claim, and what he thinks is meant by that claim: namely, that no necessary connection between law and morality can be demonstrated so long as it is possible, as history has shown it is, to enact immoral laws.<sup>17</sup> It follows from this that even if Fuller’s idea of the internal morality of law might suggest a form of connection between law and morality, any such connection is not sufficient to resolve the only salient question that Hart regards to be at issue: that is, the question of the compatibility of the internal morality of law with immoral ends.<sup>18</sup> Thus, by reconsolidating the terms of the debate as turning upon this question, Hart is able to sidestep the wider question of whether any moral significance should be attributed to the relationship between the formal features of law and the agency of the legal subject.<sup>19</sup>

---

<sup>16</sup> Hart, *Concept of Law*, *supra* note 9 at 206-207. Waldron makes an interesting observation when he notes that, across his writings, Hart tended to refuse to use the term “the principles of legality” in his own voice: *Ibid.* at 1145-1146.

<sup>17</sup> Note also how in the passage Hart associates these conditions of lawgiving with “requirements of justice”, thus again inferring that this type of moral value is something imposed on a legal order, guided by some external ideal of justice, rather than being intrinsic to its workability and distinctiveness *as* legal order. See also Waldron’s analysis of Hart’s arguments this context in *ibid.* at 1149-1151.

<sup>18</sup> Hart, *Concept of Law*, *supra* note 9 at 207.

<sup>19</sup> As I explained in Chapter 3, Hart’s discussion in the same chapter of *The Concept of Law* about the relationship of legal order to the minimum aim of survival appears to concede much to Fuller’s argument that implicit in legality is a commitment to the view that man is, or can become, a responsible agent. That is, Hart clearly accepts that law is not possible unless those who seek its protection as a form of social control are capable of mutual forbearance and compromise, because without the voluntary and mutual expression of these capacities towards the goals of the legal order, approximate equality leaves open the constant threat of resistance that renders any sustained attempt at imposed governance impossible: see Chapter 3, above, at 89, note 101.

Hart's review of *The Morality of Law* anchors this position still further through the development of a much more explicit argument about the internal morality of law being merely instrumental to the efficacy of law. According to that argument, Fuller is simply confusing the principles of craftsmanship that guide the purposive activity of lawmaking with the idea of morality in a way that can also sustain the argument that there is such a thing as an internal morality of poisoning.<sup>20</sup>

However, as I noted in Chapter 3, Hart's response to Fuller on this point is complicated by the way that he only partially quotes Fuller's own description of the appeal of the internal morality of law, leaving out the reference to "a sense of trusteeship" that precedes Fuller's statement about "the pride of the craftsman".<sup>21</sup> As I also explained in that context, Fuller's working papers and private correspondence reveal genuine disquiet about how Hart's omission of the reference to "trusteeship" made it appear like Fuller also understood the character of the internal morality of law in instrumental terms rather than as giving expression to the lawgiver's responsibility to persons.<sup>22</sup>

The point to highlight for now, however, is the way that three commitments shape the content of Hart's position. The first is his commitment to understanding law in purely instrumental terms. The second is his commitment to understanding both the idea of law and the activity of lawmaking solely from the perspective of the lawgiver. And the third is his insistence on understanding the connection between law and morality in terms of the indifference of the internal morality of law towards the morality, or immorality, of the ends of law.<sup>23</sup> It follows from these three assumptions, which support the idea that the

---

<sup>20</sup> As Hart puts it, to call the principles of the poisoner's craft the morality of poisoning is to "blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned": Hart, "Review", *supra* note 10 at 350.

<sup>21</sup> See Fuller, *The Morality of Law*, *supra* note 3 at 43.

<sup>22</sup> See my extended discussion of this point in Chapter 3, above, at 89-91.

<sup>23</sup> As I explained in Chapter 3, these commitments run throughout Hart's review of *The Morality of Law*. See, for example, Hart's comment that there is nothing in Fuller's book that amounts to "a cogent argument in support of his claim that these principles are not neutral as between good and evil substantive aims". See further Hart's response that the argument that Fuller offers in support of this asserted connection – that is, Fuller's example of the application of vague and internally contradictory race laws in the South African legal system – is "patently fallacious" and illustrates only that the principle that laws must be clearly and

formal features of law are merely a morally neutral aid to the efficacy of law, that Hart thinks it absurd to regard “the purpose of subjecting human conduct to the governance of rules, no matter what their content” as being of “ultimate value in the conduct of life”.<sup>24</sup> Only if Fuller could demonstrate such value, he argues, would there be any case for “classifying the principles of rule-making as a morality”.<sup>25</sup>

Later in his review, however, when responding to Fuller’s charge that legal positivism is insufficiently concerned with the question of legality, Hart suggests that the positivist account of law can indeed provide an explanation for why there is something fundamentally wrong with a system of laws that, for example, is wholly retroactive. Such a system would be problematic, he explains, because its laws could make no contribution to “human liberty and happiness”.<sup>26</sup> It seems, then, that Hart does see the connection between the observance of the principles of legality and the fate of the legal subject in moral terms, even if he does not then elaborate precisely what it is that constitutes the connection between the form of law and this moral value.<sup>27</sup>

A further point can also be made about how this tension within Hart’s account with respect to the relationship of legal order to agency relates to his claim that his own version of legal positivism moves away from the command conception of law that dominated the legal philosophies of his positivist predecessors. As we know from his 1958 essay, and as I reiterated in Chapter 4, Hart clearly thought when he presented an account of law cast in terms of rules and practices that he had made an important move away from the command conception and its relationship to coercion. While this is no

---

intelligibly framed is incompatible with the pursuit of vaguely defined substantive aims, irrespective of whether they are morally good or evil: Hart, “Review”, *supra* note 10 at 351. See also Hart’s comment when revisiting the issue of Nazi law that while it is “perfectly true” that the Nazi government frequently violated the principles of legality in pursuit of its monstrous aims, and that these violations – such as the use of secret laws and retroactivity – greatly aided that pursuit, this is not itself evidence of any “necessary incompatibility between government according to the principles of legality and wicked ends”, but rather a matter of what a government might do to guard itself against the contingent support of its population, or the possibility of external criticism of its actions: *Ibid.* at 352-353.

<sup>24</sup> *Ibid.* at 351. Waldron provides an excellent analysis of this point in “Hart’s Equivocal Response” at 1155.

<sup>25</sup> Hart, “Review”, *supra* note 10 at 351.

<sup>26</sup> *Ibid.* at 356-357.

<sup>27</sup> Still, one observation that can be made about this statement is that Hart seems to see the question of the connection between law and morality as a connection between law and something external to law.

doubt true, it is surely also arguable that a convincing move away from the command conception must show something more than how official practice creates legal order.

That is, the command conception, in its identification with coercion, speaks to a certain *quality* of relationship between a lawgiver and a legal subject: a relationship, that is, in which the lawgiver orders the conduct required of the legal subject, and in which coercion is available to address any defiance or default on the part of that subject. Hart himself clearly thought that there was more to the idea of law than this. In the moves that he made to flesh out this intuition, however, the position of the legal subject and her experience of agency appears to not be significantly different to that which she occupied under the command conception. This, at least, is what seems to be suggested in Hart's acceptance of the idea that such a subject can be legally designated as a sheep to the slaughterhouse,<sup>28</sup> or as a rightless slave.<sup>29</sup> And yet, such a position seems difficult to reconcile with the concession just noted about how Hart sees the connection between the form of law and respect for the legal subject as an agent.

A recent study by Jeremy Waldron enables us to take our awareness of this ambivalence within Hart's position still further. The aim of Waldron's project is to ascertain whether Hart actually held a clear position on the two questions that Waldron sees as paramount to Fuller: that is, the question of whether observance of the principles of legality is among the necessary criteria for the application of the concepts of law and legal system to a system of rule,<sup>30</sup> and the question of whether observance of the principles of legality makes an affirmative difference to the moral quality of a system of rule.<sup>31</sup>

Waldron suggests that two responses to these questions can be formulated that reflect a position close to Fuller's on the one hand (response (a)), and a position close to positivism's on the other (response (b)). With respect to the first question, Waldron proposes the following responses as indicative of the contest between Fuller and Hart:

---

<sup>28</sup> Hart, *The Concept of Law*, *supra* note 9 at 117.

<sup>29</sup> Hart, "Positivism", *supra* note 11 at 624.

<sup>30</sup> Waldron, "Hart's Equivocal Response", *supra* note 15 at 1140.

<sup>31</sup> *Ibid.* at 1142.



(1a) Observance of the principles of legality is among the necessary criteria for the application of the concepts *law* and *legal system*. There comes a point in a system's failure to observe the principles of legality where we would have to say that it does not really count as a legal system or a system of law at all.

(1b) Observance of the principles of legality is not among the necessary criteria for the application of the concepts *law* and *legal system*. Whether a system of rule counts as a legal system is determined independently of whether or to what extent that system observes the principles of legality.<sup>32</sup>

With respect to the second question – whether observance of the principles of legality makes an affirmative difference to the moral quality of a system of rule – Waldron suggests that Hart and Fuller's opposing positions might be distilled as follows:

(2a) Observance of the principles of legality tends to make a positive moral difference to a system of rule.<sup>33</sup>

(2b) No reliable generalization can be made about the moral difference that observance of the principles of legality makes to a system of rule.<sup>34</sup>

Waldron then goes on to show how Hart's engagement with the subject of legality and its connection to the existence and moral value of law oscillates between each of these propositions.<sup>35</sup> Waldron's analysis also, moreover, reveals the way that these tensions endure in Hart's work beyond the resources that I have just reviewed, with Waldron paying particular attention to a number of Hart's statements in a lesser known essay that suggest a closer connection between the principles of legality and the concept of law than

---

<sup>32</sup> *Ibid.* at 1141.

<sup>33</sup> *Ibid.* at 1142. Waldron describes this proposition as a "*moderately* affirmative" answer to question (2) that is less strong than that which is suggested in Fuller's claims that "coherence and goodness have more affinity than coherence and evil" and that "even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law" (quoting Fuller, "Positivism and Fidelity to Law" at 636, 637). Waldron adds, however, that the basis for this moderate affirmative response "might be that respect for the principles of legality is a way of respecting human dignity or of making important concessions to liberty – that is, to people's ability to control important aspects of their own lives in a meaningful way": at 1143.

<sup>34</sup> *Ibid.* Here Waldron adds that this negative response to question (2) "might be motivated either by a denial that the principles of legality make any moral difference or by a belief that the moral difference may in some cases be negative, so that one cannot count on legality's making things better", and that "there might be some who think that observance of the principles of legality tends, reliably and systematically, to make matters worse".

<sup>35</sup> Moreover, as will shortly become apparent, Waldron's distillation of the conflicts within the positivist position in this way is equally helpful for navigating the content, and tensions within, Raz's response to Fuller.

Hart conceded at any point in his exchanges with Fuller.<sup>36</sup> For example, Hart suggests at one point that

Laws, however impeccable their content, may be of little service to human beings and may cause both injustice and misery unless they generally conform to certain requirements which may be broadly termed procedural. ... These procedural requirements relate to such matters as the generality of rules of law, the clarity with which they are phrased, the publicity given to them, the time of their enactment, and the manner in which they are judicially applied to particular cases. The requirements that the law, except in special circumstances, should be general (should refer to classes of persons, things, and circumstances, not to individuals or to particular actions); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality. ...<sup>37</sup>

This passage, as Waldron points out, certainly seems to bring Hart very close to Fuller's arguments about why observance of the internal morality of law has moral value, even if Hart himself does not acknowledge this.<sup>38</sup> Elsewhere in the same essay, however, Hart again turns to his argument that observance of the principles of legality is compatible with iniquitous ends, and restates his view that we must not infer that "it will always be reasonable or morally obligatory for a man to obey the law" just because a legal system observes the principles of legality.<sup>39</sup> He also returns to the apparent point of argument between him and Fuller in his 1965 review of *The Morality of Law*: namely, the efficiency implications of the principles of legality.<sup>40</sup>

Still, as Waldron emphasizes, Hart shifts somewhat from this familiar positivist territory when he acknowledges at one point that the efficiency implications of observance of the principles of legality might be understood from the point of view of the legal subject as well as from that of the lawgiver. This, Hart explains, is because such observance provides the subject with the "advantage of knowing in advance the ways in which his

---

<sup>36</sup> H.L.A. Hart, "Problems of Philosophy of Law" in Paul Edwards (ed.) 5 *The Encyclopaedia of Philosophy* 264 (New York : Macmillan Pub. Co. & the Free Press, 1967) [Hart, "Encyclopaedia essay"]. See also Waldron's discussion of Hart's book, *Punishment and Responsibility* in "Hart's Equivocal Response", *supra* note 15 at 1156-1157.

<sup>37</sup> Hart, "Encyclopaedia essay", *ibid.* at 273-274, quoted in Waldron *ibid.* at 1144-1145.

<sup>38</sup> *Ibid.* at 1145.

<sup>39</sup> Hart, "Encyclopaedia essay", *supra* note 36 at 264, quoted in *ibid.* at 1152.

<sup>40</sup> Hart, *ibid.* at 274, quoted by Waldron, *ibid.* at 1153.

liberty will be restricted in the various situations in which he may find himself, and he needs this knowledge if he is to plan his life”.<sup>41</sup>

These arguments invite a number of observations. The first is that Hart makes no reference to Fuller’s idea of the internal morality of law, even though its content is obviously analogous to the criteria that Hart enumerates.<sup>42</sup> The second point to note is how Hart acknowledges that these principles add moral value to a legal order, in the sense that their observance contributes materially to avoiding “injustice” and “misery” for those who are subject to that order. The third and most important observation, however, is that even though Hart acknowledges this moral value, he does not go so far as to suggest that laws made in breach of these requirements should not be regarded as laws. Rather, he leaves this question unaddressed, turning instead to the argument that we should not infer from the importance of these principles that they bear any significant relationship to the obligation of the legal subject to obey law because the laws in question might be iniquitous.<sup>43</sup>

Thus, by making this move, Hart preserves the position that he maintains from his 1958 essay onwards that the question of obedience to law is a matter that belongs to the preserve of independent moral judgment, with that judgment to be shaped, above all, by the subject’s view of the moral content of the ends of law. Still, it is clear that Hart does concede that the principles of legality have affirmative moral significance, even if, as Waldron observes, he seems to land at the position that nothing of *conclusive* moral significance follows from the fact that a system conforms or fails to conform to the principles of legality.<sup>44</sup> This, however, is still significant because it shows that Hart’s position on the relationship between law and legality, as well as on the moral status of law, remains essentially open.<sup>45</sup>

---

<sup>41</sup> Hart *ibid.*, quoted in Waldron *ibid.*

<sup>42</sup> Waldron, *ibid.* at 1145.

<sup>43</sup> See also Waldron’s analysis of this point, *ibid.* at 1152-1153.

<sup>44</sup> *Ibid.* at 1153.

<sup>45</sup> *Ibid.* at 1167.

In sum, then, the tensions within Hart's responses to Fuller might be reduced to two general observations. The first is that Hart focuses, as the measure of the connection between law and morality, on the relationship between observance of the principles of legality and the moral quality of the ends of law. The second is that he does not adequately reconcile his concept of law with his apparent acceptance of the idea that law is a way of creating and expressing norms that relates in some significant way to the agency of those who are subject to it.

Fuller, as I have shown, provides a clear response to Hart on the first point: that is, to clarify, on several occasions, that he has never said that it is logically impossible to pursue evil through the legal form, even if he thinks that the facts of human experience suggest a correlation between the pursuit of an unjust aim and debasements of legal form. This, as will be recalled from Chapter 2, is Fuller's point when he suggests in his analysis of Nazi law that "legal morality cannot live when it is severed from a striving towards justice and decency".<sup>46</sup> His response to Hart on the second point, however, is more of an appeal to Hart to further address the evident tension within his position on the question of whether law is answerable to legality. Thus, drawing these observations together, it might be said that the Hart-Fuller debate leaves Fuller in a position where he is entitled to say something like the following to Hart:

You still haven't answered me on the question of whether law is answerable to legality. This is what I was trying to get you to do by objecting to your treatment of Nazi law, by criticizing your account of the rule of recognition for its failure to allow for the withdrawal of lawmaking power in the event of its abuse, and by charging positivism with defending a concept of law that looks more like managerial direction. When you observe, in *The Concept of Law*, that the principles of legality cause law to address its subjects in a certain way, you are beginning to get my point. But instead of exploring this idea, you turn the point into a statement about how observance of this and other conditions of lawgiving is compatible with the pursuit of iniquitous ends. In doing so, you fail to see how making this statement about the way that law addresses its subjects requires you to make more sense of how this moral dimension of law can be reconciled with your concept of law.

---

<sup>46</sup> Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart", (1958) 71 Harvard L. Rev. 630 at 661 [Fuller, "Positivism and Fidelity to Law"].

I will now show how these tensions within Hart's response to Fuller – between admitting and denying the connection between law and legality, and thus also between admitting and denying the moral dimensions of the relationship of law to agency – carry through to the arguments advanced against Fuller by Joseph Raz.

#### 4 Raz on the rule of law

Raz's essay, "The Rule of Law and Its Virtue", was published shortly after Fuller's death.<sup>47</sup> It is widely considered among legal philosophers to have completed Hart's work in disposing of Fuller's claim that observance of the internal morality of law is both necessary for the existence of law, and necessarily reveals a connection between law and morality.

The first point to note about Raz's essay is that where Fuller refers to the concept of legal order mainly in terms of the internal morality of law, or legality, and while Hart opts for the term principles of legality, Raz adopts the terminology of the rule of law. As he explains it, this term designates the basic idea that people should be ruled by and obey law, and that the law should be such that people will be able to be guided by it.<sup>48</sup> Thus, according to Raz, the concept of the rule of law derives from the insight that if law is to be obeyed, it must be capable of guiding the behaviour of its subjects.<sup>49</sup>

---

<sup>47</sup> Joseph Raz, "The Rule of Law and its Virtue", Chapter 11 in *The Authority of Law – Essays on Law and Morality* (Oxford: Clarendon Press, 1979) [Raz, "Virtue"].

<sup>48</sup> *Ibid.* at 213.

<sup>49</sup> *Ibid.* at 214. Raz presents eight principles that he sees as more or less capturing the content of the idea of the rule of law, and which he notes are similar to those enumerated by Fuller. Raz's eight principles are: 1. All laws should be prospective, open and clear; 2. Laws should be relatively stable; 3. The making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules; 4. The independence of the judiciary must be guaranteed; 5. The principles of natural justice must be observed; 6. The courts should have review powers over the implementation of the other principles; 7. The courts should be easily accessible; 8. The discretion of crime-preventing agencies should not be allowed to pervert the law: at 214-218. Raz acknowledges that Fuller's list of eight principles is very similar to his own, and that Fuller's discussion of many of the principles is "full of good sense". Raz then states, however, that his reason for abandoning some of Fuller's principles in favour of his own stems from "a difference of views on conflicts between the laws of one system": at 218, note 7.

Raz's main aim in the essay is to defend the view that the rule of law does not have the overriding importance that is ordinarily attributed to it.<sup>50</sup> Instead, he argues, the rule of law is merely a political ideal – that can be described in terms of the principle that “the making of particular laws should be guided by open and relatively stable general rules”<sup>51</sup> – that a given legal system may lack or possess to a greater or lesser degree.<sup>52</sup>

Raz's analysis in elaboration of these ideas is complex.<sup>53</sup> It is thus helpful for present purposes to divide that analysis into those of Raz's arguments which address the idea of the rule of law in its own right, and those which address its connection to the concept and existence of law. From this foundation, it is possible to gain a clearer sense of where Raz's claims leave the positivist response to the questions that were paramount to Fuller: that is, whether law is answerable to legality and, flowing from this, whether law must also be regarded as an inherently moral enterprise.

With respect to his claims about the rule of law in its own right, the first point to note is that Raz readily accepts that observance of the rule of law has moral value. This moral value, he explains, derives from how the rule of law stands in contrast to and curbs arbitrary power,<sup>54</sup> how it facilitates agency through stabilizing social relationships and providing a basis for individual planning,<sup>55</sup> how the predictability that the rule of law nurtures increases the individual's power of action<sup>56</sup> and minimizes frustrated expectations and,<sup>57</sup> most importantly, from how observance of the rule of law instantiates respect for human dignity by treating the legal subject as a rational autonomous creature

---

<sup>50</sup> *Ibid.* at 210.

<sup>51</sup> *Ibid.* at 213.

<sup>52</sup> *Ibid.* at 211. Raz thus also insists that this ideal is not to be confused with other morally valuable ideals such as democracy, justice, equality, human rights, or respect for persons or the dignity of man, because a “non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law”: at 211.

<sup>53</sup> *Ibid.* at 224.

<sup>54</sup> *Ibid.* at 219-220.

<sup>55</sup> *Ibid.* at 220.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.* at 222.

who is capable of planning and plotting her future.<sup>58</sup> Conversely, therefore, to violate the rule of law is to offend human dignity by expressing disrespect for the autonomy of the legal subject.<sup>59</sup>

Raz then goes on to argue, however, that in other ways the rule of law can lack moral value. He elaborates this point principally through his claim that the rule of law is ultimately of neutral instrumental moral value. Raz's point here is that as the "good-making" virtue of law,<sup>60</sup> the rule of law will have instrumental moral value only if the purposes pursued through law are moral, in the same way that the rule of law will have instrumental immoral value if the purposes pursued through law are immoral.<sup>61</sup> The rule of law, then, is the "specific excellence of the law": necessary for law to be instrumentally efficacious, but neutral with respect to the moral quality of the ends that are pursued through it.<sup>62</sup>

Raz also argues, moreover, that laws that radically subvert the moral value of autonomy can still be produced in compliance with the rule of law. This point is put most starkly when he contends that the law may "institute slavery without violating the rule of law", because such is apparently compatible with "the business of law to guide human action by affecting people's options".<sup>63</sup> In the last section of his essay, Raz further suggests that observance of the rule of law is necessary but not sufficient if individuals are to live autonomous lives. This is because more than the rule of law will usually be needed to secure such a condition, and might require the pursuit of political and social conditions that implicate a lesser degree of conformity with the rule of law.<sup>64</sup> Still, such violations of the rule of law might nonetheless help the realization of other valuable goals. Thus, Raz

---

<sup>58</sup> *Ibid.* at 221-222.

<sup>59</sup> *Ibid.* at 222.

<sup>60</sup> *Ibid.* at 225.

<sup>61</sup> As Raz famously argues, just as sharpness is the virtue of a knife in providing the knife with its ability to cut, the ultimate virtue of the rule of law, in its contribution to law's capacity to guide behavior, "is the virtue of efficiency; the virtue of instrument as instrument": Raz, *ibid.* at 226, and generally at 224-225.

<sup>62</sup> *Ibid.* at 225.

<sup>63</sup> *Ibid.* at 221.

<sup>64</sup> *Ibid.* at 227-228.

concludes, “one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law”.<sup>65</sup>

As for Raz’s arguments concerning the connections between the rule of law and the concept of law – and, specifically, his argument that observance of the rule of law is not necessary to bring law into existence – the first point to note is that he adopts Hart’s concept of law as the foundation of this analysis. This means that Raz proceeds from the idea that legal order comes into being through the union of primary and secondary rules, as those rules are supported by the attitudes and practices of legal officials.<sup>66</sup>

The second and more important point to note, however, is that Raz elaborates his arguments about the relationship between the concept and the rule of law in the section of his essay where he engages directly with Fuller. This section begins with the following observations:

Lon Fuller has claimed that the principles of the rule of law which he enumerated are essential for the existence of law. This claim if true is crucial to our understanding not only of the rule of law but also of the relation of law and morality. I have been treating the rule of law as an ideal, as a standard to which the law ought to conform but which can and sometimes does violate most radically and systematically. Fuller, while allowing that deviations from the ideal of the rule of law can occur, denies that they can be radical or total. A legal system must of necessity conform to the rule of law to a certain degree, he claims. From this claim he concludes that there is an essential link between law and morality. Law is necessarily moral, at least in some respects.<sup>67</sup>

It is clear from this passage that Raz does not attribute to Fuller – as did Hart – any claim to the effect that observance of the internal morality of law necessarily secures moral ends. Raz instead correctly understands the point at issue as hinging on the question of whether there is a necessary connection between the existence of law and the rule of law that also demonstrates the necessary moral value of law. Still, although Raz properly understands the question that defines the debate between him and Fuller, he chooses not

---

<sup>65</sup> *Ibid.* at 229.

<sup>66</sup> Raz confirms this when he states that he is following his own adaptation of Hart’s conception of law: *Ibid.* at 223, note 11.

<sup>67</sup> *Ibid.* at 223.



to engage with that question on Fuller's terms, in the sense of undertaking a direct assessment of Fuller's claims.<sup>68</sup> Instead, he chooses to assess whether Fuller's claims offer anything to disturb the positivist account of the relationship between law and morality.

Raz begins this assessment by expressing basic agreement with Fuller with respect to the idea that the principles of the rule of law "cannot be violated altogether by any legal system".<sup>69</sup> This, as Raz explains it, is because legal systems require an institutional framework that must itself be established through rules that possess certain attributes of the rule of law, such as general rather than particular rules that can facilitate the establishment of institutions of adjudication, or prospective rules that can provide instruction with respect to how the law is to be enforced.<sup>70</sup> It thus follows that some observance of the principles of the rule of law must be implicated in the establishment of a legal system. Nonetheless, Raz then goes on to insist that the extent to which such principles as generality, clarity, prospectivity and so forth are essential to the existence of law "is both minimal and consistent with gross violations of the rule of law".<sup>71</sup>

Raz quickly anticipates the objection that can be made to this argument: that surely, if he concedes that there must be some observance of the principles of the rule of law in order for a legal system to come into existence, then "there is necessarily at least some moral value in every legal system".<sup>72</sup> Raz responds to this objection by introducing the argument that the rule of law is "an essentially negative value", designed to minimize the danger of arbitrary power that is created by the law itself, as well as the infringement of

---

<sup>68</sup> This is made clear in note 11 of the essay where Raz states that he is "not adopting here Fuller's conception of the law, but rather I am following my own adaptation of Hart's conception", adding that his analysis is therefore "not a direct assessment of Fuller's own claims": *Ibid.* at 223. See also note 10 where Raz states that "Fuller's argument is complex and his claims are numerous and hard to disentangle. Many of his claims are weak and unsupportable. Others are suggestive and useful. It is not my purpose to analyze or evaluate them here".

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.* at 223-224.

<sup>72</sup> *Ibid.* at 224.

freedom and dignity that is instantiated through laws that are unstable, obscure, and retrospective.<sup>73</sup> As he explains it,

The law inevitably creates a great danger of arbitrary power – the rule of law is designed to minimize the danger created by the law itself. Similarly, the law may be unstable, obscure, retrospective, etc., and thus infringe people's freedom and dignity. The rule of law is designed to prevent this danger as well. Thus the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself.<sup>74</sup>

In summary, then, Raz's direct engagement with Fuller's claims about the internal morality of law contains two key elements. The first is his argument that although some observance of the principles of the rule of law is necessary to bring legal order into existence, this level of observance is minimal. It thus follows for Raz that the moral value realized through the rule of law need not accrue to a given legal system, because the minimal observance of the rule of law necessary to create such a system is something different to the morally valuable fulfillment of the rule of law as a political ideal. The concept of law, the conditions for its existence, and its moral value thus remain separable from the concept of the rule of law. The second element of Raz's response to Fuller is that there can also be no inherent moral value to any and every legal system because of how the rule of law is a merely negative value, designed to correct the evils that law itself creates. Together, these two arguments are meant to support the conclusion that Fuller's claims about the internal morality of law must fail.

In my view, these responses do not leave the debate between Fuller and his critics about the significance of legality to the existence and moral value of law in quite as clear a position as the widespread positive reception of Raz's claims might suggest. To explain why, I will first address the two arguments advanced by Raz that are arguably the least material to the positivist engagement with the concerns of Fuller's legal philosophy: that is, Raz's claim about the morally neutral instrumental value of law, and his claim that the rule of law is an essentially negative value.

---

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

#### 4.1 The negative value and instrumental arguments

Raz's argument that the rule of law is ultimately a negative value – designed to correct the evils that only law can create – cannot, at least without further elaboration, be regarded as a serious engagement with Fuller's claims. This is because the negative value argument denies the very basis of Fuller's understanding of what makes law a distinctive form of ordering: namely, its relationship to curtailing the possibility of arbitrary power.

As I have explained, Fuller sees law as performing this function by standing for the notion that centralized power is to be exercised not just through rules, but through a particular way of creating and communicating rules that respects the subject as an agent. It follows from this, for Fuller, that when systematic departures from the conditions of legality do occur, the result is the degradation of legal order into something else: a movement from law to non-law. The order in question might still be capable of guiding or directing the behaviour of human subjects in some way, but in negating the moral presuppositions upon which the very idea of law rests, it will lack the attributes of a *legal* order. In short, therefore, law cannot be the cause of the problem of arbitrary power, as Raz suggests, because law properly understood is the answer to this problem.

Raz's argument about the morally neutral instrumental value of the rule of law can equally be moved to the margins of the debate between Fuller and positivism, because while this claim might be important to Raz's attempt to flesh out and consolidate a positivist understanding of the rule of law, it is not directly material to his engagement with Fuller. Indeed, the fact that Raz introduces the instrumental argument only after he has addressed Fuller's claims confirms that he also does not see the contest between him and Fuller as hinging on the question of the relationship between observance of the rule of law and moral legal ends. Instead, as I noted above, he correctly understands that contest as turning on the question of whether there is a necessary connection between the existence of law and the rule of law that also demonstrates the necessary moral value of law.

Thus, if Raz is to be regarded as having successfully disposed of Fuller's claims about the existence and moral value of law, this success must rest on the two claims in Raz's essay that are clearly more salient to a positivist engagement with Fuller than those just reviewed. These claims are, first, Raz's argument that there need only be minimal compliance with the principles of the rule of law in order for legal order to be brought into existence, and second, his analysis of why the rule of law has moral value. Raz's position with respect to these points deserves close scrutiny, because in seeing him come very close to speaking Fuller's language, they appear to threaten the alleged distinctiveness of the positivist position as a response to Fuller.

## 4.2 The minimal compliance argument

It is apparent that Raz considers his claim that there is no necessary connection between law and the rule of law – because the level of compliance with the rule of law necessary to bring a legal order into existence “is both minimal and consistent with gross violations of the rule of law”<sup>75</sup> – to be a response to Fuller both on the question of law's connection to legality, and the alleged moral value that accrues to law through that connection. On a closer look, however, the real difference between Raz and Fuller on this point seems to be less one of opposed positions than a difference of opinion on a question of degree.

That is, we know that if law is to exist on Fuller's account, then there must be substantial compliance with the internal morality of law. This is apparent from how, although he accepts that his model of the internal morality of law is an aspirational ideal, Fuller refuses to designate as a legal order any attempt at lawgiving that derogates too greatly from that ideal. We learn this especially from his statement in *The Morality of Law* that a systematic failure to observe any one of his eight principles may result not simply in bad law but in something not worthy of the title of law at all. Moreover, that Fuller sees such observance as necessarily instantiating respect for the agency of the legal subject is made clear in his statement, also in *The Morality of Law*, that implicit in the very idea of the internal morality of law is a conception of the legal subject as a responsible agent.<sup>76</sup> Still,

---

<sup>75</sup> *Ibid.* at 223-224.

<sup>76</sup> These ideas, moreover, come together in especially clear terms in Fuller's analysis of Nazi law in his 1958 reply to Hart, where he insists on denying the title of law to a system of arbitrariness, systematic

exactly *how much* respect for agency needs to be instantiated through law – and correspondingly, just how great a departure from one or other of the principles of the internal morality of law can be tolerated within an order that claims to be legal – is unclear.

This lack of clarity, however, is hardly a reason to conclude that Fuller's claims must fail and Raz's must succeed. This is because Raz is equally vague about how much compliance with the rule of law is necessary to bring legal order into existence. That is, Raz's designation of "minimal" compliance tells us little or nothing more, in terms of a clear position, than the "substantial" designation that we ordinarily attribute to Fuller. Ultimately, then, the most that can be said is that the two camps disagree on the issue of the degree of compliance with the rule of law that is necessary to produce law.

This disagreement, by all appearances, seems to be a significant one, in the sense that Raz appears to accept what Fuller could not: that is, that a legal order can still be such despite being plagued with systematic legal arbitrariness, instability, obscurity, retroactivity, disrespect for the legal subject, and other ills. Nonetheless, this apparent difference of opinion does not, of itself, alter the fact that positivists share Fuller's view that law, to be such, must comply to a certain degree with the rule of law. Or, to put it still more starkly, positivists seem to agree with Fuller that law is, to some unspecified extent, answerable to legality.

### **4.3 The moral value argument**

Raz also seems to speak in a distinctly Fullerian voice when he explains the multiple ways in which observance of the rule of law has moral value. With respect to the extent to which Raz's discussion of this point suggests an engagement with Fuller, the most important point to note is that Raz understands the moral value of the rule of law in terms of its respect for the agency of the legal subject. This point is made especially clear when he states that the most important sense in which the rule of law has moral value lies in how its observance instantiates respect for human dignity by treating the legal subject as

---

retroactivity, secrecy and other ills, even though that system dressed itself in a "tinsel of legal form": Fuller, "Positivism and Fidelity to Law", *supra* note 46 at 660.

a rational autonomous creature who is capable of planning and plotting her future.<sup>77</sup> In the same discussion, however, Raz also advances the argument that observance of the rule of law is compatible with gross disrespect for agency: a point, as I observed earlier, that is put particularly strongly in his claim that the law may “institute slavery without violating the rule of law”.<sup>78</sup>

It is difficult to assess what to make of these apparently contradictory elements of Raz’s analysis. Certainly, in recognizing the moral value of the rule of law in terms of the respect for agency that it conveys to the legal subject, but then suggesting that laws that radically undermine agency can be fully compatible with the rule of law, Raz’s position is ambiguous at best. When we move beyond “The Rule of Law and its Virtue” to other of Raz’s work in legal philosophy, however, what is revealed is less a problem of ambiguity on this point than a position that seems to align closely with Fuller’s.

I am referring here to Raz’s work on the nature of legal authority, in which he argues that law, to be such, must claim not only authority, but legitimate authority.<sup>79</sup> To gain such authority, however, law must meet the conditions set by three theses that Raz elaborates: the dependence thesis, the pre-emption thesis, and the normal justification thesis.<sup>80</sup> The dependence thesis states that to be authoritative, all directives should be based on reasons that apply to the subjects of those directives: for example, a child welfare law must address issues of child welfare.<sup>81</sup> The pre-emption thesis states that the fact that an authority requires performance of an action is a reason for its performance.<sup>82</sup> For present purposes, however, my primary interest is in Raz’s normal justification thesis, which states that one should acknowledge someone as an authority when one is more likely to

---

<sup>77</sup> Raz, “Virtue”, *supra* note 47 at 221-222.

<sup>78</sup> *Ibid.* at 221.

<sup>79</sup> Joseph Raz, “Authority, Law, and Morality” in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, (1994: Oxford, Clarendon Press) at 211, 215. My purpose here is only to gesture to Raz’s thinking on legal authority, so as to highlight an apparent tension between his arguments about the nature of legal authority and those that he advances about the rule of law. To further develop this point that that which I gesture to here would require a much more sustained engagement with Raz’s thinking on authority than that which I offer here.

<sup>80</sup> *Ibid.* at 214.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

comply with reasons that apply to oneself if one accepts the directives of that person than if one decided for oneself.<sup>83</sup>

Raz's normal justification thesis deserves special attention, because it suggests strong affinities with Fuller's claims about fidelity to law. This affinity lies in how what seems inherent in the normal justification thesis is an idea of the legal subject as an agent whose judgment on the question of whether she will give her fidelity to law is critical in determining whether law has authority and thus can be legitimately regarded as law. The message of the normal justification thesis, then, seems to be that the putative legal subject must approve of the directives of the authority from the point of view of her own circumstances, if those directives are to be legitimately authoritative.

Raz therefore appears to understand the existence of legitimate authority, and also the possibility of law, as being contingent on the authority's directives being meaningful, or intelligible, to the subject's self-understanding as an agent. It follows from this that his position leans towards the claim, put forcefully by Fuller, that law's status as such is fundamentally linked to how it treats, and is perceived as treating, the legal subject. Raz's thinking on legal authority thus seems to stand in contradiction with his contention in "The Rule of Law and its Virtue" that laws of slavery could be made in full compliance with the rule of law, because it is difficult to see how the precondition of legitimate authority over a subject that is necessary for law could be achieved if the law designated that subject as a slave.

It might thus be said that when positivists confront the question of legality, its relationship to law, and its moral value, they find themselves drawn to positions that make concessions to Fuller. In this tension we see the inability of the positivist project to fully close off the implications of an avenue of inquiry that is framed in terms other than its own or, at least, to do so convincingly.<sup>84</sup> At the very least, therefore, this tension

---

<sup>83</sup> *Ibid.* Raz observes in a footnote that the normal justification thesis "specifies only the reasons for recognizing an authority", and thus says "nothing about the reasons against doing so": *ibid.* at note 7.

<sup>84</sup> From his very earliest writings, Fuller repeatedly criticized legal positivism for precisely this tendency to define the project of legal philosophy in its own image and, in doing so, to close off other trajectories of

suggests that there is more work to be done if positivist legal philosophers are to show that there is in fact a debate between them and Fuller on the question, to borrow Waldron's words, of whether

Law itself may be an enterprise unintelligible apart from the function of treating humans as dignified and responsible agents capable of self-control; unscrupulous rulers must make what they can of that fact when they decide, for reasons of their own, to buy into the "legal" way of doing things.<sup>85</sup>

## 5 Conclusion

Throughout this thesis I have shown how Fuller develops the idea that when we think seriously about how law works, and what distinguishes it from other forms of ordering, we come to see the centrality of the relationship between legal form and human agency to that workability and distinctiveness. In this final chapter I have also shown how positivists and anti-positivists alike seem to agree on this point, even if they disagree strongly on questions of degree: that is, on such questions as that of just how much agency needs to be respected by the formal features of law in order for legal order to be brought into being, or how much moral value is instantiated by this relationship or, indeed, how readily Fuller's claims can translate into a standard against which to determine questions of legal validity.<sup>86</sup>

---

inquiry. For example, in his first polemic against positivism, *The Law in Quest of Itself*, Fuller appealed for an orientation in legal philosophy that could give "a profitable and satisfying direction to the application of human energies in the law", and commented on how positivist legal philosophy stifles "the element of creation and discovery in the law": Lon L. Fuller, *The Law in Quest of Itself*, (Chicago: The Foundation Press, 1940) at 2, 140. Similarly, in his "Rejoinder to Professor Nagel" published just prior to the commencement of the Hart-Fuller debate, Fuller again advanced a plea to legal philosophers to theorize about law in a way that recovered "meaningful contact with reality": Lon L. Fuller, "A Rejoinder to Professor Nagel", (1958) 3 Nat. L. Forum 83 at 102. This sentiment was echoed a decade later in *The Anatomy of Law*, where Fuller criticized legal positivism for setting "limits to inquiry", and for attempting to persuade us to think about law in ways that "disregard of what those who brought it into being were trying to do": Lon L. Fuller, *Anatomy of the Law* (New York: Encyclopaedia Britannica, 1968) at 177, 179. Indeed, as I noted in Chapter 1, Fuller's working papers explain his enduring respect for certain commitments of the natural law tradition in terms of how it "does not bar off whole areas from investigation" and "closes fewer doors of inquiry": Undated document titled 'NATURAL LAW', Box 12, folder 1 (Notes for the 'Reply to Critics'), The Papers of Lon L. Fuller, Harvard Law School Library.

<sup>85</sup> Waldron, "Hart's Equivocal Response", *supra* note 15 at 1167.

<sup>86</sup> The problem here is that the legal subject's experience of agency, which I read to be central to Fuller's position, is something difficult to quantify in any formulaic way. Confronting this problem, however, might not be as difficult as it appears, in the sense that it is likely not the case that a judge faced with a challenge to legal validity based in a Fullerian argument would need to make a difficult empirical assessment of the



Still, in a discipline that too often highlights its differences at the expense of its similarities, the point to emphasize is that there is considerable common ground between the two camps of legal philosophy with respect to the centrality of the relationship between legal form and human agency within an account of law. Moreover, this common ground suggests that both projects might develop their understanding of this relationship by taking one of the following paths.

The first path would be to pursue a conceptual claim that explains law in terms of the relationship between the form of law and human agency. Such a claim, as I suggested earlier, might start with the idea of the agent and move from this, not only to the necessity of law, but also to a particular conception of legal form. The second path, which is in no way incompatible with the first, would be for legal philosophers to explore the interaction between legal form and agency in practice, so as to better understand the normative commitments that constitute the practice of creating and maintaining legal order. This path of inquiry has a distinctly Fullerian flavour, in the sense that, consistent with his own pragmatist philosophical leanings, Fuller would likely have welcomed the opportunity to see theory and practice inform each other in this way.

At the same time, however, the fruits of such an inquiry need not only benefit the development of an anti-positivist legal philosophy. Rather, to bring theory and practice into contact in this way could also develop the positivist project. This, as I suggested above, is because Raz's argument that law need only minimally comply with the rule of law in order to qualify as law is as much in need of further particulars as Fuller's equally vague preference for a more substantial level of compliance.

---

subject's experience of agency. Instead, the judge would need to examine the state of the formal features through which the law in question is expressed, because, on Fuller's account, the health of these features vis-à-vis their correspondence with the principles of the internal morality is something of a litmus test for the extent to which the law is communicating respect for the agency of those subject to it. For an example of the possibility of challenging actual legal practice on this basis, see W. Wesley Pue, "Protecting Constitutionalism in Treacherous Times: Why 'Rights' Don't Matter" in Miriam Gani & Penelope Mathew, eds., *Fresh Perspectives on the 'War on Terror'* (Canberra: Australian National University Press, 2008).

My point, then, is that Fuller's insights into the relationship between the form of law and human agency open up a number of illuminating paths that scholars of legal philosophy might take in the future. Above all, these trajectories of inquiry might help us to clarify precisely what it is, if anything, that distinguishes positivist and anti-positivist legal philosophy on the question of how the concept of law relates to the concept of legality.

My own efforts so far to develop these insights in a manner that tests the traditional contests of legal philosophy are reflected in my work on the connections between law and the Holocaust. This project confronts the question of whether we can assign the status of law to the Nazi legal persecution of the Jews that was so pivotal in laying the ground for the Holocaust, and explores how the positivist and Fullerian positions understand the possibility of pursuing a policy of extermination through law.<sup>87</sup>

At the centre of this project is my concern to explore Fuller's claim that the health of a purported condition of legality can be measured by the extent to which the formal features of law instantiate respect for the legal subject as an agent. Equally central is my concern to explore what is lost, in terms of our understanding of the nature of law, if we adopt an instrumental conception of law.

That is, if we adopt an instrumental conception of law, and the instrumental explanation of the relationship between law and the Holocaust that such a conception invites, there are things that we simply will not notice. We will not notice, for instance, the way that certain debasements of legal form accompanied each incremental attempt, on the part of the Nazis, to diminish the agency of the Jews within German society. The testimony of those who lived under these laws suggests that, initially, there was even some sense of relief that the overtly discriminatory laws could nonetheless improve the state of persecution that was happening everywhere and with complete arbitrariness. But this understanding changed, and it changed not only in the face of the increasingly severe content of the laws, but also in the face of debasements to their form: for example,

---

<sup>87</sup> See Kristen Rundle, "The Impossibility of an Exterminatory Legality: Law and the Holocaust", (2009) 59 U. T. L. J. 65.

through escalating instances of legislated vagueness, uncontrolled discretion, and a spiraling tendency for Nazi officials to depart from the letter of the law in its administration. Eventually, by the time that the Nazi SS terror machine gained primary jurisdiction over Jewish affairs and was putting the steps in place for the extermination program, law – at least for the majority of Jews – seemed to disappear altogether.

By looking more closely at how changes in legal form accompanied changes in agency in this way, we can potentially shed light on the institutional character of the Nazi persecution of the Jews, as well as go some way towards explaining the real differences between the experiences of those who lived under these laws.<sup>88</sup> At a deeper level, however, a study of this apparent slide from law to terror might also help us to flesh out the content of Fuller's account of the relationship between law and legality, precisely because the intuition which underscores that account is one that gravitates consistently to the connection between the formal features of law and respect for human agency.<sup>89</sup>

I hope that the reading of Fuller that I have offered in this thesis provides a valuable foundation for such an inquiry, as well as for reconvening the ongoing debate between positivists and anti-positivists about the nature and moral significance of law. In so offering, however, I hope above all to have aided the project of recasting the scholarly

---

<sup>88</sup> For example, the difference between the experience of those who, for whatever reason, maintained some form of protected legal status for the duration of the Nazi regime, versus those for whom a relationship with legal status ran out. One instance of this situation that I think invites closer attention is the experience of those who gained the legal protection of the "privileged mixed marriage" and who were not victims of the extermination. Amongst other things, this example opens up inquiry into how the phenomenon of the "privileged Jew" among those who were subject to Nazi persecution flowed from the stability of legal status.

<sup>89</sup> My project on the connections between law and the Holocaust is just one instance of practice to which we might look to test and develop Fuller's insights. Multiple other instances of legal practice invite the same kind of inquiry into how the health of a state of legality might be measured by reference to the relationship between the form of law and the agency of the legal subject. These include but are in no way limited to various aspects of legal responses to the threat of terrorism, certain onerous conditions of imprisonment, the situation of people confined for mental health reasons, and the position of immigrants whose status as legal subjects is often unclear. Although the specific legal circumstances of these groups may differ greatly, common to each is some attempt, on the part of a lawgiver, to remove or to substantially diminish the agency of the relevant legal subject while purportedly remaining within the realm of legality. Fuller's insights help us to see what law looks like in these circumstances, and give us a principled basis, beyond the resources of the positive law, for contesting their claim to legality.

memory of Lon L. Fuller into terms that correspond more closely to what he actually contributed to our study of law: the form of ordering that he understood as responding to the needs of lawgiver and subject equally, and which he insisted was unintelligible if portrayed in any other terms.

## Selected Bibliography

### Monographs

- Fuller, Lon L., *The Law in Quest of Itself*, (Chicago: The Foundation Press, 1940)
- Fuller, Lon L., *The Problems of Jurisprudence* (Temporary edition) (Brooklyn: The Foundation Press, 1949)
- Fuller, Lon L., *Legal Fictions*, (Stanford: Stanford University Press, 1967)
- Fuller, Lon L., *The Morality of Law* (revised edition), (New Haven: Yale University Press, 1969)
- Fuller, Lon L., *Anatomy of the Law* (New York: Encyclopaedia Britannica, 1968).
- Hart, Henry M. and Sacks, Albert M., *The Legal Process: Basic Problems in the Making and Application of Law*, edited by William N. Eskridge, Jr. and Philip P. Frickey (The Foundation Press, 1994).
- Hart, H.L.A., *The Concept of Law*, (second edition), (Oxford: Oxford University Press, 1994)
- Hart, H.L.A., *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983)
- Lacey, Nicola, *A Life of HLA Hart: The Nightmare and the Noble Dream*, (Oxford: Oxford University Press, 2004)
- Simmonds, Nigel, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007)
- Summers, Robert S., *Lon L. Fuller* (Stanford: Stanford University Press, 1984)
- Winston, Kenneth I., *The Principles of Social Order – Selected Essays of Fuller, Lon L.*, (revised edition) (Portland: Hart Publishing, 2001)
- Witteveen, Willem J. and van der Burg, Wibren (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999)

### Journal Articles

- Cohen, Marshall, “Law, Morality and Purpose”, (1965) 10 *Villanova Law Review* 640
- Dworkin, Ronald, “Philosophy, Morality and Law – Observations Prompted by Professor Fuller’s Novel Claim”, (1965) 113 *University of Pennsylvania Law Review* 668

Dworkin, Ronald M., “The Elusive Morality of Law”, (1965) 10 *Villanova Law Review* 631

Dyzenhaus, David, “The Grudge Informer Case Revisited”, (2008) 83 *New York University Law Review* 1000

Fox-Decent, Evan, “Is the Rule of Law Really Indifferent to Human Rights?”, (2008) 27 *Law and Philosophy* 533

Fuller, Lon L., “American Legal Realism”, (1934) 82(5) *University of Pennsylvania Law Review* 429

Fuller, Lon L. and Perdue, William R. Jr, “The Reliance Interest in Contract Damages”, (1936-1937) 46 *Yale Law Journal* 52.

Fuller, Lon L., “Consideration and Form”, (1941) 41 *Columbia Law Review* 799.

Fuller, Lon L., “Reason and Fiat in Case Law”, (1946) 59(3) *Harvard Law Review* 376

Fuller, Lon L., “Freedom – A Suggested Analysis”, (1955) 68 *Harvard Law Review* 1305

Fuller, Lon L., “Human Purpose and Natural Law”, (1956) 53 *Journal of Philosophy* 697

Fuller, Lon L., “A Rejoinder to Professor Nagel”, (1958) 3 *Natural Law Forum* 83

Fuller, Lon L., “Positivism and Fidelity to Law – A Reply to Professor Hart”, (1958) 71 *Harvard Law Review* 630

Fuller, Lon L., “Irrigation and Tyranny”, (1965) 17 *Stanford Law Review* 1021

Fuller, Lon L., “A Reply to Professors Cohen and Dworkin”, (1965) 10 *Villanova Law Review* 655

Fuller, Lon L., “Freedom as a Problem of Allocating Choice”, (1968) 112(2) *Proceedings of the American Philosophical Society* 101

Fuller, Lon L., “Human Interaction and the Law”, (1969) 14 *American Journal of Jurisprudence* 1

Fuller, Lon L., “The Forms and Limits of Adjudication”, (1978) 92 *Harvard Law Review* 353

Hart, H. L. A., “Positivism and the Separation of Law and Morals”, (1958) 71 *Harvard Law Review* 593

Lacey, Nicola, "Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate", (2008) 83 *New York University Law Review* 1059

Luban, David, "Natural Law as Professional Ethics: A Reading of Fuller", (2001) 18 *Social Philosophy and Policy* 176

Murphy, Colleen, "Lon Fuller and the Moral Value of the Rule of Law", (2005) 24 *Law and Philosophy* 239

Nadler, Jennifer, "Hart, Fuller, and the Connection Between Law and Justice", (2007) 27 *Law and Philosophy* 1

Nagel, Ernest, "On the Fusion of Fact and Value: A Reply to Professor Fuller", (1958) 3 *Natural Law Forum* 77

Pappe, H. O., "On the Validity of Judicial Decisions in the Nazi Era", (1960) 23 *Modern Law Review* 260

Rundle, Kristen, "The Impossibility of an Exterminatory Legality: Law and the Holocaust", (2009) 59 *University of Toronto Law Journal* 65

Sacks, Albert M., "Lon Luvois Fuller", (1978) 92(2) *Harvard Law Review* 349

Schauer, Frederick, "A Critical Guide to Vehicles in the Park", (2008) 83 *New York University Law Review* 1109

Summers, Robert S., "Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law", (1978) 92(2) *Harvard Law Review* 433

Teachout, Peter Read, "The Soul of the Fugue: An Essay on Reading Fuller", (1986) 70 *Minnesota Law Review* 1073

Waldron, Jeremy, "Why Law – Efficacy, Freedom or Fidelity?", (1994) 13 *Law and Philosophy* 259

Waldron, Jeremy, "Positivism and Legality: Hart's Equivocal Response to Fuller", (2008) 83 *New York University Law Review* 1135

Waldron, Jeremy, "The Concept and the Rule of Law", (2008) 43 *Georgia Law Review* 1

Winston, Kenneth I., "Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law", (1988) 8(3) *Oxford Journal of Legal Studies* 329

Winston, Kenneth I., "Legislators and Liberty", (1994) 13 *Law and Philosophy* 389

## Chapters in Books

Fuller, Lon L., “Lon L. Fuller”, in *My Philosophy of Law – Credos of Sixteen American Scholars* (Boston Law Book Co., 1941)

Lacey, Nicola, “Out of the ‘Witches’ Cauldron?: Reinterpreting the context and reassessing the significance of the Hart-Fuller Debate, forthcoming in Peter Cane (ed), *The Hart-Fuller Debate in the 21st Century* (Oxford: Hart Publishing, 2009)

Raz, Joseph, “The Rule of Law and its Virtue”, Chapter 11 in *The Authority of Law – Essays on Law and Morality* (Oxford: Clarendon Press, 1979)

Raz, Joseph, “Authority, Law, and Morality” in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, (1994: Oxford, Clarendon Press)

## Book Reviews and Review Essays

Cassels, Jamie, “Lon Fuller: Liberalism and the Limits of Law” (a review of Roberts Summers, *Lon L. Fuller*) (1986) 36 *University of Toronto Law Journal* 318

Cohen, Morris, “Should Legal Thought Abandon Clear Distinctions?” (1941) 36 *Illinois Law Review* 239

Fuller, Lon L., “American Legal Philosophy at Mid-Century – A Review of Edwin W. Patterson’s *Jurisprudence, Men and Ideas of the Law*”, (1954) 6(4) *Journal of Legal Education* 457

Hart, H. L. A., “Lon L. Fuller: *The Morality of Law*”, (1965) 78 *Harvard Law Review* 1281

Schauer, Frederick, “A Life of H. L. A. Hart: The Nightmare and the Noble Dream” (Book Review) (2006) 119 *Harvard Law Review* 852

Selznick, Philip, “Book Review – *The Morality of Law* by Lon L. Fuller”, (1965) 30 *American Sociological Review* 947

Selznick, Philip, “Book Review - *Anatomy of the Law* by Lon L. Fuller”, (1970) 83(6) *Harvard Law Review* 1474

Winston, Kenneth I., “Lon L. Fuller” (Book Review), (1985) 95(3) *Ethics* 751

Wueste, Daniel E., “Fuller’s Processual Philosophy of Law”, (Book Review – *Lon L. Fuller* by Robert Summers), (1985) 71 *Cornell Law Review* 1205