

A Critical Adjudication of the Fuller-Hart Debate

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I. Synopsis

This “critical adjudication” provides an overview, analysis, and adjudication of the debate surrounding Lon L. Fuller’s *The Morality of Law*,¹ an intellectual battle waged between Professor Fuller and H.L.A. Hart in his review of the book.² I begin by providing an overview of Fuller’s dualistic theory of morality and its relationship to the concept of law, adjudicating between Fuller’s arguments and their critique by Hart. As Fuller and Hart subsequently engage in a role-reversal, I proceed to analyze Fuller’s critique of Hart’s *Concept of Law*, along with the latter’s retorts. In my various adjudications, I conclude that on almost all points of disagreement Hart’s critical analysis and conceptual frameworks are ultimately more persuasive and lucid than those of his rival’s.

II. Fuller’s *The Morality of Law* and Hart’s Critique

Lon Fuller’s book is comprised of four parts: Chapter I provides a dualistic conceptualization of morality, specifically by articulating the distinction between a “morality of aspiration” and a “morality of duty;” Chapter II transitions to a discussion of the necessary moral foundations of the law by focusing in particular on the “inner morality of law;” Chapter III provides an expansively functional conceptualization of the law itself; and Chapter IV considers how the book’s cumulative framework sheds light upon the substantive moral enterprises with which the law should concern itself. Let us tackle each portion of his argument in turn, along with Hart’s correlative critical assessments.

Fuller’s dualistic conception of morality is what garners Hart’s greatest praise and relatively little critique: It constitutes a veritable “contribution to moral philosophy,” Hart concludes, and cannot be reduced to a mere “casual byproduct of jurisprudential thought.”³ Indeed, Fuller constructively and elegantly distinguishes between two types of morality. The first is a *morality of aspiration*: it is the morality of Greek Philosophy, “of the Good Life, of excellence, of the fullest realization of human

¹ Fuller, Lon L. 1969 [1964]. *The Morality of Law*, 2nd ed. New Haven, CT: Yale University Press.

² Hart, H. L. A. 1965. “Review of *The Morality of Law*.” *The Harvard Law Review* 78: 1281-1296.

³ *Ibid*, pg. 1282.

powers.”⁴ It shares “kinship with aesthetics”⁵ and the principle of marginal utility in economics;⁶ it is an amorphous, subjective morality, confident in man’s ability for self-perfection and willing to enable his quest for self-fulfillment even as it “condemn[s] men for failing to embrace opportunities for the fullest realization of their powers.”⁷ By contrast, the second type of morality is the *morality of duty*, which “lays down the basic rules without which an ordered society is impossible [...] speaks in terms of “though shalt not,” and condemns men for “failing to respect the basic requirements of social living.”⁸ It is not unlike the “rules of grammar,”⁹ the law itself,¹⁰ and theories of reciprocity and market exchange in economics¹¹ – namely a rationally discoverable and objective morality.

While Fuller begins by precisizing the meaning of the two moralities as if they were mutually exclusive in the interest of conceptual clarity, he quickly and intriguingly problematizes this binary opposition through the notion of a *moral scale*.¹² At the bottom of the scale lies the morality of duty: cynical, formal, prohibitive – the bare essentials for social existence. At the top of the scale lies the morality of aspiration: hopeful, informal, liberating – the domain of human triumph. Somewhere near the middle of the scale exists a foggy transition from the morality of duty to the morality of aspiration, and Fuller highlights the task of locating this pointer is “a basic problem of social philosophy: If it is set too low, the notion of duty itself may disintegrate under the influence of modes of thought appropriate only to the higher levels of morality of aspiration. If the pointer is set too high, the rigidities of duty may reach up to smother the urge toward excellence.”¹³ Ultimately, aside from some minor quibbling regarding Fuller’s occasionally unselfconscious use of the word “duty,” Hart raises no substantial objection to the foregoing conceptualizations.

Nevertheless, once we depart from treating Fuller’s theory of morality *in vacuo* and approach the domain of law, conceptual clarity begins to fade, and a debate with Hart starts to become

⁴ Fuller, *The Morality of Law*, pg. 5.

⁵ *Ibid*, pg. 15.

⁶ *Ibid*, pg. 17.

⁷ *Ibid*, pg. 6.

⁸ *Ibid*, pgs. 5-6.

⁹ *Ibid*, pg. 6.

¹⁰ *Ibid*, pg. 15.

¹¹ *Ibid*, pg. 19.

¹² *Ibid*, pg. 28-29.

¹³ *Ibid*, pg. 170.

inevitable.¹⁴ For whereas Fuller took great pains to clearly define morality in his first chapter, his definition of the law strikes one as almost polemically amorphous: “law is the enterprise of subjecting human conduct to the governance of rules.”¹⁵ In other words, contra the apex-centered Austinian theory of law or Hart’s crisp conception of law as the union of primary and secondary rules, Fuller’s definition rests “not on two or three fronts, but on thousands,” including “[l]abor unions, churches, social clubs, and a whole host of other institutional forms.”¹⁶ The law, in other words, both functions to facilitate man’s social existence and finds its most concrete expression within said existence. It would be an understatement to suggest that this definition is incongruous with the logical, parsimonious, and crisp concept of law articulated by Hart. And so Hart’s critique of Fuller’s definition of the law is nothing if not predictable: “The outer boundaries of this wide conception cannot be determined from this book with any precision, since the author does not give us any account of what “rules” are.”¹⁷

Such conceptual ambiguity is only increased once Fuller elaborates the dual moral foundations of the law itself. The *inner morality of law*, upon which Fuller focuses his attention, is the “basic morality of social life, duties that run toward other persons generally.”¹⁸ It is an affirmative, general, procedural morality that generally that tends to warn individuals “away from harmful acts” but also “demands [that] human energies must be directed towards specific kinds of achievement.”¹⁹ Hart perceptively notes the similarities between this formulation and Herbert Wechsler’s call for “neutral principles of constitutional law.”²⁰ Yet despite its apparently neutral and disinterested garments, the inner morality of law is a rather curious mixture of the morality of duty and the morality of aspiration, with a decided predilection for the latter.²¹ Its occasional allegiance with the morality of duty manifests itself via eight legal dictums, namely that laws should be (1) general, (2) publicly promulgated, (3)

¹⁴ One telling statement that Fuller makes towards the end of the book should serve to foreshadow the state of affairs to which we are headed: “I think I need not repeat here the argument implicit in my whole second chapter...” (pg. 155). Such “implicit arguments” pervade important transitions from concept to concept throughout Fuller’s book, and, what’s more, they are often repeated just as implicitly as in their initial formulations.

¹⁵ Ibid, pg. 106.

¹⁶ Ibid, pgs. 124; 128.

¹⁷ Hart, “Review of *The Morality of Law*,” pg. 1281.

¹⁸ Fuller, *The Morality of Law*, pg. 42.

¹⁹ Ibid.

²⁰ Wechsler, Herbert. 1959. “Toward Neutral Principles of Constitutional Law.” *The Harvard Law Review* 73: 1-35.

²¹ Fuller, *The Morality of Law*, pg. 43-44.

non-retroactive, (4) clear, (5) internally consistent, (6) not impossible to be complied with, (7) temporally enduring, and (8) congruent with official action.²² Conversely, the more aspirational aspects of the law's inner morality manifest themselves via the difficulties inherent in applying the foregoing dictums without flexibility-enhancing exceptions. Even retroactive laws, for example, can enhance legality, as when individual's benevolent yet mistaken observance of an opaque or quasi-public law at time $t-1$ is recognized and legalized at time t , such that the principle of non-retroactivity is violated in the interest of fulfilling the principle of publicity.²³ Indeed, the fact that the law's inner morality can contain endogenous contradictions pushes Fuller to conclude that "of course, both rules of law and legal systems can and do half exist."²⁴ This conclusion, if not altogether satisfying (or, as I will note later, logically coherent), constitutes an admirable acknowledgement by Fuller of the complexity inherent in the concept of the law. His discussion of the other dimension of law's morality, on the other hand, is at once more cloudy and less self-conscious of its own ambiguity.

Specifically, Fuller posits that the external morality of law is concerned not with procedure, or means, but with substance, or ends: it is, in Fuller's words, a "substantive natural law."²⁵ This conceptualization is largely implied and underdeveloped, and at times it is manifestly misleading. Indeed, Hart's definition of the external morality of law is more cogent than Fuller's and serves to orient us towards the source of its conceptual confusion: "external" moral principles relating to the law's substantive aims or content [...] are reached solely through a realistic consideration of what is necessary for the efficient execution of the purpose of guiding human conduct by rules."²⁶ One may quickly note that the foregoing "considerations" for what is "necessary for the efficient execution" of socially functional law appear reducible to the inner morality of law, and, indeed, in Chapter 4 Fuller contradicts his previously procedural, output-neutral characterization of the inner morality of law by stressing that "it affects and limits the substantive aims that can be achieved through law."²⁷ From this conclusion Fuller derives the "one central indisputable principle of what may be called substantive natural law [i.e. the external morality of law][...]: Open up, maintain, and preserve the integrity of

²² Ibid, pgs. 46-81.

²³ Ibid, pg. 54.

²⁴ Ibid, pgs. 122-123.

²⁵ Ibid, pg. 96.

²⁶ Hart, "Review of *The Morality of Law*," pg. 1284.

²⁷ Fuller, *The Morality of Law*, pg. 184.

channels of communication by which men convey to one another what they perceive, feel, and desire.”²⁸ The only conclusion that we can derive with certainty from the foregoing discussion is that if the inner morality of the law is largely aspirational and hence difficult to crystallize into legal duties, then the external morality of the law appears, the foregoing exception aside, to be fully aspirational and hence impervious to legalization *in toto*.

This is all too much for Hart, who is intent on clearing away the fog that Fuller has introduced to conjoin the concept of law with that of morality. The core of Hart’s critique is, I think, persuasive, and it centers on Fuller’s conflation between “the notions of purposive activity and morality.”²⁹ The act of poisoning, Hart notes, “is no doubt a purposive activity, and reflections on its purpose may show that it has internal principles [...] 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” is concerned.³⁰ Fuller attempts to counter this critique by illustrating that authoritarian states whose actions violate the external morality of law, such as the apartheid regime in South Africa, also violate the inner morality of law.³¹ This, I take it, should demonstrate that it is not possible to commit social evils while fulfilling the requirements of the inner morality of law. It is at this point that Fuller ties himself into a knot. For if it is true that compliance with the inner morality of law also ensures its external morality, then it would appear that the latter is a derivative of the former, begging the question: what is the purpose of distinguishing between the two? On the other hand, if the inner morality of law cannot be relied upon to always ensure external legal morality, then it seems impossible for Fuller to escape the grips of Hart’s critique.

While neither of the foregoing outcomes are favorable to Fuller’s theory, I suggest that an evaluation of the following hypothetical confirms Hart’s critique: Consider a law publicly promulgated by a sovereign, Rex, stating that, from this moment forward and for the next twenty years, all female children born within his kingdom are to be brought by their parents or guardians to his royal residence, where they are to be executed by public officials personally selected by Rex on the basis of past

²⁸ Ibid, pg. 186.

²⁹ Hart, “Review of *The Morality of Law*,” pg. 1286.

³⁰ Ibid.

³¹ Fuller, *The Morality of Law*, pg. 159-160.

displays of loyalty to their sovereign. While repugnant by any moral standard, such a law is (1) general (it is directed towards a class of infants), (2) public (it was transparently promulgated), (3) non-retroactive (it does not harm any infant born before the law's promulgation), (4) clear (there can be no doubt about the merciless message it cogently conveys) (5) internally consistent (there are no apparent contradictions in the law) (6) not impossible to be complied with (it is logically possible, albeit exceptionally unpleasant, for parents or guardians to deliver their infant daughters for execution) (7) temporally enduring (it is due to expire a full 20 years following its promulgation), and (8) congruent with official action (only the most obeisant public officials are to commit the evil deed). Hence when Fuller posits that "this [inner] morality is itself violated when an attempt is made to express blind hatreds through legal rules," he must either be referencing a ghost-like quality to the internal morality of law that he fails to make explicit, or he seems unable to conceive the very real possibility that a set of highly efficacious rules may be leveraged for the perpetration of moral wrongs.

III. Fuller's Critique of *The Concept of Law* and Hart's Response

One would be remiss to leave the Fuller-Hart debate at this stage, for Fuller directs some offensive punches of his own towards his intellectual opponent. "With [Hart's] fundamental analysis of the concept of law," Fuller begins, "I am in virtually complete disagreement." Fuller directs his most focused blitzkrieg at one specific type of secondary rule elaborated by Hart, namely the rule of recognition. He delivers his attack thusly: "The rule of recognition, [Hart] declares, must be regarded as a power-conferring rule [...] Hart seems to read into this characterization the further notion that the rule cannot contain any express or tacit provision [that] the authority it confers can be withdrawn for abuses of it."³² Without this possibility, then, Fuller concludes that Hart's concept of law is not very different from that of Austin: "if the rule of recognition means that anything called law by the accredited lawgiver counts as law, then the plight of the citizen is in some ways worse than that of the gunman's victim."³³ Hart's response is that his book implies nothing of the sort: "There is, for me, no logical restriction on the content of the rule of recognition,"³⁴ and indeed "the rule itself is not to be

³² Ibid, pg. 137.

³³ Ibid, pg. 139.

³⁴ Hart, "Review of *The Morality of Law*," pg. 1294.

characterized as either legally valid or invalid – though it may be the subject of moral criticism, historical or sociological explanation, and other forms of inquiry.”³⁵

My reaction to the foregoing squabble is to be unable to see what conceptual purpose it may plausibly serve, for there appears to be nothing implicit in Fuller’s notion of the inner morality of the law that cannot accommodate Austinian hierarchy. Thus even if Fuller were able to persuasively demonstrate the congruence between Austin’s command theory of law and Hart’s own efforts, it is unclear how this would distinguish Hart’s work from his own. In fact, the institutional organization of the law and the role of sovereign power is nowhere explicitly discussed by Fuller, preoccupied as he is with the function that law serves to effectively regulate social practice. Once again, I find Hart’s perceptive retort persuasive: “[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.”³⁶ The point is not that it is incorrect to suggest that the law, or even its moral foundation, lies in its ability to facilitate orderly social life. The point is that Fuller seems to assume that this is necessarily achieved in non-Hobbesian states and that it is “only under capitalism that the notion of the moral and legal duty can reach its full development.”³⁷ This may generally be true in practice (though I would hasten to highlight the existence of Singapore and of Sweden to counter Fuller’s first and second conclusions, respectively), but it need not *necessarily* be true given Fuller’s conceptualizations of the law and its inner morality.

The second critique leveraged by Fuller is to chastise Hart’s discussion of the minimal content of natural law that underlies most systems of positive law. Hart’s overall argument is that the minimal content of the natural law serves “the modest aim of survival,” and that “an overwhelming majority of men do wish to live, even at the cost of hideous misery.”³⁸ This formulation appears to openly violate Fuller’s emphasis on the aspirational dimension of the inner morality of law. Fuller hence counters Hart by highlighting the aspirational drive of man conveyed in a statement by Thomas Aquinas: “if the highest aim of a captain were to preserve his ship, he would keep it in port forever.”³⁹ Hart does not directly address this critique, though he does highlight that Fuller’s conviction that “a legal system “derives its ultimate support from a sense of its being ‘right’” is even more unsatisfactory than his own formulation: “Is it really not possible,” Hart cuttingly remarks, “to be more specific than this?”⁴⁰ Though Hart is elsewhere silent on the issue, I would claim that Fuller’s critique is self-defeating. Does

³⁵ Ibid, pg. 1293.

³⁶ Ibid, pg. 1296.

³⁷ Fuller, *The Morality of Law*, pg. 24.

³⁸ Ibid, pg. 185.

³⁹ Ibid.

⁴⁰ Hart, “Review of *The Morality of Law*,” pg. 1294.

not Fuller emphasize that human aspirations, precisely because they are spontaneous, subjective, and creative, are consequently impossible to harness within the domain of law? Might this not be the reason why Hart, who seems to take the task of precisely defining the law more seriously than does Fuller, refuses to incorporate the aspirational dimension of morality within his minimal content of natural law? Fuller may retort that this argument is flawed, for the natural law is precisely meant to capture the uncodifiable aspects of the morality of aspiration. But if this is the case, why exactly does it merit the title of “natural law” as opposed to “the morality of nature”? Indeed, Fuller’s porous definition of the law allows him to slip between the terminology of “natural law,” “the morality of aspiration,” and even “the inner morality of the law” with such ease that one begins to wonder whether there were any worthwhile distinctions between said concepts in the first place.

At this point, we may conclude, in sympathy with Fuller, that there exist gradations of legality, and hence the foregoing ambiguity merely reflects the sociological realities of the enterprise of regulating social life. This reconciliation, while attractive *prima facie*, strikes me as a red herring. After all, before we can even speak of gradations of law, we must clearly define the conceptual boundaries whereby it makes sense to even speak of legality at all. In other words, even if we are to embrace a gradation theory of legality we must first specify its constitutive dimensions. Had Fuller treated the concept of law with as much care as he treats the notion of dualistic morality, then perhaps he would not have so frequently violated this logical precondition for effective conceptualization. As it stands, however, *The Morality of Law* leaves one perplexed and only all too willing to jump into the comparatively lucid embrace of his positivist foe.