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TITLE PAGE

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'Fuller's Internal Morality of Law'

Abstract

Teased out through a playful tale about a king who failed in eight ways to make law, Lon L Fuller's eight principles of the 'internal morality of law' became an important contribution to legal philosophy and rule of law theory alike. Moreover, it was Fuller's claim that his principles were not just internal to the enterprise of law, but also 'moral' in character, that precipitated a particular kind of 'natural law versus legal positivism' contest that continues among legal philosophers today. But as a recent revival of interest in Fuller's thought indicates, his scholarly agenda around the idea of 'the internal morality of law' was wider still and deserves revisiting for the range of avenues of inquiry it opens up.

The idea that law has an 'internal morality' lies at the heart of the jurisprudence of the mid-twentieth American legal philosopher, Lon L Fuller. Yet this famous claim has also historically been the target of considerable misunderstanding with respect to each of its key elements. The following questions might therefore be posed. What idea of 'law' was Fuller working with when he spoke of the 'internal morality of law'? What precisely did he seek to communicate through designating its so-called morality as 'internal'? And, most controversially, why did he insist that this internal aspect of law constituted a 'morality'?

The aim of this entry is to offer insight into how these questions might be answered, and then to contextualise those answers within inquiries of legal philosophy past and present. Attention to the past is needed not only to appreciate the distinctive kind of 'procedural' or 'formal' 'natural law' jurisprudence with which Fuller's idea of the internal morality of law has long been associated, but also to understand why and how his claims presented a challenge to the core tenet of legal positivism that there is no necessary connection between law and morality. But after a half-century in which these controversies took centre stage, the recent 'revival' of interest in Fuller's thought among contemporary legal philosophers bodes well not only for a more attentive engagement with the broader agenda of his jurisprudence (van der Burg 2014a; Hanisch), but a renewed examination in his idea of law's 'internal morality' in particular.

The best way to begin an acquaintance with the idea of the 'internal morality of law' is through a classic figure of Anglo-American legal philosophy: Fuller's hapless King Rex who failed in eight ways to make law. As Fuller recounts the tale in his most well-known book, *The Morality of Law*, Rex came to the throne with the zeal of a legal reformer, determined

to make his name in history as a great lawgiver. Unfortunately, however, his efforts were doomed from the start. First he struggled to achieve appropriate generality in his rules. Then he didn't manage to keep his decisions with respect to those rules consistent. Worse still, some of his laws were kept secret, while others were applied retroactively. He proved, moreover, to be a terrible legislative draftsman, with his laws suffering too greatly from obscurity, perpetuating confusion, and being changed too often. Finally, adding insult to injury, in his capacity as an adjudicator he rendered judicial opinions that bore little relation to the enacted laws on which they were allegedly based. Disillusioned and facing revolt from his subjects, Rex gave up on the job of lawgiving and died a miserable king. The first act of his successor, Rex II, was to take the powers of government away from the lawyers, in the hope that his people might be made happy without rules ('Morality of Law' 33-38).

What are we to make of this playful tale? By presenting us with an account of how *not* to create and maintain a legal system, Fuller's story of King Rex invites us to think about what it might take to replace such failure with success. The pathologies that rendered Rex's efforts at lawgiving so hopeless were ultimately eight in number: (1) a failure to achieve general rules at all, (2) a failure to publicise 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, or (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 ('Morality of Law' 39). Corresponding with each of Rex's failures, Fuller suggests, are 'eight kinds of excellence towards which a system of rules may strive': the demands that law be general, publicly promulgated, clear, non-contradictory, possible to comply with, relatively constant through time, non-retroactivity, and the that there be congruence between official action and declared rule ('Morality of Law' 41). It is these eight principles, he argues, that together comprise the 'internal morality of law'.

Fuller's aim in presenting this account of the eight principles of the internal morality of law is not merely to offer a description of the lawgiving job. He has a much stronger, normative, claim in view: a total failure to meet these 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'. The basis for this conclusion is explained in terms of how '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' ('Morality of Law' 39). The point is not that it is necessarily impossible, in practical terms, to obey such a rule, though it might well be. The

point is instead that a legal subject's obligation to obey law only arises in the first place in response to, or in anticipation of, a *corresponding effort* on the part of the lawgiver.

At the heart of 'the internal morality of law', therefore, is an idea of *reciprocity*. As Fuller explains it, to secure the legal subject's fidelity to law, a lawgiver must enter into a relationship of reciprocity with her. If, however, this bond of reciprocity is finally and completely ruptured, 'nothing is left on which to ground the citizen's duty' to observe the lawgiver's rules' ('Morality of Law' 40). The point to notice, then, is the extent to which Fuller associates a range of demands on human agency with the very possibility of a legal condition. He insists, for example, that his principles of lawgiving presuppose a conception of the legal subject as 'a responsible agent, capable of following rules, and answerable for his defaults' whose dignity is affronted by departures from the internal morality of law ('Morality of Law' 162). But it is the demands that accompany the role of lawgiver that gain Fuller's primary attention. The eight principles of the internal morality of law concern a 'relationship to persons generally', and are described as appealing to both 'a sense of trusteeship and the pride of the craftsman' on the part of the lawgiver ('Morality' 42).

These responsibilities that Fuller views as inseparable from the very possibility of what can properly be called a legal condition often occupy a secondary place within discussions of the idea of the 'internal morality of law' among legal theorists. Fuller's eight principles have long been widely accepted as an account of the basic elements of a 'formal' conception of the rule of law: that is, a conception of the rule of law that goes to the *form* through which legal norms should be expressed, rather than to the substantive *content* of the norms themselves. To have the rule of law, the idea runs, is to have laws and a legal system which exhibit the features contained in Fuller's model, or some close cousin thereof (Raz 1979; Finnis 1980; Waldron 2008). But it is the potential significance of the idea of the principles to legal positivism that provides the site of most controversy. Fuller insisted that his idea of the 'internal morality of law' demonstrated the unviability of the core positivist tenet that there is no necessary conceptual connection between law and morality.

This alleged challenge positivism's 'separability thesis' runs along two closely related lines. The first goes to the possibility that the concept of 'law' can be insulated from the concept of the 'internal morality of law' (or, in more common terminology, 'the rule of law'). Here, against positivism, Fuller insists that a (putative) legal system that fails to meet the demands of his internal morality of law is not just a bad legal system but something not properly to be called a legal system at all. But the real dilemma for positivism arises from Fuller's related claim that the demands of his eight principles are 'moral' in character. The argument, in

short, is this. If the demands of the rule of law are moral in character, *and* if they are part of the very idea of law rather than a contingent ideal separable from it, then *law itself* must necessarily contain some moral dimension. The positivist separability thesis is accordingly disturbed.

Positivists must therefore neutralise the alleged 'moral' dimensions of Fuller's eight principles, as well as their apparently constitutive significance to the concept of law itself, if the separability thesis is to be defended. An argument designed to do precisely this work was quickly provided by Fuller's most famous interlocutor, H L A Hart (Hart 1965). The so-called 'moral' principles on the internal morality of law, Hart argued, are actually nothing more than neutral aids to the effectiveness of the lawgiving task. That is, akin to an 'internal morality of poisoning' – principles that, when followed, aid the poisoner to poison well – observance of Fuller's eight principles simply makes the end-product of law more effective in the pursuit of its ends. As this aid to efficacy is just as likely to assist the realisation of morally evil laws as it is morally good ones, there is nothing of 'moral' interest here (343).

This 'efficacy' reading of the value of the principles of the internal morality of law has had an enormous impact on how Fuller's jurisprudence has been received by legal philosophers. Yet on closer inspection it can be seen that Hart's response, informed as it is by strictly instrumental presuppositions, is at best an incomplete reply to the arguments that Fuller actually made. That is, to Hart it would seem that the only kind of 'moral' dimension of law relevant to debates about the connections between law and morality is the moral quality of law's *ends*. But Fuller never advanced any conceptual claim about the connection between observance of his eight principles and the moral quality of legal ends of the kind that Hart's reply speaks to. Indeed, he was explicit that his eight principles were 'neutral over a wide range of ethical issues' ('Morality of Law', 162). His writings at most entertained a connection between the observance of the internal morality of law and the substantive justice of laws as something likely, but not necessarily, to be observed in practice ('Reply to Cohen and Dworkin' 664).

Though more recent positivist engagements with Fuller's jurisprudence have reflected a greater willingness to work with the several levels at which his challenge to positivism actually plays out (Shapiro 2011; Gardner 2013), the dominant response to the 'internal morality of law' in contemporary legal philosophy can be traced not to Hart but to Joseph Raz (Raz 1979). In Fuller's favour, Raz's seminal essay, 'The Rule of Law and its Virtue', did much to strengthen the association between Fuller's principles of the 'internal morality of law' and the idea of the rule of law. But much more problematically, 'Virtue' also

consolidated the position advanced by Hart that Fuller's claims failed to disturb the positivist separability thesis.

Raz's essay is most famous for an argument that repackages, albeit in more sophisticated form, Hart's claim that the principles of the so-called 'internal morality of law' are merely non-moral aids to instrumental efficacy. As Raz expresses it, the rule of law is the 'virtue' of law in the same way that sharpness is the virtue of the knife: its 'good-making' quality (225). But Raz also advances two further arguments that together are thought to dispose entirely of Fuller's challenge to the separability thesis. The first, the 'minimal compliance' argument, contends that although all legal systems require rules to establish the institutions that will constitute the legal system itself, the level of compliance with the ideal of the rule of law needed to achieve these rules is minimal.¹ The intended inference from this 'minimal compliance' argument, it would seem, is that this level of compliance with the 'internal morality of law' is so small as to be morally insignificant. But should someone sympathetic to Fuller's claims interject that, though minimal, this is nonetheless still compliance with something that Raz himself recognises as morally significant – the ideal of the rule of law – a second argument is at the ready. The rule of law, Raz argues, is ultimately a 'negative' virtue. It merely offsets or corrects evils that only law itself could have created (224).

A number of scholars sympathetic to Fuller's jurisprudence have strongly questioned whether these arguments really constitute the kind of 'knockdown' response to Fuller that is claimed for them. This has especially been the case with respect to the 'negative virtue' claim that compliance with the principles of the rule of law merely corrects evils that 'only law' could create.² Jeremy Waldron in particular has highlighted the over-inclusive or 'casual' positivism that is reflected in such a position (Waldron 2008, 15), and has called for a more 'discriminating' concept of law that seeks to strengthen the connection between the concept of law and the concept of the rule of law rather than insulating the former from the latter (13). But a more specific impact of these debates to the reception of Fuller's jurisprudence in particular needs also to be kept in view, in so far that their very narrow terms have operated to overshadow the much broader character of his intellectual program.

Here we might particularly notice the way that Fuller's arguments in support of his idea of the internal morality of law reinvent as well as depart from certain key premises of the natural law tradition. In terms of departure, Fuller himself approached the 'natural law' label in association with his thought very cautiously precisely because his jurisprudence contains no commitment to 'ultimate ends', or primary concern for the justice of individual

laws, in the vein one might typically expect from natural law inquiry. His focus, as already noted, was on the moral integrity of legal *processes*, not the *content* of laws thereby produced. Yet in terms of other core themes of the natural law tradition, Fuller's contribution is both original and significant. This is especially so with respect to view of the relation between fulfilment of the demands of his 'internal morality of law' and the legal subject's obligation to obey law. The nub of Fuller's position on this point can be seen in his response to Hart on the jurisprudential quandaries raised by the example of Nazi law. As Fuller saw it, the status of the Nazi law *as* law had to be approached by asking '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' ('Positivism and Fidelity to Law' 646). We can also see here how Fuller reworks the natural law premise of the answerability of positive law to standards beyond its own pedigree in the image of his idea of the internal morality of law. That is, the standards against which both the legal subject's obligation to obey law and the status of law itself is to be assessed are drawn not from some external idea of the good, but from demands *internal* to the distinctiveness of the legal endeavour itself.

For some contemporary scholars, however, it is important to put the 'positivism versus natural law' frame in its place if the more expansive agenda within which Fuller's idea of the 'internal morality of law' came to expression is to be appreciated as well as developed. The overarching inquiry that animated Fuller's scholarship for over three decades was his effort to uncover how, and in what ways, the human interactions constitutive to different 'forms of social order'³ generate distinctly moral demands on their agents. The seeds of this inquiry can be seen in Fuller's earliest writings in jurisprudence in their attempt to illuminate the 'natural laws' or 'compulsions necessarily contained in certain ways of organising men's relations with one another' ('American Legal Philosophy' 476), and the inherently normative comportment of those responsible for the creating and maintaining these forms of social order ('Reason and Fiat' 378). Indeed, frustrated with the limitations of legal positivist inquiry as well as with the focus of natural law scholarship on ends to the expense of processes, by the mid-1950s Fuller had announced his intention to pursue an entirely new jurisprudential project. The 'science or theory of good order and workable social arrangements' that he called 'eunomics' was intended to illuminate the values and modes of participation constitutive different forms of social ordering as well as their suitability to different contexts ('American Legal Philosophy' 477).⁴ Though the eunomics project was ultimately under-realised, its basic program can readily be seen in Fuller's famous essay on the forms and limits of adjudication ('Forms and Limits'), and which in private correspondence he described as concerned with essentially the same problems as his writings on the 'internal morality of law'.⁵

These works pre-date the essays such as 'Human Purpose and Natural Law', and Fuller's famous reply to H L A Hart's restatement and defence of legal positivism in the 1958 *Harvard Law Review*, in which the specific idea of the 'internal morality of law' took hold. But the elaboration of the themes associated with his articulation of that idea continued to track its own trajectory of development in the aftermath of its systematic exposition in *The Morality of Law*. Here we might especially notice the self-styled 'sociological turn' that came to animate Fuller's later writings, and which saw him focus still more on the *quality* of human interactions constitutive to law. This development is exemplified in his final 'Reply to Critics', which sees Fuller argue that the only way Hart's morally neutral 'efficacy' reading of the value served by observance of the principles of the internal morality of law can possibly make sense is if it is attached to a top-down, essentially coercive conception of law in which the role of a legal subject is merely to serve the legal superior's ends. This, Fuller asserts, is what the positivist conception of law ultimately boils down to, and it is why that conception is best understood as one of 'managerial direction' ('Morality of Law' 207-216). 'Law', by contrast, is an enterprise that relies for its very existence on 'a cooperative effort – an effective and responsible interaction – between lawgiver and subject' ('Morality of Law' 216).

This insight into Fuller's wider program helps us to articulate much more refined answers to the three questions posed at the outset of this entry. On the question of what idea of *law* animates Fuller's idea of the 'internal morality of law', the closest thing that Fuller ever offered of a 'definition' of 'law' – 'the enterprise of subjecting human conduct to the governance of rules' ('Morality of Law' 96) – makes clear that his focus lay with the 'enterprise' rather than the 'rules'. That is, Fuller's 'internal morality of law' is concerned with the generative conditions, *prior* to law, that are foundational to the possibility of law itself. The *internal* designation, it should now be clear, speaks to the orientation of his inquiry not to the substantive ends of law, but to the inner constitutive structure of the legal condition itself. As for the controversial claim – that this 'internal' structure of a legal condition constitutes a *morality* – here we might take our best cue from how Fuller ultimately came to elaborate the message of his tale of King Rex. Rex failed because he failed to appreciate the moral demands that come with the special kind of responsibility to persons that is lawgiving. The eight principles of the internal morality of law are best understood as a statement of the *role morality* appropriate to the particular relationship between lawgiver and legal subjects that the legal enterprise entails ('Morality of Law' 239).

This is a much richer and original agenda for legal inquiry than is reflected in the orthodox debates through which Fuller's claims about the internal morality of law have long been interpreted. In the spirit of honouring that richness, the recent 'Fuller revival' in

contemporary legal philosophy is notable not only for its revisitation and reinterpretation of those debates (Simmonds; Rundle 2012; Priel 2013; Waldron 2008; Lacey), but for the much wider perspective on the importance, value, and promise of Fuller's thought that it seeks to promote. To name only a few examples, recent scholarship that engages with the idea of the 'internal morality of law' records fresh interest in such questions as the conception of freedom implicit in Fuller's thought (Waldron 1994; Simmonds 2007; Priel 2014), and the relationship of his jurisprudence to ideas of constitutionalism, human dignity and human rights (Allan; Eleftheriadis; Waldron 2012; Luban; Fox-Decent). The theme of reciprocity or 'interaction' that is sustained throughout Fuller's writings has been amplified by legal philosophers, indigenous law scholars, and international lawyers alike (van der Burg 2014b; Walters, Brunnee & Toope), while the significance of his claims about the distinctive form of law to public law theory has also begun to be explored (Dyzenhaus). Those committed to the development of contemporary natural law theory have in turn sought to bring the themes of Fuller's jurisprudence into contact with developments in that field (Crowe), while, in a different direction, a range of scholars drawn to questions of moral and political philosophy in the Kantian tradition have sought to illuminate the possible significance of Fuller's idea of the internal morality of law to inquiry therein (Pauer-Studer; Hanisch).

It might be, therefore, that the tables of legal philosophy are finally turning, favourably, in Fuller's direction. Yet even if he is ultimately to remain something of an awkward fit within the field of legal philosophy, two key points must be kept front and centre. The first is a reminder that Fuller did not devise his idea of the 'internal morality of law' merely as a reaction to legal positivism. Though his claims undoubtedly reached a higher expression because of that engagement, the idea that law makes its own demands of integrity on its agents is continuous with his highly original theoretical ambition to explore the features of form and agency that distinguish one mode of social ordering from another. The second point is a disciplinary one. Though committedly open to the insights and methods of other disciplines – especially, ultimately, sociology – Fuller never strayed from the view that his intellectual enterprise was fundamentally preoccupied with things legal. His questions, welcome or not, were about law. To his eyes, therefore, they were questions that it was incumbent on legal philosophers to answer.

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Endnotes:

¹ Here it must be noted that Raz's analysis consciously adopts Hart's account of the foundations of a legal order in the union of 'primary' and 'secondary' rules as the basis for this point (223 note 11).

² See, for example, Kristen Rundle, 'Form and Agency in Raz's Legal Positivism', (2013) 32 *Law & Philosophy* 767, 778-781; Nigel Simmonds, 'Reply: The Nature and Virtue of Law' (2010) 1 *Jurisprudence* 277, 285; Martin Krygier, 'The Hart-Fuller Debate, Transitional Societies and the Rule of Law', in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-first Century* (Oxford, Hart Publishing, 2009), 117; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 11; and Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 *Law and Philosophy* 239, 246-252.

³ By which Fuller meant to include 'rules, procedures, and institutions': Human Purpose and Natural Law' *Journal of Philosophy* 53 (1956): 697, 704.

⁴ See especially Kenneth I Winston, *The Principles of Social Order – Selected Essays of Lon L. Fuller*, (Portland: Hart Publishing, revised edition, 2001).

⁵ See letter from Fuller to Professor John P. Dawson, November 30, 1966, The Papers of Lon L Fuller, Harvard Law School Library, Box 2, Folder 12 (Correspondence).