

Oxford Handbooks Online

Lon Fuller, The Morality of Law

Frank Lovett

The Oxford Handbook of Classics in Contemporary Political Theory

Edited by Jacob T. Levy

Online Publication Date: Dec
2015

Subject: Political Science, Comparative Politics, Political Theory
DOI: 10.1093/oxfordhb/9780198717133.013.10

Abstract and Keywords

This chapter reviews *The Morality of Law*, by Lon L. Fuller, one of the most important books in jurisprudence published in the twentieth century. Fuller offers an account of the rule of law and its connection to morality that has influenced not only legal philosophers, but also a wide range of political theorists and social scientists. This chapter provides some background that led to the publication of *The Morality of Law*, considering in particular Fuller's response to Hart's lecture on legal positivism, delivered in 1956 at the Harvard Law School. It also discusses the publication of *The Morality of Law* in 1964 and its description of eight "principles of legality": generality, promulgation, no retroactive laws, clarity, no contradictions, no laws requiring the impossible, constancy of the law through time, and congruence between the official action and declared rule.

Keywords: The Morality of Law, Lon L. Fuller, jurisprudence, H. L. A. Hart, The Concept of Law, legal theory, rule of law, morality, principles of legality, legal positivism

The Morality of Law by Lon L. Fuller numbers among the most important books in jurisprudence published in the twentieth century. Together with H. L. A. Hart's *The Concept of Law* and Ronald Dworkin's *Taking Rights Seriously*, it is often credited with reviving the field of legal theory after the debate between realists and formalists had long ceased to be productive by mid-century. Also like the other two, it is one of the relatively few strictly jurisprudential works widely cited outside its field, and especially among political theorists and philosophers. This is largely because it articulates an account of the rule of law and its value that many have found, and continue to find, extremely attractive.

In all fairness it must be said that *The Morality of Law* is no masterpiece of theoretical rigor. Though he was widely read and a formidable scholar in his own right, Fuller was trained as a lawyer, not as a philosopher. Characteristically, his discussions are often more analytically sharp than they are systematic. But this should not be seen as detracting from his achievement: *The Morality of Law* would not have been so successful had it not captured—however imperfectly—an important insight regarding the nature of law and its connection to morality. Further, as we shall later see, the very ambiguity of the work may have helped as much as hindered its success. It will be the aim of this review to explain Fuller's important insight, but first it is necessary to provide some background.

The Debate with Hart

In the fall of 1956, while a visiting professor from Oxford University, H. L. A. Hart delivered an important and influential lecture, "Positivism and the Separation of Law and Morality," at the Harvard Law School. Among the many faculty and students in attendance was Lon Fuller. A prominent member of the Harvard Law faculty for more than fifteen years, Fuller was at this time well-known as a member of the process school of jurisprudence, a group of scholars who hoped to circumvent the stale debate between formalists and realists by reorienting discussion toward the operation of legal systems in practice—toward their distinctive purposes and procedures. In his lecture, Hart discussed Fuller's work explicitly only briefly near the end, but the general tenor of his argument was firmly opposed to the legal process school.

Lon Fuller, The Morality of Law

Since *The Morality of Law* grew out of the debate initiated in Hart's lecture, it is worth briefly reviewing the main points of the latter.

Hart's aim in the lecture was to revive the tradition of legal positivism, which by the middle of the twentieth century had fallen into some disrepute. He began by observing that the classical positivists such as Bentham and Austin were actually committed to two distinct doctrines: on the one hand, the idea that our conception of law should be separated from our conception of morality; and on the other hand, the idea that the essential nature of law is that of command (specifically, commands of a sovereign). From this initial observation, Hart proceeded as follows. First, he conceded that legal positivism's critics were correct to regard the command theory of law as deeply flawed; indeed, he restated the main objections to that theory in what has since become their canonical form (1958, 602–606). But he then went on to argue that the demise of the command theory leaves untouched the other central commitment of legal positivism—the importance of separating law and morality. This latter doctrine he proceeded to defend vigorously, specifically raising the problem of whether we should count laws of the Nazi regime as laws in the relevant sense. According to the legal process school, laws are not found in the legal source materials alone, but rather in the process of their interpretation according to the broader moral and political aims the legal system is meant to serve. As Hart pointed out, however, this was nothing to the purpose given the repugnant moral and political aims of the Nazi regime. Far better, he argued, to resist giving moral credit to something merely because it is a law: only when law and morality are clearly distinguished can we face the issue of our ethical obligations to resist or obey particular legal regimes in a straightforward manner. “Surely if we have learned anything from the history of morals,” Hart said, “it is that the thing to do with a moral quandary is not to hide it” (619–620).

Hart's lecture was subsequently published in the *Harvard Law Review*, and the editors invited Fuller to prepare a response for the same issue. This he did, and his paper “Positivism and Fidelity to Law—A Reply to Professor Hart” outlined many of the arguments that would later appear in *The Morality of Law*. Glossing over many interesting aspects of their debate, Fuller's response presses two main objections to the separation of law and morality advocated by Hart. The first concerns what Fuller terms the “external” morality of law. Once we abandon the command theory of law, he argues, it should be apparent that legal order is a collective achievement which “requires not merely the respectful deference we show for ordinary legal enactments, but that willing convergence of effort we give to moral principles” (1958, 642). In other words, successful legal orders necessarily have morally acceptable purposes and aims, for “the authority to make law must be supported by moral attitudes that accord to it the competency it claims” (1958, 645). In order to avoid drawing this conclusion, and thus having to abandon the separation of law and morality, positivists must supply some alternative account of how legal order is possible, and so far (according to Fuller) they have been unable to do this.

The second main objection concerns what Fuller terms the “internal” morality of law. Suppose we ignore the constraint that an effective legal order must be responsive to external morality, and imagine some evil regime such as the Nazis bent on imposing an unjust legal order. There is an important sense in which the Nazi regime simply failed to do this, Fuller suggests: for example, they had recourse to laws validating purges after the fact, they kept important laws secret from the general population, they regarded the law as subordinate to political considerations in trials, and so forth. While these activities succeeded perhaps in terrorizing the population, they did not succeed in producing anything resembling a legal order—that is, a system of rules for the guidance of conduct. It follows, Fuller concludes, that even “considered merely as order,” the law must contain “its own implicit morality. This morality of order must be respected if we are to create anything that can be called law, even bad law” (1958, 645). For both these reasons, then, the separation of law and morality positivists advocate cannot be maintained. Nor should it be, Fuller adds. For the best way to prevent evil from corrupting law is not to insist on excluding morality from law altogether, but rather to fight back with good.

In 1961, a few years after Hart's lecture and Fuller's response appeared in print, Hart published *The Concept of Law*. This work is unquestionably the most significant contribution to legal philosophy in the twentieth century, and it can be fairly described as setting the agenda and providing much of the framework for analytic legal theory ever since. Building on his famous Harvard lecture, Hart reiterated and expanded both his critique of the command theory of law, and also his defense of the separation of law and morality (Hart 1994, chs. 2–4 and 8–9 respectively). Arguably more consequential than either, however, he developed a sophisticated account of the possibility of legal order to replace the command theory. Without elaborating on the details, his basic idea was to conceive of a legal order as resting on an important conventional social rule he termed “the rule of recognition.” Such a rule might have the form “recognize the pronouncements of the queen-in-parliament as valid law,” for example. The adoption of a rule of this sort by legal officials enables them to coordinate their various efforts and implement a legal system. Hart invested considerable effort in

analyzing the nature of social rules and what it means for people to follow them (Hart 1994, esp. chs. 5–7). Because, on his view, social rules are purely conventional, the result is a plausible account of legal systems that does not depend on their external morality. Though not explicitly addressed to the first objection Fuller had raised, *The Concept of Law* effectively answered it.

The Principles of Legality

Two years after the publication of *The Concept of Law*, Fuller delivered the William L. Storrs Lectures at the Yale Law School which, among other things, again responded to Hart's book. These lectures, substantially expanded, were published as *The Morality of Law* in 1964. While he was not entirely convinced by Hart's new account of legal systems as having their basis in conventional social rules, for the most part Fuller leaves this aspect of his original critique behind. The central focus of *The Morality of Law*—and the main theme for which it has become famous and influential—concerns the inner morality of law.

In chapter two, Fuller tells the story of a well-meaning and reform-minded monarch named Rex (33–38; cf. Fuller 1958, 644–645). The legal system in place when Rex assumes the throne is archaic, inefficient, and corrupt. Accordingly, his first act is to repeal the entire body of existing law and announce that henceforth he will personally resolve all disputes on a case-by-case basis. Unfortunately, this method soon proves intolerable: since there is no discernible pattern to his judgments, his subjects find themselves in a continual state of confusion and uncertainty. Responding to their complaints, Rex drafts a formal legal code to guide his future decisions systematically, but initially keeps this new code secret from his subjects. When this does nothing to mollify them, Rex agrees to publish the legal code incrementally together with each particular case judgment. Alas, his subjects must explain, knowing particular rules serves no purpose unless they can be known in advance, and thus they reiterate their demand that the legal code be published in its entirety forthwith. When Rex finally bows to these demands, his subjects are dismayed to discover successive iterations of the published code thoroughly confusing, riddled with contradiction, and unrealistically demanding. To make matters worse, the effort to purge the code of these faults through a constant stream of supplements, amendments, and repeals leaves Rex's subjects at their wits' end to know what the law is at any given time. When a performable, consistent, and clear legal code is finally settled once and for all, things seem to be looking up—that is, until it becomes apparent that when called upon to adjudicate particular disputes, Rex apparently has no interest in governing his decisions by those official rules. With his despairing subjects now on the verge of revolt, the unhappy king Rex suddenly dies, and the throne passes to his successor.

The lesson of Fuller's colorful story is perfectly clear. It illustrates that "the attempt to create and maintain a system of legal rules may miscarry" in a variety of ways (38–39). Regardless of one's substantive aims—notice that the story deliberately makes no reference to Rex's specific political and moral commitments—to meet with any degree of success in lawmaking, one must undertake the enterprise in a certain particular manner. Fuller characterizes this fact in terms of a set of success conditions or (as they are generally called in the literature) "principles of legality," which can be listed as follows:

1. Generality
2. Promulgation
3. No retroactive laws
4. Clarity
5. No contradictions
6. No laws requiring the impossible
7. Constancy of the law through time
8. Congruence between the official action and declared rule

Interestingly, these eight principles bear a striking resemblance to the traditional conception of the rule of law, and Fuller's work is thus commonly read as an attempt to provide a deeper account of that ideal. A considerable portion of *The Morality of Law* (nearly one-quarter of the first edition) is devoted to elaborating the principles, their complexities of detail, and their application to specific legal problems (46–91). Here Fuller exhibits his lawyer's sensibility at its best. Rather than rehearse the details of his discussion, we might instead note that, although the issues addressed by the principles are diverse, roughly speaking they answer to three distinct problems.

First, several of the principles concern the necessary *form* any system of rules capable of governing conduct must take.

There simply would be no system of rules, for example, if public officials adjudicated all controversies on a case-by-case basis. Likewise, no system of rules could even potentially govern conduct unless those rules are normally forward-looking, mutually consistent, and realistically performable by well-meaning human beings of ordinary virtue. These formal concerns are addressed by the requirements that legislation be general (1), that there be no retrospective laws (3), that the legal system not include contradictions (5), and that laws not require the impossible (6).

Second, the mere existence of rules capable of governing conduct is not sufficient to constitute a legal system unless those rules are actually *observed* by the relevant parties. Fuller thus adds the requirement that there must in practice be a congruence between the actions of public officials and the declared legal rules (8).

Finally, even if the relevant official conduct is indeed governed by a system of rules, we would not be inclined to describe that state of affairs as a legal system until it is *common knowledge* both what the rules are, and that they do indeed govern conduct effectively and reliably. This sort of common knowledge requires that the system of rules governing conduct be published (2), that what is published be clearly understandable by those concerned (4), and that it not change so rapidly as to leave people in doubt as to its contents at any given time (7).

Fuller insists that the principles of legality are aspirational, in the sense that they represent ideals we ought to strive toward, even if they cannot all be perfectly met in every possible instance. He cautions that there may be situations in which broader ethical or moral considerations conflict with the principles: the need for legal reform in periods of rapid social and economic change, for instance, may outweigh the value of legal stability. Indeed, the principles might sometimes conflict even with each other such that their joint perfect realization would be impossible. The effort to spell out all the laws in language all citizens can perfectly understand might conflict with the effort to give law the technical precision necessary to ensure that courts can apply them consistently, for instance (44–45). Fortunately, however, the principles will often be mutually reinforcing: success on some dimensions will render success on the others easier to achieve, as for example where maintaining clarity and publicity will tend to reduce the need to resort to corrective retroactive legislation (92). Only when all eight principles of legality are met to at least some reasonable degree can we speak of a genuine legal order. Failure in this regard “does not simply result in a bad system of law,” he says; “it results in something that is not properly called a legal system at all” (39).

Having explained the eight principles, Fuller goes on to argue that they constitute a sort of “morality” in two different respects. On the one hand, it seems obvious that there are benefits to being governed by prospective general rules that are clear, consistent, performable, and so forth, if for no other reason than that this allows us to formulate plans for our lives. Thus it follows that when some political regime—even one whose purposes and aims are, for better or worse, substantially at odds with our own—sets out to govern us through the creation of a legal order, to that extent at least we will be better off than we might otherwise have been. This is because the regime will find itself bound to respect the law’s inner morality as a success condition for its own enterprise. As an instrument of social organization, we might say, wherever the law goes, at least some small measure of good always follows in train. Fuller connects this thought with the plausible aspects of the natural law tradition in jurisprudence, though stripped of any connection to dubious metaphysical or theological assumptions (96–106).

On the other hand, among the various available instruments of social organization, the law is more suited to the realization of some broader political and moral purposes than others. If one’s aim is to establish a free market economic order, say, the law is a very effective tool; by contrast, if one’s aim is to terrorize a population into submission, by contrast, the law is a much less effective tool. Thus it is no surprise that the Nazi regime found itself often having to circumvent even its own laws. The law, in other words, is not perfectly neutral toward the substantive aims political regimes might choose to adopt: not only does it always deliver some good of its own, it also constrains in a salutary manner the broader purposes and aims regimes might pursue (153–162). In both respects, Fuller concludes, it is impossible to fully separate law and morality as positivists claim.

The Law’s Inner Morality

While it did not carry the field against legal positivism (for reasons discussed in the next section), Fuller’s argument has nevertheless proved extremely influential. Not only among legal scholars, but also among political theorists and philosophers, and indeed among social scientists more generally, *The Morality of Law* is far and away the most-often cited authority on the rule of law, and it is frequently cited in other discussions as well. Interestingly, the influence of Fuller’s book has not been hampered by the fact that its main argument is deeply ambiguous.

As we have seen, Fuller maintains that his principles of legality constitute an inner morality of law. The ambiguity arises when we begin to wonder on what basis he purports to establish this claim. In other words, why do these eight principles specifically, and not some others more or less, properly characterize the rule of law? At first pass, it might seem that he intends to advance a *conceptual* claim about what we mean and understand by law. Here we might refer again to a passage cited earlier. Just after concluding the parable of king Rex and listing his principles for the first time, Fuller says that a “total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is *not properly called a legal system at all*” (39, emphasis added). A few pages later he adds that “respect for constituted authority must not be confused with fidelity to law. Rex’s subjects ... remained faithful to him as king” but they “were not faithful to his law, *for he never made any*” (41, emphasis added). These passages seem to suggest that Fuller intends the eight principles to represent conceptual criteria of law. That is, when the activities of some political regime contravene the criteria, the social ordering that results does not properly count as law on the correct meaning of that term.

The difficulty with this reading is that Fuller provides nothing in the way of an argument supporting such a claim. He does not, for example, undertake to show that our ordinary language use of the terms “law” and “legal system” conceptually entail his eight principles. Instead, he sometimes advances on their behalf what are better described as *normative* considerations of political legitimacy. There ought to exist, he argues, “a kind of reciprocity between government and the citizen” (39; cf. 61, 139). It is often the case that we do not share in the aims and purposes of our government; nevertheless, we are asked to observe the rules and obey authorities. On what grounds are we obligated to do so? Fuller’s principles of legality might provide at least part of an answer: “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,” and so forth (39). For there to be reciprocity, of course, observing the principles alone must deliver some measure of good to the citizens, apart from whatever substantive purposes and aims the government intends to pursue. Fortunately, the goods delivered are not hard to find. Apart from the earlier-mentioned advantage of being able to plan our lives on the basis of reasonably stable expectations, Fuller also highlights two further benefits. First, in observing the principles of legality, the government opens its policies to public criticism and is thereby forced to articulate justifications: when “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,” Fuller observes (159; cf. 51). Second, in observing the principles the government is also compelled to adopt a particular perspective or orientation toward human nature: governing through law

... involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of the law’s inner morality is an affront to man’s dignity as a responsible agent. (162)

In order to earn their legitimacy, governments must aspire to create legal orders that are public, reliable, and respectful of their citizens’ dignity. We may thus understand the eight principles of legality as those specific principles whose observance answers to the requirements of reciprocity. When some government fails to observe them, and the “bond of reciprocity is finally and completely ruptured,” Fuller concludes, “nothing is left on which to ground the citizen’s duty to observe the rules” (40). Indeed, at some extremity the citizens might legitimately contemplate outright revolution (41, 61–62).

No doubt textual support exists for this normative reading of *The Morality of Law*, and therefore it is not surprising that it has found favor in a number of recent discussions (see, e.g., Murphy 2005; Luban 2010). The main obstacle to our accepting it is that, unfortunately, there seems to be even greater textual support for a third strand of argument which might be described as *practical*. This strand emerges as Fuller explores the eight principles in detail. Criticizing previous attempts to analyze generality, for instance, he observes that they confuse the issue of “what is essential for the efficacy of a system of legal rules” with the issue of what we call law. His concern, he says, is with the former, not the latter. Thus, “the requirement of generality rests on the truism that to subject human conduct to the control of rules, there must be rules” (49). As each principle is discussed and defended in turn, its specific justification hinges not on the normative requirements of reciprocity, but rather on the pragmatic success conditions inherent to what he terms “the enterprise of subjecting human conduct to the governance of rules” (74, 91; cf. 53, 66). This strand of argument comes through even more emphatically at the opening of chapter three, where Fuller suggests an analogy between lawmaking and carpentry. In any purposeful activity, there will be certain instrumental considerations that constrain the form and shape our performance of that activity must assume if it is to be generally efficacious. These constraints are “natural laws” in the straightforward sense that the material properties of different sorts of lumber are constraints on effective carpentry (96;

cf. 155–156).

The instability of the text is evident when we press on any one of its three strands. Suppose we begin with the last strand, for example. On this approach, the principles of legality reflect practical success conditions for creating a legal system. If our aim is to subject human conduct to the governance of rules, we will usually not succeed in our aim issuing rules that cannot be performed, that are retroactive, and so forth. So far so good. But usually is not always. What if, in some particular instance, our aim seems better served by violating one of the principles of legality? In an example Fuller himself offers in the revised edition of *The Morality of Law*, the government of the Soviet Union once sought to bring economic corruption under effective legal control by subjecting some individuals to retroactive judgment under new, harsher statutes requiring the death penalty (202). This clearly violates the principles of legality, but perhaps in a manner that instrumentally serves the aim of effectively subjecting human conduct to the governance of rules in the long run. To this Fuller might respond by observing that, while the Soviet tactic was effective, it was something other than lawmaking. This response, however, implies a conceptual claim about what counts as law, to which one might fairly respond: What do we care what we call it? What is really at stake? When pressed on this front Fuller seems to answer in normative terms. He suggests that the real objection to the Soviet tactic is not that it “was an ineffective measure for combating economic crime,” but rather “that it involved a compromise of principle, an impairment of the integrity of the law” (203). Perhaps so, but then we seem to be evaluating laws as good or bad rather than discussing the law’s necessary character as a purposeful human enterprise. As the positivist Joseph Raz writes,

If the rule of law is the rule of good law then ... the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.

(Raz 1979, 211)

It was precisely in order to attack legal positivism that Fuller first introduced the idea that there are necessary built-in success conditions for creating legal systems, and so we return to the practical claim where we began.

The unavoidable conclusion is that the text is irreducibly ambiguous. To be sure, Fuller had an important intuition about the connection between law and morality, an intuition that on its face is both plausible and attractive. He did not, however, ultimately resolve that intuition into a single, coherent, analytically rigorous line of argument. But far from hindering the influence of *The Morality of Law*, this ambiguity may partly explain its popularity, for it has enabled a wide diversity of readers to find something to love in its pages. Just as the practical argument provides fruitful ground for those who want to explore the constraints law places on evil regimes (e.g., Dyzenhaus 2010), so too the text can be mined for normative arguments connecting the rule of law to human dignity (e.g., Luban 2010).

Fuller and Legal Positivism

Before concluding our discussion, it is worth considering the extent to which *The Morality of Law* succeeds in presenting a challenge to legal positivism. By and large, the legal positivists themselves remain unconvinced.

Recall that, according to Fuller, the principles of legality constitute a morality in two different respects. On the one hand, he argues that as an instrument of social organization, the law always delivers at least some small measure of good. This is because any political regime aiming to subject human conduct to the governance of rules, regardless of its substantive purposes, will necessarily find itself bound to respect the law’s inner morality as a condition of success. On the other hand, he also argues that among the various possible instruments of social organization, the law is more suited to the realization of some substantive purposes than others: thus, not only does the law always deliver some good of its own, it also tends to channel political regimes toward more beneficent purposes and aims.

Contrary to what is often supposed, some legal positivists are willing to accept the first aspect of Fuller’s argument, at least to a point. On their view, admitting that the law always delivers at least some small measure of good does not impinge on the separation of law and morality in the relevant sense. Here it is helpful to clarify a distinction between what might be termed the *existence conditions* of law and the *practical consequences* of law. The existence conditions of law are the criteria according to which some mode of social organization actually constitutes a legal system, whereas the practical consequences of law are the effects we expect to follow whenever a legal system happens to exist. To illustrate by parallel: it is an existence condition of having the flu that one be infected by the influenza virus, whereas it is a practical consequence of having the flu that one will experience fever, fatigue, congestion, and so forth. According to

Hart and some other positivists, we can agree that the law has good practical consequences—that is, that as one possible mode of social organization among others, the law always delivers at least a few positive effects (see Hart 1958, 621–624, 1994, 157–161, 206–207). While there is some dispute as to whether Hart appreciated the full measure and significance of these positive effects, we may leave this question aside (but see Waldron 2008). The point is that nothing need follow with respect to the existence conditions of law. When positivism insists on separating law and morality, it means to insist only that the existence conditions of law cannot include moral criteria.

The legal positivists have uniformly rejected the second aspect of Fuller’s argument, however. It is a serious mistake, Hart and others argue, to believe that the principles of legality effectively constrain the substantive purposes political regimes might adopt: they cannot do so precisely because they are merely instrumental success conditions of subjecting human conduct to the governance of rules. In his notorious review of *The Morality of Law*, Hart put the issue as follows:

[T]he crucial objection to the designation of these principles of good legal craftsmanship as morality ... is that it perpetrates a confusion between ... the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. (“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.”) But to call these principles of the poisoner’s art “the morality of poisoning” would simply 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 1965, 1286)

The point here is obviously that as mere efficacy principles, Fuller’s principles of legality say nothing about the good or evil purposes to which the law might be directed. Joseph Raz later pressed the same objection. Granting that the principles of legality are “a necessary condition for the law to be serving directly any good purpose,” they also unfortunately enable “the law to serve bad purposes.” He draws a comparison with knives. “Being sharp is an inherent good-making characteristic of knives,” but this is perfectly consistent with the fact that “a sharp knife can be used to harm” (Raz 1979, 225). Sharp knives are much more effective at slicing fruit than dull ones, but they are equally more effective at slicing throats. We have no reason, according to the positivists, to suppose the law any different.

Conclusion

In the revised edition of *The Morality of Law*, Fuller added a lengthy “Reply to Critics” as a fifth chapter. His attempt to answer Hart’s critique in this reply, suitably elaborated, might provide the basis for an interesting reconciliation of the normative and the practical strands of argument as we find them in the original text. In order to develop this interpretation, we must return for a moment to Fuller’s association with the legal process school in jurisprudence. The process school was interested in developing an account of the characteristic nature and form of law considered as a distinctive mode of social ordering. Of particular interest to Fuller was the contrast between two different methods for regulating human conduct which he termed “managerial direction” and “law.” This distinction is hinted at in various places in the original text, but is drawn more explicitly in the reply to critics (38, 163–167, and 207–208). These two methods correspond to two very different approaches to regulation: the first represents a “one-way projection of authority” in which the expert manager applies directives to those persons in his charge, whereas the second represents a cooperative exercise in “self-directed action” in which the government and the citizens are mutual participants (209–210). In other words, to adopt law as our mode of social ordering is itself to make a normative choice to engage in a reciprocal rather than a unilateral sort of enterprise. The eight specific principles of legality are indeed the practical success conditions for implementing our decision to engage in the reciprocal mode of regulation, but the beneficial consequences for human dignity and so forth that follow on observing those conditions explain why our decision was the right one.

Whether this is exactly what Fuller intended to argue or not we cannot determine with any certainty: after publishing the revised edition of *The Morality of Law* in 1969, Fuller made no further explicit contributions to his debate with the positivists. What is certain, however, is how valuable his book has proved to so many in the years since. To begin with, it stands as the most authoritative and frequently cited contemporary statement of what the rule of law actually is. When John Rawls, for instance, introduces a discussion of the rule of law, he cites Fuller first (Rawls 1971, 235). Not only political theorists and philosophers, but also scholars of development economics, comparative politics, and many others interested in the rule of law regularly turn to Fuller for a definitive treatment of the concept.

Beyond this, however, Fuller's arguments for an inner morality of law have inspired a diverse range of legal theorists and political philosophers. Civic republicans such as Philip Pettit, for instance, have found the claim that the law always delivers some measure of good highly congenial to their own views: in constraining political authorities to govern according to rules that are clear, consistent, stable, and so forth, the principles of legality help protect our freedom from arbitrary power (Pettit 1997, 174). At the same time, Fuller's more controversial claim that the law tends to frustrate the very aims and purposes of evil regimes continues to find support. The best example here is perhaps David Dyzenhaus's work on South Africa, which seems to show that the law did not serve as a mere neutral instrument of the Apartheid regime, but rather as a positive hindrance to it (2010). *The Morality of Law* thus shows no signs of abating in its influence any time soon.

References

- Dyzenhaus, David. 2010. *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2nd edn. Oxford: Oxford University Press.
- Hart, H. L. A. 1958. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71: 593–629.
- Hart, H. L. A. 1965. "Review of Lon Fuller's *The Morality of Law*." *Harvard Law Review* 78: 1281–1296.
- Hart, H. L. A. 1994. *The Concept of Law*, 2nd edn. Oxford: Clarendon Press.
- Fuller, Lon L. 1958. "Positivism and Fidelity to Law—A Reply to Professor Hart." *Harvard Law Review* 71: 630–672.
- Fuller, Lon L. 1969. *The Morality of the Law*, revised edn. New Haven: Yale University Press.
- Luban, David. 2010. "The Rule of Law and Human Dignity: Reexamining Fuller's Cannons." *Hague Journal on the Rule of Law* 2: 29–47.
- Murphy, Colleen. 2005. "Lon Fuller and the Moral Value of the Rule of Law." *Law and Philosophy* 24: 239–262.
- Pettit, Philip. 1997. *Republicanism: A Theory of Freedom and Government*. Oxford: Clarendon Press.
- Rawls, John. 1971. *A Theory of Justice*. Cambridge: Belknap Press.
- Raz, Joseph. 1979. *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press.
- Waldron, Jeremy. 2008. "Positivism and Legality: Hart's Equivocal Response to Fuller." *New York University Law Review* 83: 1135–1169.

Further Reading

- Bennett, Mark J. 2011. "Hart and Raz on the Non-Instrumental Moral Value of the Rule of Law: A Reconsideration." *Law and Philosophy* 30: 603–635.
- Fuller, Lon L. 1978. "The Forms and Limits of Adjudication." *Harvard Law Review* 92: 353–409.
- Summers, Robert S. 1984. *Lon L. Fuller*. Stanford: Stanford University Press.
- Waldron, Jeremy. 1994. "Why Law—Efficacy, Freedom, or Fidelity?" *Law and Philosophy* 13: 259–284.

Frank Lovett

Washington University in St. Louis



