

Fuller's Faith

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1. Introduction

What has come to be known as the "Fuller–Hart debate" in legal philosophy refers to a series of intellectual exchanges between Lon Fuller and Herbert Hart. Judging from the fact that in several anthologies in the field of legal philosophy excerpts or integral texts of the debate are included,¹ this debate is considered to be important to modern legal philosophical thought, and rightly so. It started with "Positivism and the Separation of Law and Morals" by Hart.² Fuller's answer was "Positivism and Fidelity to Law – A Reply to Professor Hart."³

In most books on legal philosophy the discussion between Hart and Fuller is presented as a debate on the "separation of law and morals," but the discussion is much richer than this. It has to do with interpretation, with the ideals of legal scholarship, and much more.

It has been a debate that seems to have stimulated both writers to further develop their theories. Both Hart and Fuller wrote substantial treatises on legal philosophy. Hart wrote *The Concept of Law* (1961),⁴ Fuller *The Morality of Law* (1964).⁵ In *The Morality of Law*, Fuller reacted to *The Concept of Law*, and in 1965 Hart reacted to Fuller's criticism in a

* I want to thank Kenneth Winston and Willem Witteveen for their valuable comments on an earlier draft of this article.

1 Cf. Joel Feinberg and Hyman Gross, eds., *Philosophy of Law*, 4th ed. (Belmont, Calif.: Wadsworth Publishing Company, 1991), pp. 63-103.

2 H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593-629; also in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), pp. 49-87.

3 Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630-72 (hereafter referred to as PFL); also in Feinberg and Gross, eds., *Philosophy of Law*, pp. 82-102.

4 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

5 Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1969; hereafter referred to as *ML*).

review of Fuller's work.⁶ In a revised edition of *The Morality of Law*, Fuller countered Hart's arguments.

2. Two points of agreement

2.1 Both Fuller and Hart subscribed to "hypothetical natural law"

Many scholars have underlined the differences between Hart and Fuller, but there are some striking points of agreement as well. Both Hart and Fuller protest against classical natural-law thinking and develop what might be called "hypothetical natural law."⁷ Their conception of natural law is based on the presumption that people wish to survive.⁸ Hart is concerned with the survival of society, Fuller with the survival of the legal system. These are indeed different foci. But, all the same, the points of agreement, so it seems to me, are more striking than their differences.

Both reject "classical natural law" thinking. Hart defines this as follows: "that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform to be valid."⁹ Hart continues in criticizing several forms this classical natural-law doctrine has taken, especially as it has been connected with a teleological conception of nature. Hart thinks this conception is to be rejected, although he contends that there is a grain of truth in it. This is "the tacit assumption that the proper end of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to

6 H.L.A. Hart, "Lon L. Fuller: *The Morality of Law*," *Harvard Law Review* 78 (1965): 1281-96; also in Hart, *Essays in Jurisprudence and Philosophy*, 343-65.

7 Cf. for Hart's treatment of natural law: Hart, *Concept of Law*, pp. 181-95, and for Fuller, *ML*, p. 96: "What I have tried to do is to discern and articulate the natural laws of a particular kind of human undertaking, which I have described as 'the enterprise of subjecting human conduct to the governance of rules.' These natural laws have nothing to do with any 'brooding omnipresence in the skies.' Nor have they the slightest affinity with any such proposition as that the practice of contraception is a violation of God's law. . . . They are like the natural laws of carpentry." The most important predecessor, if not founding father, of the hypothetical approach is Kant. Cf. Jeremy Waldron, "Why Law – Efficacy, Freedom, or Fidelity?," *Law and Philosophy* 13 (1994): 259-84, at p. 259: "The internal morality argument would be a way of establishing what Kant called a hypothetical imperative."

8 My emphasis on the "hypothetical" character of both Hart and Fuller's natural-law conceptions does not exclude, of course, that there are other similarities. Both, for instance, are examples of a "secular" natural-law conception. Cf. Kenneth Winston, "Introduction," *Law and Philosophy* 13 (1994): 253-58.

9 Hart, *Concept of Law*, p. 182.

continue in survival.”¹⁰ Taking human survival as an absolute norm would mean to subscribe to the traditional natural-law position. But what we could do is take this aim of human survival as a *hypothesis*. And reflecting on human nature and the nature of reality we could, given survival as an aim, detect even a “minimum content of natural law.”

The nature of man and reality points to five “truisms”: (i) human vulnerability; (ii) approximate equality; (iii) limited altruism; (iv) limited resources; (v) limited understanding and strength of will. In each case these facts afford a *reason why*, given survival as an aim, law and morals should include a specific content. For instance, the norm “Thou shalt not kill” is understandable under the presuppositions of (a) the aim of human survival and (b) human vulnerability. Hart writes: “The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other.”¹¹

There are differences with Fuller’s approach as developed in *The Morality of Law*, of course. Fuller is not concerned with norms like “Thou shalt not kill.” These are examples of “substantial aims” of the law, and it may be claimed that Hart’s approach to natural law is, in a sense, more ambitious than Fuller’s, who only claims to have found some “lower laws”¹² or “procedural laws,”¹³ as distinguished from a substantive natural law. But there are several points of agreement; especially the “hypothetical approach” to the problems of natural law that Hart and Fuller share is striking. Hart is concerned with delineating the moral norms that make *society* viable, Fuller is concerned with the norms that make a *legal system* viable. Paraphrasing Hart’s idea of classical natural law, we could typify Fuller’s ambition as the quest for “certain principles of law, awaiting discovery by human reason, with which man-made law must conform to *remain* valid.”¹⁴

2.2 Fuller and Hart were no “rights thinkers”

There is another interesting feature of Fuller’s thought that made him

10 Hart, *Concept of Law*, p. 187.

11 Hart, *Concept of Law*, p. 189.

12 *ML*, p. 96: “They are not ‘higher’ laws; if any metaphor of elevation is appropriate they should be called ‘lower’ laws.”

13 *ML*, p. 96: “As a convenient (though not wholly satisfactory) way of describing the distinction being taken we may speak of a procedural, as distinguished from a substantive natural law.”

14 Hart, *Concept of Law*, p. 182 (emphasis added).

more of a companion to Hart's positivist approach than a critic. Neither Fuller nor Hart was a "rights thinker."¹⁵ This explains why in the 1960s, when political demands were more and more formulated in the vocabulary of "rights," their approach no longer seemed in tune with modern developments. In this period, civil rights for people discriminated against because of their skin color, equal rights for women, and other political ideals were formulated. In this period Ronald Dworkin came to the fore.¹⁶ His *Taking Rights Seriously* (1978) was the intellectual underpinning of these social developments. Dworkin – commenting on Rawls's work – assents to the proposition that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but "simply as human beings with the capacity to make plans and give justice."¹⁷ According to Dworkin rights are "trumps," which will prevail over official acts done in pursuance of some policy, judged to be conducive to some desirable public goal.

This sounds like natural-law thinking, and Dworkin does not seem very allergic to that.¹⁸ Yet he clearly writes that rights are no gift of God, but

15 Cf. Winston, "Introduction," p. 254: Winston contends that Fuller saw freedom (not justice) as the inherent general aim of the law. Fuller wrote extensively on freedom. Most of his writings are unpublished lectures and fragments of essays. His most well-known essay is "Freedom – A Suggested Analysis," *Harvard Law Review* 68 (1955): 1302-25. Cf. about the relation between freedom and law also: Kenneth I. Winston, "Toward a Liberal Conception of Legislation," in *Liberal Democracy: Nomos XXI*, ed. J.R. Pennock and J.W. Chapman (New York/London: New York University Press, 1983), pp. 313-42. Hart wrote "Are There Any Natural Rights?," in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984), pp. 77-91, but this essay is not included in any of his collections of essays.

16 Cf. for these developments: J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), p. 426. All the same, there are many Fullerian ideas in Dworkin's work, cf. Luban in this volume. For instance, the comparison Fuller makes between telling a joke and developing law (Lon L. Fuller, *The Law in Quest of Itself*, New York: AMS Press, [1940] 1978, p. 8) or, even better, his comparison between law and executing the pencil sketch of an invention (*ML*, p. 85), is similar to Dworkin's idea of the chain novel (Ronald Dworkin, *Law's Empire*, Cambridge, Mass./London: Belknap Press, 1986, p. 228). Cf. N.E. Simmonds, "Philosophy of Law," in *The Blackwell Companion to Philosophy*, ed. Nicholas Bunnin and E.P. Tsui-James (Oxford: Blackwell, 1996), pp. 388-414, at p. 409: "Fuller's work seems to have influenced Dworkin in several fundamental respects, although the influence is not acknowledged."

17 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), p. 426.

18 Cf. Ronald A. Dworkin, "Natural' Law Revisited," *University of Florida Law Review* 34 (1982): 165-88; also in *Philosophical Problems of the Law*, 2d ed., ed. David M. Adams (Belmont, Calif. [etc.]: Wadsworth Publishing Company, 1996), pp. 93-99.

are entailed by the primordial right to equality. No divine natural law, but a kind of natural law after all. What distinguishes Dworkin from Fuller and Hart in this respect, is the absolutist timbre. Dworkin's "natural law" is not the hypothetical natural law which both Hart and Fuller subscribed to,¹⁹ but an a priori, a "self-evident truth" in the sense of American natural-law thinking.

3. Three points of difference

3.1 Do the eight principles contain a "morality of law"?

So what are the differences between Hart and Fuller? The first point of controversy is prima facie a point of semantics. Hart refuses to call the "eight principles" a "morality of law." His most vocal protest on this point is found in his review of Fuller's *The Morality of Law*.²⁰ Hart states that the principles that make law possible are characterized by Fuller as "the inner morality of law," "the special morality of law," "the morality that makes law possible," "procedural natural law," and "the principles of legality." Hart is critical toward all these labels, except the last one. He adopts the last one as, what he thinks, the "most conventional designation." The classification of the eight principles as a form of morality "breeds confusion."²¹ What the eight principles are, is a set of "principles of good craftsmanship." Fuller confuses two notions "that it is vital to hold apart": the notions of purposive activity and morality. And then Hart presents his hilarious analogy that inspired so many followers to reject Fuller's semantics as absurd: "Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its 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 in its various forms is concerned."²²

19 Although Hart is not a "happy natural lawyer." He was certainly not "in love" with the minimum content of natural law he felt that he had to adopt, as Fuller was "in love" with the purposive conception of law that he developed in all his writings. Cf. Hart in "Lon L. Fuller: *The Morality of Law*," p. 363: "The author has all his life been in love with the notion of purpose and this passion, or any other, can both inspire and blind a man."

20 Hart, "Lon L. Fuller: *The Morality of Law*," pp. 343-65.

21 Hart, "Lon L. Fuller: *The Morality of Law*," p. 347.

22 Hart, "Lon L. Fuller: *The Morality of Law*," p. 350.

A majority of commentators have followed Hart in this criticism, presenting countless variants to Hart's example of poisoning. Martin Golding speaks of "golf" and "safecracking."²³ Fuller's use involves an overextension of the term "morality," he says. "It would seem strange to call the conditions for good golf-playing the 'inner morality of golf' or the conditions for excellence in safecracking (a recognized profession) an 'internal morality.' Not all kinds of excellence are moral, so not all matters of aspiration involve a 'morality of aspiration.'" Brian Bix objects to the use of the word "morality" as well: "Unlike traditional natural-law theorists . . . the test Fuller applies is one of function and procedure rather than strictly one of moral content."²⁴ And Wacks contends that Fuller "has not made clear" how his eight principles are "moral."²⁵

Apart from the group of thinkers who censure Fuller for his semantic extravagances, there is also the group that belittles the significance of the question whether we call the eight principles "moral" or rather "efficacious."²⁶

Perhaps there is more at stake than mere semantics; but this will be exemplified during the course of my argument. Let us first have a look at what is defended by Fuller's critics. They insist on naming the eight principles "principles of efficient lawmaking." Again, it is Hart who took the lead here. We should not 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 writes.²⁷

I do not agree. I think Nigel Simmonds makes a point in asserting that there is something question-begging in the description of the eight principles as principles of effective lawmaking. "If Hart had said that they were principles of effective social control, there would have been obvious objec-

23 Martin P. Golding, *Philosophy of Law* (Englewood Cliffs, N.J.: Prentice-Hall, 1975), pp. 49-50.

24 Brian Bix, *Jurisprudence: Theory and Context* (London: Sweet & Maxwell, 1996), p. 82.

25 Raymond Wacks, *Jurisprudence*, 2d ed. (London: Blackstone Press, [1987] 1990), p. 73. Cf. also James Herget, *American Jurisprudence, 1870-1970* (Houston, Tex.: Rice University Press, 1990), p. 258, who thinks that "whether or not his canons of lawmaking should be called a morality is itself open to question."

26 Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, Mass./London: Harvard University Press, 1990), pp. 229-330, is critical on the Fuller-Hart debate. Rereading the debate he was "struck by how little was at stake." He castigates Fuller's faith in "persuasive definition" and – in the words of Shklar – his attempt to "condemn unjust decisions to grammatical death through definitional execution."

27 Hart, "Lon L. Fuller: *The Morality of Law*," p. 350.

tions to his claim. If social control is merely a matter of preventing widespread violence and revolutionary dissent, it is unlikely that Fuller's eight principles will be a good guide to the most effective techniques."²⁸ A regime of terror where officials act unpredictably or on the basis of secret directives is much more likely to succeed in quelling opposition, Simmonds writes.²⁹

Thus presented, the statement that the principles of legality are merely principles of efficacy, immediately leads us to the question: efficacious *for what*? The eight principles will not be a good guide to the effective techniques of mass coercion, Simmonds writes. Therefore, the question remains *what law is* and how it differs from organized coercion.³⁰ "Law is the enterprise of subjecting human conduct to the governance of rules," Fuller wrote.³¹ This view treats law as an activity and regards a legal system as the product of a sustained purposive effort, Fuller tells us. Two elements are central to this "definition."³² First, the object of the definition is something we consider *good*. For obvious reasons we consider human conduct subjected to rules to be better than utterly capricious and arbitrary conduct. Second, law is seen as something *purposive*. These two elements explain that the conditions that have to be fulfilled to make law possible can be regarded as something good, or conducive to something good, and even as a morality. This "morality" does not have to be the "morality" in the sense of a personal feeling of justice, the critical function we hold back to judge everything we ourselves do and other people do. So Hart and other legal positivists do not have to fear we neglect our critical faculties. Nonetheless, there is reason enough to call the principles of legality a "morality of law."

What about the claim that designating the principles of legality as a

28 N.E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (London: Sweet & Maxwell, 1986), p. 119.

29 Simmonds, *Central Issues in Jurisprudence*, p. 119. Cf. also John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 274, contending the same: "Adherence to the Rule of Law . . . is always liable to reduce the efficiency for evil and an evil government, since it systematically restricts the government's freedom of manoeuvre."

30 Simmonds, *Central Issues in Jurisprudence*, p. 120.

31 *ML*, p. 106.

32 Winston denies Fuller ever had the ambition to present something of a "definition" of law. Cf. Kenneth I. Winston, "Introduction," in Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth I. Winston (Durham, N.C.: Duke University Press, 1981), pp. 11-44, at p. 30: "[I]t is clear that such a characterization is meant to define not law in general but only the process of legislation." This may be right. I use the word "definition" here in a rather loose sense.

morality would commit us to the view that there must be a "morality of poisoning" as well? I believe this argument simply overlooks the difference between two kinds of activities people can engage in: good and evil activities. The principles conducive to good activities can, without strain of language, be called "a morality," and the principles conducive to evil activities can be called "efficious," thereby making clear that the goal they are conducive to is not something good or at least neutral. Because loving is a good activity there is a "morality of loving." This morality comprises principles such as: never be egocentric, always be caring, try not to be moody, show care for the person you love, never squabble about money, etc. It would be a bit silly to protest to the use of the word "morality" in this context, because the principles presented are merely a matter of "efficiency." "For better or for worse" is not a principle of efficiency, it is a moral principle. Why? Because marriage is not a matter of efficiency.

And because torturing people is not a good deed but an evil one, there can be no "morality of torture," although it may be possible to enumerate the rules and principles that maximize the pain for the victim. Of course, there are many instances where we hesitate whether to speak of "principles of efficiency" or "the morality" of a certain activity. Gardening seems an example of this. A "morality of gardening" sounds bizarre, although it is imaginable that in a certain context, e.g. when we would want to emphasize that certain activities have to be avoided, we could present them as "absolutely violating the morality of gardening."

When all this seems convincing, it is not only clear why Fullerians, and other natural-law thinkers, have no qualms about using the word "morality" in relation to law, but also why legal positivists wish to avoid that. Positivists do not think that law is something to be valued in itself – law can be good or bad. It all depends on the content of the laws. For the Fullerian, law is always better than no-law, because human conduct that is subjected to rules is better than human conduct that is "lawless."³³

So far, the first point of difference. I do not think that the words "morality of law" involve an overextension of the word "morality."

3.2 *What is the relation between legality and justice?*

But this first point, although there is a real difference of opinion, can hardly explain the heat of the debate. What else can explain this? Richard

³³ Cf. Peter P. Nicholson, "The Internal Morality of Law: Fuller and His Critics," *Ethics* 84 (1974): 307-26, at p. 318: "Fuller's basic assumption, so basic that it is probably insufficiently emphasized, is that law per se is morally good."

Posner argues it has to be sought in “cultural differences” between the contestants.

In Fuller’s emphasis on the U.S. Constitution we have a clue that the debate between Hart and him – between an American and an Englishman – was as much cultural as intellectual. Since the United States has a judicially enforceable constitution that contains both open-ended provisions such as those guaranteeing equal protection and due process and a number of specific prohibitions and guarantees as well, while England has neither a written constitution nor a practice of judicial review of the validity of legislation, profoundly immoral laws are apt to be illegal in the United States and merely profoundly immoral in the United Kingdom. The overlap between law and morality is different in the two countries.³⁴

But the problem is that Fuller is so “British.”³⁵ Nowhere do we find Fuller stressing the significance of a written charter of rights, to be enforced by judicial power, as we find this with the ideologues of “American constitutionalism.”³⁶ Even Fuller’s reference to Coke, by many commentators lauded as the precursor of judicial review,³⁷ does not emphasize what we now see as the adoption of American principles.³⁸ Both Hart and Fuller seem to bet on ordinary law that conforms to the principles of law (or “legality,” in Hart’s phrasing).³⁹

34 Posner, *Problems of Jurisprudence*, p. 230.

35 Cf. for a good comparison between the British and the American traditions: Alan Ryan, “The British, the Americans, and Rights,” in *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law – 1791 and 1991*, ed. Michael J. Lacey and Knud Haakonssen, (Cambridge [etc.]: Woodrow Wilson International Center for Scholars/Cambridge University Press, 1991), pp. 366-440.

36 Cf. Fuller’s relatively reserved treatment of typically American institutions like civil rights and judicial review (e.g. Lon L. Fuller, “La Philosophie du droit aux États-Unis,” *Les Études philosophiques* 12 (1964): 559-68) with Dworkin’s abounding enthusiasm in Ronald Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990).

37 Cf. Theodore F.T. Plucknett, “Bonham’s Case and Judicial Review,” *Harvard Law Review* 40 (1926-1927): 30-70; Roscoe Pound, “Common Law and Legislation,” *Harvard Law Review* XXI (1908): 383-407, at p. 390.

38 In commenting on the work of Coke, Fuller writes: “Those who actually created our republic and its Constitution were much closer in their thinking to the age of Coke than they are to ours. They, too, were concerned to avoid repugnancies in their institutions and to see to it that those institutions should suit the nature of man.” (*ML*, p. 101)

39 In Hart’s case this is not very surprising. It goes back to a long tradition of Bentham and Dicey. Cf. J. Bentham, *Anarchical Fallacies*, in *The Works of Jeremy Bentham*, Bowring ed. (Edinburgh: William Tait, 1843); also in *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man*, ed. Jeremy Waldron (London/New York: Methuen, 1987), pp. 46-69; A.V. Dicey, *Introduction to the Law of the Constitution*, 10th ed., with an introduction by E.C.S. Wade (London: Macmillan Education, [1885] 1987). For Hart’s attitude toward this tradition cf. H.L.A. Hart, “The United States of Ameri-

Let us see how both writers struggle with this difficult issue, and how Hart makes far-reaching concessions to Fuller's perspective. Hart makes some interesting remarks when he treats the connection between law and morality in *The Concept of Law*. Hart is well aware, of course, that there is an impressive body of literature claiming a necessary connection between law and morals. Among the several claims that have been made in this respect, he also mentions an unidentified "critic of positivism," whose criticism is easily recognizable as Fuller's unease with the legal-positivist stance. "It may be said," Hart writes, "that the distinction between a good legal system which conforms at certain points to morality and justice, and a legal system which does not, is a fallacious one, because a minimum of justice is necessarily realized whenever human behaviour is controlled by general rules publicly announced and judicially applied."⁴⁰ When the most odious laws are justly applied, we have, in the bare notion of a general rule of law, the germ at least of justice.⁴¹ And if these rules fulfil their function, social control, the laws have to satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. "Plainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality," Hart writes, and he continues:

Indeed one critic of positivism has seen in these aspects of control by rules, something amounting to a necessary connection between law and morality, and suggested that they be called "the inner morality of law." Again, if this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.⁴²

For the moment I will not comment on the question if, and if so, to what extent, "iniquity" would be compatible with compliance with the morality of law. Let us concentrate on what precedes: "If this is what the necessary connection of law and morality means, we may accept it," Hart writes. Now, this *is* the connection of law and morality that Fuller wants to emphasize. So what is left of the difference of opinion? Is there any difference of opinion at all? Some commentators have, for reasons understandable by now, denied the differences of opinion. "There is much in the

ca," in H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), pp. 53-78.

⁴⁰ Hart, *Concept of Law*, p. 202.

⁴¹ Hart, *Concept of Law*, p. 202.

⁴² Hart, *Concept of Law*, p. 202.

above that a positivist of Hart's variety can agree with," says Golding after a résumé of Fuller's theory.⁴³ Judith Shklar is even more adamant in her emphasis on congruence and tells us: "Whatever their disagreements, both sides agree that justice is a matter of the equal application of rules."⁴⁴ Fuller insists that some values are immanent in the law as such and that law is not law unless they are present, Shklar writes. But this "definitional self-insurance"⁴⁵ of Fuller (that Hart apparently lacks) is considered relatively unimportant by this commentator.

When both Hart and Fuller subscribe to the position that the principles of legality are important, where is the difference?⁴⁶ Perhaps in that the two authors have different expectations of what a "utopia of legality" implies for justice? But neither Hart nor Fuller is very clear about what they expect from compliance to legality. Both Hart and Fuller seem to accept the principles of legality as *necessary conditions* for "good law" (or "law," in Fuller's case). But neither considers them to be *sufficient conditions*.

3.3 How much iniquity is possible when the morality of law is respected?

Although both thinkers agree that iniquity is possible when the eight principles are respected, there seems to be a difference of opinion about the extent of iniquity that is possible, and the likelihood that this will occur. Hart writes that the inner morality of law is compatible with "very great iniquity" (emphasis added).

Commenting on this passage Fuller writes that "one could not wish for a more explicit denial of any possible interaction between the internal and external moralities of law than that contained in this last sentence."⁴⁷ Perhaps these words are somewhat exaggerated so long as Hart has not

43 Golding, *Philosophy of Law*, p. 48.

44 Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass./London: Harvard University Press, [1964] 1986), p. 109.

45 Shklar, *Legalism*, p. 108.

46 Not only Hart, but also other critics of Fuller subscribed to the importance of the eight principles. This also pertains to all the members of the "New Analytical Jurists" (a supposedly new school of legal philosophy, comprising Hart, Dworkin, Marshall Cohen, and Summers). Cohen sees Fuller's "canons" as a "tolerable start at producing a set of conditions necessary for the presence of a (modern) legal system." Dworkin accepts "Fuller's conclusion that some degree of compliance with his eight canons of law is necessary to produce (or equally important, to apply) any law, even bad law." Also, Summers contends that "if we are to have law at all," we must have some compliance with the principles of legality. Cf. R. Summers, "The New Analytical Jurists," *New York University Law Review* 41 (1966): 861-96 and Fuller's commentary in *ML*, p. 197.

47 *ML*, p. 154.

clarified what he exactly means. Hart's concession on the part of an internal connection between law and morality seems clear, but Fuller is fastidious.

Does Hart mean merely that it is possible, by stretching the imagination, to conceive the case of an evil monarch who pursues the most iniquitous ends but at all times preserves a genuine respect for the principles of legality? If so, the observation seems out of place in a book that aims at bringing "the concept of law" into closer relation with life. Does Hart mean to assert that history does in fact afford significant examples of regimes that 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.⁴⁸

These are relevant questions. But Fuller makes no effort to answer them. He criticizes Hart for his "no more than casual and passing consideration" that the problems of legality deserve. But what kind of utopia we can expect when the principles of legality are honored Fuller does not exemplify. He asks for "examples about which some meaningful discussion might turn."

Later participants in the debate have furnished some material. Friedmann sets the tone: "The Nazi system, at the height of its effectiveness, complied with all the eight requirements, except, to some extent, that of promulgation," he writes.⁴⁹ And he continues:

The Nazi extermination decrees, for example, whose "orderly" and systematic brutality has more than anything else inspired the many postwar discussions on the invalidity of the Nazi legal system as incompatible with basic principles of humanity – were certainly general, insofar as they applied to a tragically large but clearly definable class of victims; they were made known to them with cynical brutality; they were prospective, clear, and free from contradictions; and they were, unfortunately, far from being impossible of execution. Nor was there any lack of congruence between the law and official action, because the exterminations took place within a hierarchic structure derived from the supreme legislative authority of the *Fuehrer*.⁵⁰

This is a radical statement. But Friedmann's stance is not rare. Dias agrees with Hart (and Friedmann) that Fuller's eight "desiderata" are compatible with very great iniquity. He refers to Herod's order for the massacre of innocent children as an example that satisfied all the conditions.⁵¹ Bix asks whether there are regimes, generally condemned as evil,

48 *ML*, p. 154.

49 W. Friedmann, *Legal Theory*, 5th ed. (London: Stevens & Sons, 1967), p. 19.

50 Friedmann, *Legal Theory*, p. 19.

51 R.W.M. Dias, *Jurisprudence*, 5th ed. (London: Butterworths, 1985), p. 493.

which have at times at least been quite meticulous about legal procedures, and as an answer to this question he refers to South Africa and East Germany as examples.⁵² Wacks tells us that compliance with Fuller's "internal morality" is no guarantee of a just order. The South African legal system probably satisfies all eight principles, he tells us.⁵³ Even Simmonds, Fuller's most sympathetic commentator among modern legal philosophers, contends that compliance with the eight principles does not guarantee that the law will be just. However, both Simmonds and Bix make relevant restrictions. The fact that there are no guarantees does not demonstrate that the rule of law is not a genuine moral value, Simmonds writes. "The fact is that compliance with the eight principles is logically consistent with the pursuit of evil aims in very much the same way that armed robbery is logically consistent with a scrupulous concern for paying one's debts. They are indeed logically consistent, but they are very unlikely to be found together."⁵⁴ Bix writes that, although it is probably claiming too much for those principles to say that following them would guarantee a substantively just system, following the principles of legality is itself a moral good, because following the principles of legality may "hinder base actions."⁵⁵

Two observations seem to give cause for further thought. First, Simmonds's remark that they are "very unlikely to be found together." And second, something that none of the participants in the discussion has revealed but which seems relevant: *None of the regimes mentioned by Fuller's critics is in existence any longer.* East Germany, Nazi Germany, South Africa – they have all crumbled down. Is this a mere coincidence? Or is it significant? Perhaps we should understand Fuller's thesis as saying that no regime violating the principles of the morality of law can *continue* to exist.

This is, indeed, how some commentators have understood Fuller's claims. Dias is well aware, for instance, that Fuller seems to think "that iniquitous regimes have not *continued* to exist, nor could they *continue* to combine evil policies with fidelity to the 'internal morality.'"⁵⁶ Also Friedmann, a relentless critic of Fuller and admirer of Hart, states that "no totalitarian legal order could survive for any length of time if all or a great majority of its laws were made retroactive; legal order would break down

52 Bix, *Jurisprudence*, p. 84.

53 Wacks, *Jurisprudence*, p. 73.

54 Simmonds, *Central Issues in Jurisprudence*, p. 123.

55 Bix, *Jurisprudence*, p. 84.

56 Dias, *Jurisprudence*, p. 493 (emphasis added).

in confusion.”⁵⁷ Martin, finally, writes: “At best, Fuller’s thesis would only show that *in the long run* a system of law in which decisions are justified and explained could have no evil laws. But, as Lord Keynes once remarked, in the long run we’ll all be dead.”⁵⁸

The reference to Keynes and the words “at best” make clear that Martin thinks the “discovery” that evil regimes are *in the long run* incompatible with respect for the morality of law, is a trivial insight. But this is unjustified, so it seems to me. It is rather puzzling how Dias, Friedmann, Martin, and other commentators of Fuller can be so critical about the significance of the morality of law and at the same time confess that no legal order can continue to exist without compliance to those principles. If Fuller had really established that “in the long run” a system with no respect for the morality of law is moribund, his contribution to the theory of law and government would have been considerable indeed.

The last part of this essay is dedicated to the question why Fuller adhered to the morality of law as an ideal for legal systems. I think this can be explained by two factors. The first is that he was aware of the vicissitudes inherent in the more ambitious undertaking of developing a theory of substantive justice. The second is what could be called “Fuller’s faith.”

4. Why Fuller made no attempt to develop a theory of substantive justice

A good starting point of this section may be the following question: Why did Fuller never go on to making the step of developing a theory of substantive justice? If the morality of law is only a necessary reason for justice, why not develop a theory of “rights” as a superstructure complementing the morality of law as the infrastructure of a theory of justice?

The following reasons may be an explanation for this. We will first have to dwell a little on the rule of law as an ideal, because the principles of

⁵⁷ Friedmann, *Legal Theory*, p. 18.

⁵⁸ Michael Martin, *The Legal Philosophy of H.L.A. Hart: A Critical Appraisal* (Philadelphia: Temple University Press, 1987), p. 222 (emphasis added).

law, taken together, constitute what is usually called "the rule of law."⁵⁹ Craig discerns two conceptions of the rule of law.⁶⁰

Formal conceptions of the rule of law address the manner in which the law was promulgated (Was it done by a properly authorized person, in a properly authorized manner?, etc.); the clarity of the ensuing norm (Was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life?, etc.); and the temporal dimension of the enacted norm (Was it prospective or retrospective?, etc.).⁶¹ Typical of the formal concept of the rule of law is that no judgment upon the actual content of the law itself is passed; the question is whether the formal precepts of the rule of law were met.

Substantive conceptions of the rule of law seek to go beyond this. They stress the importance of certain rights that have to be complied with. If laws meet this standard, they are "good" laws; if not, they are "bad" laws, or, in some theories, not laws at all.

As an example of the formal conception of the rule of law one may consider the approach taken by Joseph Raz⁶² and that taken by the great Victorian lawyer A.V. Dicey.⁶³ The most outspoken contemporary supporter of a substantive conception of the rule of law, however, is Ronald Dworkin. Central to Dworkin's concern is the question what rights people currently possess. It is a task of the court to assess this, according to the best theory of justice.

Dworkin does not explicitly distinguish between these two conceptions of the rule of law. But what he calls the "rule book conception" is quite similar to the formal conception of the rule of law as discerned by Craig. The second conception of the rule of law is termed by Dworkin the "rights conception."⁶⁴ He favors the second conception. This means that Dworkin

59 Simmonds, *Central Issues in Jurisprudence*, p. 119: "It is easy to see that Fuller's eight principles correspond to the idea of 'the rule of law' (or at least to one aspect of that idea), long regarded as an important regulative ideal for Western legal systems."

60 Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law* 21 (1997): 467-87.

61 Craig, "Formal and Substantive Conceptions."

62 J. Raz, "The Rule of Law and Its Virtue," *Law Quarterly Review* 93 (1977): 195-211 (also in J. Raz, *The Authority of Law: Essays on Law and Morality*, Oxford: Oxford University Press, 1986, pp. 210-29). (Craig does not mention J. Raz, "The Politics of the Rule of Law," *Ratio Juris* 3 [1990]: 331-39, which to me seems more indicative of the substantive conception of the rule of law than the formal brand.)

63 Dicey, *Introduction to the Law of the Constitution*. Cf. Craig, "Formal and Substantive Conceptions," p. 470.

64 Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass. [etc.]: Harvard University Press, 1985), p. 11. Cf. Craig, "Formal and Substantive Conceptions," p. 477.

rejects a firm distinction between "legal" rules and a more complete political philosophy. For that very reason we find virtually no mention of the phrase "the rule of law" as such within his major work *Law's Empire*.⁶⁵

On the whole, I think the analytical framework that Craig presents is fruitful, even though one does not have to agree with all his assertions. One of the most interesting questions for us is, of course, the position of Lon Fuller's work. It appears that he is hard to qualify. Craig contends that most advocates of the formal conception of the rule of law, Raz for instance, are also leading exponents of legal positivism. The formal conception of the rule of law and the desire to keep legal questions separate from broader issues of political theory in deciding what the content of the law actually is, fit naturally together, he writes.⁶⁶ But we immediately realize that Fuller is an exception to this distinction. Fuller defends what Craig defines as a "formal conception," while at the same time he attacks legal positivism for its blindness toward values.

How can we explain this? Should we conclude that, obviously, "Fuller's faith" is responsible for this? Does Fuller's faith in the formal aspects of the rule of law explain his reluctance to develop a theory of substantive justice, as his followers Ronald Dworkin, John Rawls and many others have indeed done? And can Fuller's hesitation be justified?

5. The modesty of Fuller's claim

I think Fuller's claim is quite modest. His position may be summarized as follows: "I do not know exactly what justice is, but I have a clear idea about what it is not. There are some values we have to incorporate in every legal system. If we fail in this respect, justice fails and the system crumbles down."

It seems that his critics want to hear from him that he defends a much bolder thesis. He must defend that the morality of law is the alpha and omega of justice; if not, his achievements are belittled as mere trivialities. A good example of this view of Fuller's achievements can be found in Martin's book on Hart. If we follow the advice given by Fuller, Martin writes, "it does not follow from this that evil laws are impossible."⁶⁷ Now, *impossible* is an ambitious claim. But what Fuller argued for is that there

65 Craig, "Formal and Substantive Conceptions," p. 478.

66 Craig, "Formal and Substantive Conceptions," p. 477.

67 Martin, *Legal Philosophy of H.L.A.Hart*, p. 221.

must be some respect for the morality of law in order for a system to continue to exist. The examples of Nazi Germany, East Germany, and South Africa have only made this claim more probable in recent history. To be sure, "Fuller's faith" is no hard knowledge; it is what is characteristic of faith. It is no illusion, but you have no hard assurance either. For faith some reasons can be adduced.⁶⁸ I think Tertullianus' *credo quia absurdum* can hardly be called a faith. Faith seeks understanding, as Anselmus knew, but there are no hard proofs to make faith a "science." This is also the case with Fuller's faith. Fuller thinks that if judges are required to justify their decisions they will be "pulled" toward goodness. There are some reasons to think that this is true, and there are also some reasons to believe that this is a feasible strategy. One of the reasons why Fuller's minimalistic account of natural law seems so attractive is that his theory is invulnerable to attacks that more ambitious theories (e.g. Dworkin's theory) fail to counter.

6. Fuller's theory is not vulnerable because of "immoral morality"

The previous sentences require some further explanation. One of the most impressive arguments against a substantive theory of the rule of law is the problem of "immoral morality." There are standards of "what ought to be" that can hardly be called moral, the argument runs. In a society devoted to evil ends, its principles of justice will also be tainted.

"I take it that this is to be a warning addressed to those who wish 'to infuse more morality into the law,'" Fuller writes.⁶⁹ And he continues by exposing what can be called "Fuller's faith," to wit, the relation between coherence and goodness. It may be justified, however, to dwell a little more on the question in what sense Fuller's theory is affected by this problem of the "immoral morality." As far as I can see, Fuller's theory is not affected by this argument at all. This has to do with his defense of what has been called the "formal conception of the rule of law." What characterizes Fuller's approach to the concept of law is that he favors a very minimalistic moral infusion; an infusion, moreover, with universal or semi-universal moral values that are not part of the specific cultural

68 At least, according to some conceptions of faith. Cf. Paul Helm, *Faith and Understanding* (Edinburgh: Edinburgh University Press, 1997); Stephen T. Davis, *God, Reason and Theistic Proofs* (Edinburgh: Edinburgh University Press, 1997).

69 PFL, p. 636.

inheritance of particular groups.⁷⁰ The problem of immoral morality is a genuine problem, but it is a problem that has to be dealt with by adherents of the more substantive conceptions of the rule of law, like Ronald Dworkin. The concept of law as advocated by Dworkin not only contains the principles of legality but rights that have to "fit" into the specific legal culture where a problem of interpretation arises. Now, this may be a very evil legal culture. It may be a Nazi culture. But the morality of law, as outlined by Fuller, is not a set of principles that, in itself, gives reason for suspicion. It may not be enough for justice, but it would certainly not cause injustice.

7. Fuller's faith fully stated: There is a relation between coherence and goodness

Taken the modesty of Fuller's claim as a point of departure, the only thing Fuller is required to substantiate is that respect for the morality of law is likely to improve things in the sense of enhancing justice. It is against this background that we have to gauge Fuller's faith. Let us see whether this claim can be upheld.

In a much-debated phrase Fuller writes: "I shall have to rest on the assertion of a belief that may seem naive, namely, that coherence and goodness have more affinity than coherence and evil."⁷¹ This is the boldest assertion of Fuller's faith. Many people think he overstated his faith in the principles of law.⁷² This declaration of faith was made in his 1958 article. The reformulation of his faith in *The Morality of Law* is more cautious. In 1958 Fuller also believed that "when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions

70 His principles of legality are valid for all systems of law, modern law, ancient law, law in general. In that sense the principles that make lawmaking possible are really natural-law-like. They are not different "at Rome and at Athens, or different laws now and in the future," they are "for all nations and at all times," to paraphrase the famous characterization of natural law by Cicero, *De Republica*, b. III, XXII, 33.

71 PFL, p. 636.

72 Bix notes that there were times when Fuller overstated the importance of his "principles of legality." "When critics argued that a regime could follow those principles and still enact wicked laws, Fuller stated that he 'could not believe' that adherence to the internal requirements of law was as consistent with a bad legal system as they were with a good legal system." Bix speaks in this context also of Fuller's "faith." (Brian Bix, "Natural Law Theory," in *A Companion to the Philosophy of Law and Legal Theory*, ed. Dennis Patterson, Cambridge, Mass. [etc.]: Blackwell, 1996, pp. 223-40, at p. 233)

toward goodness, by whatever standards of ultimate goodness there are."⁷³ This is a kind of faith, indeed. It is faith like the faith that is expressed in sayings such as: "In the clash of opinions truth will finally triumph"; "You can fool all the people some of the time and some of the people all the time, but you can't fool all the people all the time."⁷⁴

Let us examine more closely the statement that coherence and goodness have more affinity than coherence and evil. I think this is likely to be true. It is for this very reason that it is easy to speak the truth and difficult to tell consistent lies all the time.⁷⁵ But as far as the second formulation of Fuller's faith is concerned, we have to discriminate between two parts of the sentence. The first is that when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness. We may ask: justification with reference to *what standards?* If these are the standards as specified in the morality of law, I think Fuller's faith is justified. It is more difficult to commit unjust deeds by means of general, promulgated, nonretroactive, clear, and noncontradictory laws than by means of particular, secret, retroactive, and vague standards. Indeed, "it does not follow from this that evil laws are impossible,"⁷⁶ but they are less likely.

However, Fuller states more in the second part of the phrase cited above. Fuller writes that "when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are."⁷⁷ This claim goes further than the first. This sentence has puzzled many readers and a majority of them scorn the message conveyed as preposterous. Romantic, naive, optimistic – these are some of the more gentle qualifications that have been presented in comments on this part of Fuller's ideas. Before Fuller wrote them, Hart reflected on the idea that "what is utterly immoral cannot be law or lawful."⁷⁸ He adduced two points of criticism. The first is that it will serve to cloak the true nature of the problems with

⁷³ PFL, p. 636.

⁷⁴ Abraham Lincoln cited in James Bryce, *Modern Democracies*, vol. I (London: MacMillan, 1921), p. 169.

⁷⁵ Cf. Richard Taylor, *Restoring Pride: The Lost Virtue of Our Age* (Buffalo, N.Y.: Prometheus Books, 1996), p. 100: "Truth has a simple but important property that is insufficiently appreciated by persons driven more by vanity and conceit than by genuine pride. It is expressed by saying that all truth is consistent with itself, while even the smallest untruth is at odds with everything."

⁷⁶ Martin, *Legal Philosophy of H.L.A. Hart*, p. 222.

⁷⁷ PFL, p. 636 (emphasis added).

⁷⁸ Hart, "Positivism," p. 77.

which we are faced. This is the well-known argument, first advanced by Bentham and Austin, that the separation of law and morals "will enable men to see steadily the precise issues posed by the existence of morally bad laws."⁷⁹ This point has been much debated in the literature on the separation of law and morals, and I will leave it untouched here. I would like to dwell on another part of the discussion, to wit, that Fuller's approach would "encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that not one of them has to be sacrificed or compromised to accommodate another."⁸⁰ In this context, Hart quotes the lines: "All Discord Harmony not understood/All Partial Evil Universal Good." Without further commentary Hart writes: "This is surely untrue."

This passage is very relevant in the context of the Fuller-Hart debate. Hart seems to think that it is "romantic" to hold that the values we cherish will fit into a single system. The question whether this is true, is dependent on the question what we understand by "romantic" and "romanticism." Taken in the sense of a cultural movement, the idea characterized is certainly not "romantic";⁸¹ optimistic it may be. Hart seems to reject such optimism, and as an argument for this, he seems to paraphrase some lines that could have been extracted from the work of Isaiah Berlin, who was always combating what he called "monism."⁸² The lines by Pope (whose name is not revealed) are appropriate here, because he is a paradigm of the classical thinker, indeed, who advocated that the values we

79 Hart, "Positivism," p. 53.

80 Hart, "Positivism," p. 77.

81 Cf. H.G. Schenk, *The Mind of the European Romantics: An Essay in Cultural History* (Oxford [etc.]: Oxford University Press, 1979); Hugh Honour, *Romanticism* (New York [etc.]: Harper & Row, 1979); Kenneth Clark, *The Romantic Rebellion: Romantic versus Classic Art* (London: John Murray/Sotheby, 1973).

82 Isaiah Berlin, "Two Concepts of Liberty," inaugural lecture Oxford University (Oxford: Clarendon Press, 1958; also in Isaiah Berlin, *Four Essays on Liberty*, Oxford [etc.]: Oxford University Press, [1969] 1975, pp. 118-72). At p. 167 Berlin speaks of an "ancient faith" which rests on "the conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another" and "that all good things are compatible." Berlin rejects this faith. He even asserts it is responsible "for the slaughter of individuals on the altars of the great historical ideals." Berlin was Hart's "closest friend among his philosophical colleagues" and he informed Hart about the developments in modern philosophy (cf. Neil MacCormick, *H.L.A. Hart*, London: Edward Arnold, 1981, p. 11).

cherish will ultimately fit into a single system.⁸³ But Hart does not make the slightest effort to explain why this is “surely untrue,”⁸⁴ and Berlin, *pace* all his rhetorical brilliance, has not made this clear either. Pope was not the only one, of course, who thought this. Classical rationalism, the tradition that Berlin rejected, and by implication Hart rejects, had a considerable influence on Western thinking (an “ancient faith,” Berlin writes) and seems to have influenced Lon Fuller as well.⁸⁵ Fuller himself made this clear when he referred to his sources of inspiration for the morality of aspiration. “The morality of aspiration is most plainly exemplified in Greek philosophy,” he writes. “It is the morality of the Good Life, of excellence, of the fullest realization of human powers.”⁸⁶ I think it is not unfair to say that much of Hart’s inability to understand some of the claims made by Fuller are explained by his incapacity to understand the central ideas of Greek philosophy, mainly Greek ethics.

8. The essence of Greek ethics according to Richard Taylor

The best exposition of Greek ethics seems to me the work of the American philosopher Richard Taylor.⁸⁷ Taylor is known in circles of legal philosophers for his elaboration of the central tenets of American realism.⁸⁸ But

83 The poem continues (and closes) with: “And, spite of pride, in erring reason’s spite, One truth is clear, Whatever is, is right.” (*An Essay on Man*, cited in *A Book of English Poetry*, ed. G.B. Harrison, Harmondsworth: Penguin, [1937] 1978, p. 188)

84 Hart, “Positivism,” p. 77.

85 Cf. also Robert S. Summers, *Lon L. Fuller* (London: Edward Arnold, 1984), p. 76: “Fuller singled out John Stuart Mill in the nineteenth century and Sir Isaiah Berlin in our own time as social theorists whose views illustrate many of the emphases and tendencies to which he objected. Unlike Berlin, Fuller refused to separate means and ends, insisting that they form a continuum.”

86 *ML*, p. 5.

87 Other works that are helpful here are: W.T. Stace, *A Critical History of Greek Philosophy* (London/New York: MacMillan, [1920] 1960) and Paul Elmer More, *Hellenistic Philosophies, Volume II, The Greek Tradition* (Princeton, N.J.: Princeton University Press, 1923).

88 Cf. Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* (Hassocks, Sussex: Harvester Press, 1978), p. 13: “Perhaps the most extreme realist view of law is that expressed by such writers as Jerome Frank, Karl Llewellyn, and Richard Taylor.” The main ideas of Taylor in this respect are to be found in: Richard Taylor, “Law and Morality,” *New York University Law Review* 43 (1968): 611-50.

his more philosophical work⁸⁹ is interesting for the Fuller–Hart debate because he widely commented on the Greek conception of morality as a morality of excellence, a conception that not only influenced Fuller's ideas on the morality of aspiration, but also pervaded his other opinions, his "faith" about coherence and goodness in particular.

What Hart rejected as "surely untrue" is also repudiated by Taylor. But the difference between Hart and Taylor is that Taylor, after a meticulous analysis of Greek ethics, understands what the Greeks were doing. Hart has no idea of another conception of ethics than modern ethics, and so he rejects the classical ideas as "romantic" without understanding them.⁹⁰ Essential for the Greek conception of ethics is the – for us, moderns, at least – mysterious⁹¹ identification of virtue and knowledge.

Characteristic of Greek ethics, mainly the classical conception of ethics as has been expounded by Socrates, is that wrongdoing is always involuntary, and the product of ignorance. Men who bring about bad ends are acting from ignorance; they quite literally do not know any better. To explain this conviction that, again, is so hard to understand for modern man, Taylor presents an analogy. Suppose a man is thirsty. He arrives at a well from which he is perfectly free to drink. He will want, then, to drink from that well, for this will certainly appear to him as good. But all this is consistent with the supposition that the well is in fact, and unbeknown to him, poisoned. If, then, he does drink from it, he will be doing what he wants to do (drink from that well), thereby seeking to realize a certain good. From the perspective of a fuller knowledge of what he is doing, however, he is not doing what he wants to do at all. For what he wants is to drink, not to drink poison. This means that he drinks from the well out of ignorance, not really knowing what he is doing.⁹²

This analogy is important, because Socrates – based on a theory as expounded above – thought that all injustice, and all voluntary behavior whose consequences are on the whole bad, is to be interpreted in such terms. Injustice is always the result when people do things not fully

89 Richard Taylor, *Good and Evil* (Buffalo, N.Y.: Prometheus Books, 1984); *Restoring Pride: The Lost Virtue of Our Age* (Buffalo, N.Y.: Prometheus Books, 1996); *Reflective Wisdom* (Buffalo, N.Y.: Prometheus Books, 1989); and, especially, *Ethics, Faith, and Reason* (Englewood Cliffs, N.J.: Prentice-Hall, 1985).

90 William J. Prior, *Virtue and Knowledge: An Introduction to Ancient Greek Ethics* (London/New York: Routledge, 1991) may also be helpful.

91 Cf. Martin, *Legal Philosophy of H.L.A. Hart*, p. 222: "Why Fuller thinks that this justification and explanation would tend to improve matters is a mystery."

92 Taylor, *Good and Evil*, p. 54.

knowing what they do. If they did know, they would be deliberately choosing what is bad for them, which is an absurdity.

This also applies to the dictator. If the dictator chooses what in fact turns out to be evil – namely, injustice – then he must be acting from ignorance. This is consistent with supposing that, from a more limited view, he gets what he wants – namely, self-aggrandizement – and that appears good to him. From a larger perspective, however, he gets what he does not want: a state of affairs that is loaded with evil.⁹³

Let us now turn back to Fuller's intimations that "coherence and goodness have more affinity than coherence and evil."⁹⁴ And let us reconsider Fuller's belief that when men are compelled to explain and justify their decisions, the effect will generally be to "pull those decisions toward goodness."⁹⁵ From the Greek perspective these convictions are not only justified, but the contrary view, the view lauded by Berlin and by Hart as self-evident, would be considered absurd. Of course, all good things are coherent otherwise they would not be good. They may be *considered* good by people with limited understanding, but that does not *make* them good. This is also relevant to the question of justification. Of course, as the Socratic theory will state, the effect of a successful justification and explanation of decisions is *that they will pull decisions toward goodness*. Because evil decisions cannot be adequately explained, they cannot be satisfactorily justified.

Perhaps somewhat confusing for Fuller's rationalism is the fact that he refers not only to Greek ethics, but also to the more dynamic kind of rationalism that is associated with Hegel's philosophy. "According to these beliefs," Fuller writes in "Positivism and Fidelity to Law," not mentioning any great historical predecessors, "I find a considerable incongruity in any conception that envisages a possible future in which the common law 'works itself pure from case to case' toward a more perfect realization of iniquity."⁹⁶ But, again, this is an argument *within* a certain tradition. We have to subscribe to the Hegelian "whatever is real is rational and whatever is rational is real."⁹⁷ In law more "empirical" varieties of this kind of "dynamic rationalism" or "historicism" have been presented; for instance,

93 Taylor, *Good and Evil*, p. 55.

94 PFL, p. 636.

95 PFL, p. 636.

96 PFL, p. 636.

97 Cf. also the end of Pope's poem cited above.

the theory as developed by the Historical School⁹⁸ or the "theory"⁹⁹ behind Burke's conservatism. But in all these varieties there are always the assumptions that Hart considered to be romantic and optimistic. Burke's "The individual is foolish, the species is wise," the idea of "historical reason" that is also to be found in the idea that the common law works itself pure,¹⁰⁰ is another expression of faith that Hart would reject as romantic optimism. For the Benthamian H.L.A. Hart, the idea that the common law would "work itself pure from case to case" would be absurd, because common law is, in the famous characterization of Bentham, dog law.¹⁰¹ Bentham had faith in another tradition. He believed that a legislature chosen by the broadest possible electorate was the institution most likely to produce laws that served the public welfare. This would leave judges and commentators little discretion in their interpretation and application.¹⁰²

So everybody has his own faith. I believe the faith as expounded in Fuller's work is certainly neither the most naive nor the least promising as far as the search for the principles of good government is concerned.

98 Its most important American protagonist was: James Coolidge Carter, *Law: Its Origin, Growth and Function* (New York: G.P. Putnam's Sons/London: Knickerbocker Press, 1907). Fuller gives a brief summary of his ideas in "La Philosophie du droit aux États-Unis," p. 564.

99 Conservatives do not like the word "theory," nor do they favor "rationalism." They are both contrasted with "tradition." Cf. Anthony Quinton, *The Politics of Imperfection: The Religious and Secular Traditions of Conservative Thought in England from Hooker to Oakeshott* (London/Boston: Faber and Faber, 1978).

100 Cf. also Teachout in this volume about Bickel's jurisprudential vision and the "common-law sensibility."

101 Bentham: "When your dog does anything you want to break him of, you wait till he does it, and then beat him for it," cited in John Dinwiddy, *Bentham* (Oxford/New York: Oxford University Press, 1989), p. 57.

102 Cf. Thomas C. Grey, "Advice for 'Judge and Company,'" *The New York Review of Books*, 12 March 1987: 32-35, at p. 32.