Rediscovering Fuller: Essays on Implicit Law and Institutional Design

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> A great deal of bad legal theory has paraded under the banner of a misapprehension that something called 'positivism' and something called 'natural law' exhaust the universe of jurisprudential space, such that anyone who is not a legal positivist must, by the operation of the law of the excluded middle, be an adherent of natural law. My own view is that the two most prominent twentieth-century American critics of legal positivism—Lon Fuller and Ronald Dworkin—have no more in common with classic natural law theorists such as Cicero, Aquinas, and Blackstone than they do with the classic legal positivists such as Bentham, Austin, Kelsen, and Hart.[1]

As this quotation from the volume under review suggests, Fuller may be insufficiently appreciated today because he is categorized as one of the players in a stale debate that no longer excites most jurisprudential writers. One of the virtues of this book is that it gives us a Fuller who is broader and more interesting than that. In fact, he comes across as an original and neglected jurisprudential thinker who anticipated many of the positions that are being advanced today by Critical Legal Studies and people like Stanley Fish. In this review I shall briefly describe that stale debate, then describe how Fuller moves outside it, and finally draw out in more detail his connection with more contemporary jurisprudential movements.

Crudely put, the classic natural law theorists argued that there were moral norms that did not originate with human beings, and with which human conduct had to comply. More specifically, these moral norms formed a higher natural law with which humanly created laws had to comply upon pain of losing their status as valid laws. The legal positivists reacted against this position by arguing that there was no necessary connection between law and morality, that valid laws came into being purely by state action, and that valid laws could be identified in a purely empirical manner without any recourse to morals or metaphysics.[2] Early positivists like Austin said that the empirical social facts giving rise to law were the commands of the political sovereign. Later positivists like Hart saw that the notion of a rule, not simply commands, was central to law but Hart too saw these rules as being the products of state officials. The rule of recognition would tell you what empirical behaviour by state officials would give rise to valid laws.[3] Legal positivists like Hart argued that their way of conceiving of law was superior because

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1 Frederick Schauer, "Fuller on the Ontological Status of Law" page 135 footnote 26.

2 David Luban, "Rediscovering Fuller's Legal Ethics" page 207.

3 Of course, the story gets more elaborate than this: the rule of recognition is itself ascertained by observing the behaviour of state officials. And some "soft" or "inclusive" legal positivists now say that the rule of recognition may require the making of moral judgments by the state officials.

> under a positivist perspective —under a perspective that considered law and morality as *conceptually* distinct—people would be more likely, as an empirical matter, to distinguish the question of legality from the question of morality. By distinguishing the two questions, Hart maintained, people would take the fact of legality as a morally neutral social fact. Consequently, the fact of a directive's being a legal directive would give to its addressee no reason to believe that it should be followed, and certainly no reason to believe that it bore the quality of moral desirability.[4]

Fuller rejects this legal positivist account in at least two important ways. First, he thinks that there *is* an essential connection between law and morality, but it turns out not to be the connection claimed by the classic natural lawyers. This claim is dealt with by a number of the contributors to this book, but I found Frederick Schauer's "Fuller on the Ontological Status of Law" to be the most helpful.

The traditional understanding of Fuller's eight characteristics of law—generality, promulgation, nonretroactivity, clarity, noncontradiction, possibility of compliance, constancy over time, and congruence between official action and declared rule—is that they form a timeless *essence* for law. If any system of commands or rules does not have them, it is not a legal system. This understanding of Fuller aligns him closely with classic natural law, but as an account of the necessary moral content of law it seems rather thin. The eight features seem merely procedural and neutral. How is this "internal morality" of law connected to morality in a stronger sense?

Here is where Fuller's argument may be much more interesting than it is typically portrayed. Schauer says that for Fuller, "the essence of X was a function of what X was *for*, with the essence of X-ness being not some Platonic form or natural kind, but rather those properties of an X which enabled it to do something else, to achieve some purpose, aim, or goal."[5] So the eight essential characteristics of law (its "internal morality") are the features of a legal system that will tend to produce a social order which best approaches the desired "external morality", which is "the reduction of iniquity and inhumanity".[6] The eight characteristics are picked out not by conceptual analysis which discloses a pre-existing essence, but because of their instrumental quality in tending to produce the desired moral consequences. Fuller believed that a legal system exhibiting the eight characteristics could not be an evil one:

> When challenged with the example of the apartheid regime of South Africa, which appeared to be a legally effective government pursuing evil ends, Fuller insisted that the inner morality of law was regularly violated by the South African government and that the substantive immorality of apartheid was, as a practical matter, linked to the breakdown in the principles of legality experienced in that society.[7]

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4 Frederick Schauer, "Fuller on the Ontological Status of Law" page 126 (emphasis in the original).

5 Ibid page 135 (emphasis in the original).

6 Ibid pages 137, 139-140.

7 Francis J. Mootz III, "Natural Law and the Cultivation of Legal Rhetoric" pages 430-1 Note too footnote 23 on page 431 where Mootz quotes Fuller as follows:

What I take from Schauer's analysis is that Fuller would not see any procedure as "merely neutral". Any institutional design implicates certain results or end-states, and so any procedures have an unavoidable connection with larger goals and values. This is where the unavoidable connection between law and morality comes in. Fuller is simply insisting upon the procedural features which will tend to produce the social order exhibiting what he sees as the correct moral values.

The second way in which Fuller rejected legal positivism was in his denial that all law was the product of the acts of some state official. This claim is dealt with by Gerald Postema's chapter on "Implicit Law".[8] On Postema's account, Fuller distinguished between laws that were deliberately created by the acts of determinate state officials, and implicit rules that are reflected in the conduct and expectations of people, but which never had a determinate author or authoritative formulation. Fuller claimed that although explicit law looks like it stood on its own, in reality it was always dependent upon the in-place shared background of understandings and expectations that were the home of implicit law.

> Fuller argues that the content of legal norms cannot be determined (for the purpose of providing guideposts for self-directed social interaction) strictly from the linguistic meanings of the words in which they are formulated. Lawmakers construct legal norms in the abstract, but the norms are 'projected into' the developing life of the community, and they are practically intelligible only if they are successfully so projected. Thus, understanding a norm requires not merely understanding the meaning of the words in which it is formulated, but understanding the institutions, practices, and attitudes of the community to which it is addressed. Enacted norms make sense as practical guides for self-directing agents (that is, are followable as norms) only when they are set in the context of concrete practices, attitudes, and forms of social interaction.[9]

Both of these positions taken by Fuller anticipate those taken by contemporary jurisprudential writers who certainly would not fall into either pole of the natural law/legal positivism dichotomy. It is not only Ronald Dworkin who asserts that law and morality cannot be disentangled. The Critical Legal Studies writers notoriously assert that "law is politics". They do *not* mean by this that the law always involves the exercise of discretion by judges, and that in exercising this discretion the judge necessarily has recourse to his or her own personal moral or political views. That is the legal positivist picture of how morals or politics sneaks into the law. By contrast, Critical Legal Studies writers argue that all seemingly neutral or black-letter law rests upon a concealed commitment to some political or moral social vision. It is the assumptions and values provided

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> "Does Hart mean to assert that history does in fact afford significant examples of regimes which have combined a faithful adherence to the internal morality of law with a brutal indifference to justice and human welfare? If so, one would have been grateful for examples about which some meaningful discussion might turn."

8 Gerald Postema, "Implicit Law", page 255ff. See too David Luban, "Rediscovering Fullers' Legal Ethics" pages 206-7.

9 Postema, page 266.

by that background commitment which give law its common-sense shape and meaning for practitioners.[10]

So Critical Legal Studies shares Fuller's anti-positivist view that the law, even if it seems merely procedural or black-letter in nature, is never neutral, but is always connected to an underlying moral, political, or social vision. The difference between the Critical Legal Studies position and the natural law position is that CLS does not claim that there is one objectively correct moral position which *should* lie underneath the law. The CLS question is not whether the morality or politics under the law is the correct one, but which social groups benefit from it, and what structures of power is it maintaining. Hence the CLS calls to subject the law to "ideology critique". In an interesting twist, they turn Hart's argument on its head and argue that it is only by seeing that law and political commitments will always be connected that you are rendered better able to find and criticise these commitments.

Finally, the connection between Fuller and contemporary jurisprudence that I am attempting to draw here has a personal element. A few years ago I wrote a CLS-inspired paper in which I urged that since there is always a connection between the structure of property law and a moral/political goal, one needs to consciously design the property ground-rules to better achieve the moral/political goals you desire.[11] I now find that I was echoing Fuller's earlier work on institutional design and the inevitable connection between law and morality. Another aspect of my current work is devoted to Stanley Fish.[12] Fish is famous for his claim that it is the widely shared beliefs, values, expectations and practices of "interpretive communities" which accounts for those embedded in the same community reading texts in the same way, rather than any constraint rooted in the text itself. I now find that this idea is present in Fuller's stress on the importance of "implicit law". So I find myself in agreement with the authors of this book: there is a lot worth rediscovering in the work of Lon Fuller.

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10 For a simple example of this claim being worked out, see Gerald Frug, "A Critical Theory of Law", (1989) 1 Legal Educ. Rev. 1395.

11 See Michael Robertson, "Reconceiving Private Property", (1997) 24 Journal of Law and Society 465.

12 See Michael Robertson, "Picking Positivism Apart: Stanley Fish on Epistemology and Law" (1999) 8 Southern California Law Review 401.