

Jurisprudence

Hart – Fuller Debate

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Introduction and background

One of the most significant contributions to contemporary Natural Law thinking is the writings of Lon L. Fuller (1902-78). He parted company with much of the earlier natural law traditions, rejecting Christian doctrines of natural law and 17th and 18th century rationalist doctrines of natural rights. Fuller was a professor of general jurisprudence at Harvard Law School for many years until his retirement in 1972. The scope of his writings on law included legal philosophy, contracts, mediation, comparative law, and legal procedure. He believed that law should stand the scrutiny of reason and stressed the importance of good order. He criticized the views of philosophers such as Hans Kelsen, H.L.A. Hart, Ronald Dworkin, and Marshall Cohen. Fuller opposed legal positivism, the idea that law is no higher than a particular authority, that is, a sovereign state or a rule of recognition, is morally neutral, and is merely an instrument of external ends such as utility. His leading work on legal theory, *The Morality of Law* (1964, 1969), has been translated into several languages and has been used as the text for teaching legal principles in developing nations. The book advocated a kind of secular natural law, and it was initially severely attacked by many lawyers and philosophers. *The Morality of Law* offers an extended discussion of the difference between the morality of duty and the morality of aspiration and took the position that the purpose of law was both.

Fuller concentrated on what is required to make the law work. His solution is that a legal system, properly so-called must embody what he calls an Inner Morality. Since, morality is clearly central to Fuller's enterprise, it is essential to consider how he clarifies the way in which he uses the term.

The Two Moralities

There is a distinction between the morality of duty and the morality of aspiration. The morality of duty lays down the basic rules without which an ordered society is impossible. Essentially, its language is that of the Ten Commandments, "Thou shalt not." It condemns men for failing to respect the basic requirements of living in society. A failure to fulfill one

or more of these requirements would be wrong-doing. On the other hand, the morality of aspiration is the morality of excellence, of the fullest realization of human powers. A failure to realize one or more of these powers would not be wrongdoing; it would be shortcoming or a failure to actualize potential.

The law cannot compel a man to fulfill his potential. The work-able standards of judgment which the law must use can be found only in the morality of duty. A man cannot be compelled to live the life of reason. Only the more obvious manifestations of chance and irrationality can be excluded from his life by the law so as to create the necessary but not the sufficient conditions for a rational human existence.

One significant manifestation of the distinction between the two moralities can be found in our notion of rewards and punishments. An individual is not praised or rewarded for fulfilling the requirements of the morality of duty. Here, we are operating at the lower levels of human achievement and an individual is punished for any failure to fulfill these requirements. At the higher levels of human achievement, however, an individual is praised or rewarded for his accomplishment. He is not punished for a failure to accomplish excellence. When dealing with a violation of the morality of duty, the wrongdoing is comparatively clear. Thus, the process of meting out punishments is surrounded with objective tests often listed under the heading, "due process." However, when dealing with the morality of aspiration, many difficulties beset any individual or group charged with the responsibility of determining excellence. The deciders must be carefully chosen. It is, perhaps, desirable if the deciders themselves have manifested such excellence at some time because the judgment they render is essentially subjective and intuitive. The closer a man comes to the highest reaches of human achievement, the less competent others become in their ability to judge his performance.

One may envision a moral scale which begins at the bottom with the most obvious demands of social living. From this bottom point, the scale ascends with more manifestations of the morality of duty. However, at some point, the morality of duty ends and the higher demands of the morality of aspiration begin. Where the dividing line should be placed to indicate that duty leaves off and the challenge of excellence begins?

Controversy over the placement of this dividing line has dominated the whole field of moral argument. The controversy has been needlessly complicated by a confusion of thought. This confusion is based upon the assumption that we cannot know what is bad without knowing the perfectly good, that is, moral duties cannot be discerned absent a comprehensive morality of aspiration. This assumption is shown to be fallacious by elementary human experience. The injunction against killing does not suggest a picture of the perfect life. Yes, we are very much aware that no conceivable morality of aspiration can be attained if men kill each other. Another example is found in the field of linguistics. While the perfect language has not been realized, we are not prevented from struggling against corruptions of usage which destroy meaningful distinctions. Thus, with social rules and institutions, we can know what is plainly unjust without committing ourselves to declare with finality what perfect justice is.

Hart on Social Rules

The internal point of view is a crucial element in H.L.A. Hart's theory of law. Hart first introduces the notion by pointing out that, within a social group which has rules of conduct, "It is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct." Those who are concerned with the rules in the latter way have, Hart tells us, adopted the internal point of view towards the rules. Hart thus defines the internal point of view in a very specific manner, by reference to the notion of "accepting and using a rule." Furthermore, as Hart's more general discussion in *The Concept of Law* makes clear, he has in mind quite specific and closely related conceptions both of what a rule is and of what it means to accept and use a rule.

A rule is, according to Hart, a certain kind of complex social practice that consists of a general and regular pattern of behavior among some group of persons, together with a widely shared attitude within the group that this pattern is a common standard of conduct to which all members of the group are required to conform. To use the rule is to conform one's own conduct to the relevant pattern, and to accept the rule is to adopt the attitude that the pattern is a required standard both for oneself and for everyone else in the group.

The existence of such “social” rules, as Hart calls them, thus consists of these very facts of acceptance and use. Since the internal point of view is just the perspective of those who accept the rule, it follows that, as a conceptual matter, a social rule does not even exist unless a sufficiently large number of people within the requisite group adopt the internal point of view with respect to some regular pattern of behavior.

A social rule in Hart’s sense lies, according to Hart, at the foundation of every legal system. The rule of recognition, as he calls this fundamental rule, is a complex social practice of the kind just described which holds among those persons in a society whom we would intuitively recognize as its officials. The normative character of the rule of recognition, like all Hartian social rules, is duty or obligation-imposing. More particularly, it imposes a duty on officials to apply other rules which can, in accordance with criteria set out by the rule of recognition, be identified as valid law.

The existence of a rule of recognition is, according to Hart, a necessary condition of the existence of a legal system. Since the rule of recognition, like other social rules, cannot exist unless a sufficiently large number of people in the requisite group adopt the internal point of view, and since, for Hart, the requisite group is a society’s officials, it follows that a legal system cannot exist unless most—if not all—of its officials adopt the internal point of view. By the same token, a legal system can, according to Hart, exist even if no one other than its officials adopts the internal point of view.

The internal point of view serves two particularly important and related roles in Hart’s theory of law. The first is, as just discussed, to specify one of the constitutive elements of the complex social practice that comprises a legal system, and, more particularly, to specify that element which permits us to say that law is not just a social practice, but a normative social practice. The second role is to explain the normative dimension of the meaning of such statements as “It is the law of Pennsylvania that everyone has an obligation to do X.”

John Austin and Jeremy Bentham had maintained that law could be explained as a general habit of obedience, and that the concept of obligation could be reduced to the non-normative concepts of threat and sanction. Hart argues very persuasively, and to the satisfaction of virtually all of his successors in jurisprudence, that neither of these reductive

analyses has any hope of success, precisely because they omit the normative dimension of, respectively, the practice of law and the concept of obligation. In each case, the remedy that Hart proposes to cure the defect is the internal point of view. Habits and rules both involve regular patterns of behavior, but rules also involve, and are partly constituted by, a characteristic normative attitude: Those who accept the rule regard the pattern of behavior as a common and binding standard of conduct. The internal point of view also figures in Hart's analysis of the meaning of legal statements. Although the point has not been widely appreciated until recently, the account Hart offers of the meaning of such statements as "It is the law of Pennsylvania that everyone has an obligation to do X" is in part a non-cognitivist one. The normative aspect of the meaning of this statement has, on Hart's view, nothing to do with whether or not the residents of Pennsylvania do, in fact, have an obligation to do X, but consists, rather, in the expressed endorsement of the view that everyone in Pennsylvania is obligated to do X.

The meaning of the normative dimension of such statements is given, in other words, by the fact that those who assert this statement express their acceptance of the internal point of view towards the law of Pennsylvania. Although Hart rejects Austin's reductive analyses of law and obligation, he shares the naturalistic and empiricist commitments that led Austin to be suspicious of normativity. In this essay I argue that Hart's own theory of law does not fully escape the difficulties of the Austinian theory that he so successfully criticizes because in the end, he, like Austin, does not take normativity sufficiently seriously. Since the internal point of view is nothing more than an attitude that a standard is binding, Hart is not offering an account of the normativity of law that looks to its (potential) reason-givingness. I argue that Hart's non-cognitivist account of the meaning of legal statements, based as it is on the idea that the proper explanation of the normativity of law looks to the expressed endorsement of a standard of conduct rather than to the law's potential to create reasons for action of a specifically legal kind, prevents him from offering an analysis of power-conferring rules that fully corresponds to his analysis of duty-imposing rules. The upshot is that Hart cannot offer a proper theoretical account of that aspect of the phenomenon of law which he himself took to be most important, namely, the

claim by legal officials to have the authority or power to change the normative situation of those who are subject to law.

That law makes this claim is indeed one of the most fundamental attributes of both the concept and practice of law. The internal point of view, properly understood, is the perspective both of the authorities who make this claim and of the subjects of law who accept it. To accept the legitimacy of the law's claim to authority is to believe that the law has such authority, and not simply to adopt an attitude of endorsement towards the law's requirements. The internal point of view must be freed, in other words, both from its conceptual role as a constitutive element of a certain kind of norm and from its semantic role in a non-cognitivist account of the meaning of legal statements. Once we adopt a properly liberated, cognitivist understanding of the internal point of view, then we are no longer committed, as Hart was, to conceiving of law as a socially practiced norm of a certain kind, a constitutive element of which is a widely shared attitude of endorsement. While it might be the case that accepting the authority of law involves the acceptance of a norm—presumably, a power-conferring rather than a duty-imposing norm—it is by no means obvious that this is so, and to show that it is so requires more in the way of argument than Hart provides. Adopting a cognitivist understanding of the internal

point of view, and of the meaning of normative statements generally, also leads naturally to the recognition that the meaning of normative expressions is, contrary to Hart's own view of the matter, the same in both moral and legal contexts. Legal normativity is moral normativity, and the law's claim to authority is a moral claim.

Fuller and the Law of Morality

Lon Fuller differed from the positivist theory and pursued to impress upon the legal and academic fraternity on the relevance of the moralist theory of law.

In his work titled *Morality of Law*, he charted eight fundamental problems that would lead to the failure of a legal system.

1. The lack of rules or law, which leads to ad-hoc and inconsistent adjudication.
2. Failure to publicize or make known the rules of law.
3. Unclear or obscure legislation that is impossible to understand.
4. Retroactive legislation.
5. Contradictions in the law.
6. Demands that are beyond the power of the subjects and the ruled.
7. Unstable legislation (ex. daily revisions of laws).
8. Divergence between adjudication/administration and legislation.

Fuller presents these problems in his book *The Morality of Law* with an entertaining story about an imaginary king named Rex who attempts to rule but finds he is unable to do so in any meaningful way when any of these conditions are not met. Fuller contends that the purpose of law is to "subject human conduct to the governance of rules". Each of the 8 features which lead to failure form a corresponding principle to avoid such deficiencies which should be respected in legislation. If any of these 8 principles is not present in a system of governance, a system will not be a legal one. The more closely a system is able to adhere to them, the nearer it will be to the ideal, though in reality all systems must make compromises. These principles, Fuller argues, represent the "internal morality of law", and he argues that compliance with them leads to substantively just laws and away from evil ones.

The Allegory of Rex

A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract. Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him or that came into existence only after he had acted or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile-as futile, in fact, as casting a

vote that will never be counted. As the sociologist Simmer has observed, there is a kind of reciprocity between government and the citizen with respect to the observance of rules.

Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules. The citizen's predicament becomes more difficult when, though there is no total failure in any direction, there is a general and drastic deterioration in legality, such as occurred in Germany under Hitler. A situation begins to develop, for example, in which though some laws are published, others, including the most important, are not. Though most laws are prospective in effect, so free a use is made of retrospective legislation that no law is immune to change *ex post facto* if it suits the convenience of those in power. For the trial of criminal cases concerned with loyalty to the regime, special military tribunals are established and these tribunals disregard, whenever it suits their convenience the rules that are supposed to control their decision.

Increasingly the principal object of government seems to be, not that of giving the citizen rules by which to shape his conduct, but to frighten him into impotence. As such a situation develops; the problem faced by the citizen is not as simple as that of a voter who knows with certainty that his ballot will not be counted. It is more like that of the voter who knows that the odds are against his ballot being counted at all, and that if it is counted, there is a good chance that it will be counted for the side against which he actually voted. A citizen in this predicament has to decide for himself whether to stay with the system and cast his ballot as a kind of symbolic act expressing the hope of a better day. So it was with the German citizen under Hitler faced with deciding whether he had an obligation to obey such portions of the laws as the Nazi terror had left intact.

In situations like these there can be no simple principle by which to test the citizen's obligation of fidelity to law, any more than there can be such a principle for testing his right to engage in a general revolution. One thing is, however, clear. American respect for constituted authority must not be confused with fidelity to law. Rex's subjects, for example,

remained faithful to him asking throughout his long and inept reign. They were not faithful to his law, for he never made any.

The Hart Fuller Debate

The Seeds of the Debate

In 1949, a woman was prosecuted for the offence of depriving a person illegally of his freedom. The offence having been committed by her having denounced her husband to the wartime Nazi authorities as having made insulting remarks about Hitler. The woman, in defense claimed that her action had not been illegal since her husband's conduct had contravened the laws made at the time of the Nazi regime. The Court found that the Nazi statute, being 'contrary to the sound conscience and sense of justice of all decent human beings', did not have legality that could support the woman's defense, and she was found guilty.

The case illustrated a conflict between positivism and natural law, the latter triumphing.

Fuller's Case

A legal system is to have certain characteristics if it is to command the fidelity of right thinking people. Foremost among these characteristics is respect for what Fuller calls the "inner morality of law". By this Fuller refers to the essential requirement of a legal system that it should provide coherence, logic and order. These characteristics were lacking in the system of government instituted by the Nazis. A system of government that lacks what he terms "Inner Morality of law" cannot constitute a legal system; the system lacking the very characteristic – order – that is a *sine qua non* of a legal system, the characteristics without which a system cannot properly be regarded as a legal system. The phrase also used by Fuller "fidelity to law" reflects the notion that a citizen can owe a duty to obey only where the features that make up the inner morality are present.

Hart's Case

Hart rejected the notion that because of the circumstances in which it is made, a Nazi law should be deemed invalid. Hart explains that people, who claim that a posited law is not

valid, muddy the water. The positivist approach makes people face up to the real issue. The positivist confront people with the question – “the law is the law. Is it so evil that you intend to disobey and suffer the consequences?” This is a moral question, which everyone can understand, and it makes an immediate and obvious claim to moral attention. So long as human beings can gain sufficient cooperation from some to enable them to dominate others, they will use the forms of law as one of their instruments. The certification of something as legally valid is not conclusive of the question of obedience and that however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to moral scrutiny.

In his review of "The Morality of Law" Hart criticizes Fuller's work, saying that these principles are merely ones of efficacy; it is inept, he says, to call them a morality. One could just as well have an inner morality of poisoning as an inner morality of law, but of course we find this idea absurd. A contemporary debate raged, with much "bombast and invective"¹, between Professor Matthew Kramer and Dr. Nigel Simmonds over the moral value of the rule of law as constituted by Fuller's 8 principles. The former agrees with Hart that it is compatible with great iniquity, arguing that evil regimes would have good prudential reasons for complying with it. The latter contends that adhering to the rule of law has value in and of itself, giving citizens a liberty to act as they please and conform their conduct to the rules and know that if they do so force beyond that which is prescribed will not be used against them by the state. Evil regimes would have every reason to operate outside the rule of law to 'chill' the population into compliance, rather than to use the rule of law for their own ends as Kramer suggests.

Hart and Fuller in Conversation: Subject, Terms and Assumptions In reply, I want to suggest that the legal visions of Hart and Fuller are quite similar, and certainly commensurable. My account of the discourse between Hart and Fuller, and their commonalties, however, does not rely on the subtleties of literary theory and its conventions for discourse analysis. Rather it treats the famous debate as a Conversation between scholars and asks some fairly straightforward questions about

¹ (Kramer, "*Big Bad Wolf*", (2005))

the interlocutors, the questions they pose for themselves, their definition and deployment of terms and their presuppositions. But, like Anderson, I am also interested in the ghosts in these stories: what remains spectral and in the background; what is unsaid because it is taken to be a given: an assumed commonality which requires no further explication. And as we were asked to do, I am also concentrating on the debate itself, not what Hart and Fuller said before or later came to say and came to stand for.

Even within the confines of this two-article debate, the research questions posed are of remarkable breadth. Indeed, in today's research climate, when there is a financial imperative to devise projects which are clearly delineated and delimited, ideally comprehensible across disciplines, which are suitably focused and manageable, which do not claim too much without substantiation, one wonders how these two scholars would fare if this debate were to be the anticipated outcome of their researches or even the intellectual setting for a project seeking funding.

On the second page of his paper, Hart effectively sets the subject and terms of the debate. He informs us that he will offer a positivist's reply to the proposition that 'law and morals' or differently phrased 'what is and what out to be are indissolubly fused or inseparable'. He will argue for a distinction rather than a fusion. He concedes from the outset that these phrases concerning 'the point of intersection between law and morals' could have many different meanings and so he will have to be quite clear about what he, as a positivist, means by them and how he intends to refute them.

At this point one could anticipate a careful definition of terms, an explanation of how Hart will employ them, and delimitation of the scope of project: Which law? Which jurisdiction or jurisdictions perhaps? And whose morality? How are these main terms to be deployed? How is analysis thus to be delimited and managed, given the extraordinary sweep of the proposition to be evaluated? This is the level of specificity that I think we would demand of our scholars today.

What is striking about both papers is that neither author ever really answers these very basic questions, but only walks around them. Neither makes himself perfectly clear about what precisely he means by 'law' and 'morals' and yet the conversation does not fall apart. I suspect that it is because of the large measure of their common thinking about law that Hart and Fuller can sustain a meaningful dialogue in the absence of clearly-defined central terms. My point is that Hart and Fuller do not confront each other as alien thinkers offering truly incommensurable visions of law, as Manderson suggests. They do not stare at each other with mutual incomprehension, mouths hanging open. Somehow a great deal is implicitly agreed upon and assumed, without too much explication, and it is these implicit agreements that enable meaningful dialogue to occur. Implicitly, the conversation is confined and constrained by common background assumptions which enable and delimit the debate and sustain the conversation and make it deeply interesting to the other.

It is true that Hart, in setting the terms of the debate, tells us quite soon what Blackstone, Bentham and Austin all meant by a moral law. The laws of God and the principles of utility are mentioned here (with Bentham the utilitarian, Blackstone and Austin the invokers of higher law). But Hart is far less clear about what he means by 'morals'. His paper is peppered with terms which employ the word 'moral' as a qualifying adjective; he refers to 'moral aims', 'moral principles', 'moral rules', 'morally good rules', 'moral factors', 'moral propriety' and 'moral right'. He refers to the converse, to that which is 'morally outrageous' and to 'evil aims'. He gives some illustrations of 'moral factors' which are relevant at the point of sentencing, such as the protection of society from 'wanton attack' and not inflicting 'too much misery'. The setting for this discussion is the aftermath of the Nuremberg trials and the 'moral evil' entailed in the Nazis' treatment of the Jewish people. This gives some specific substance to Hart's idea of evil and of 'morally iniquitous laws' (618) and of departures from what Hart calls 'the fundamental principles of humanitarian morality'.

Hart recognizes 'certain fundamental notions which are "necessary" and "bottomed in the common nature of man"', quoting Austin here. (621) He goes on to explain that as we are not 'giant land crabs with an impenetrable carapace' which extract nutrients from the air there must at least be 'rules forbidding the free use of violence and rules constituting the

minimum form of property' and that 'Such rules overlap with basic moral principles vetoing murder, violence, and theft'. This is his natural minimum moral content of law which he takes to be present in all 'developed legal systems'. He then says that beyond this we cannot agree about what is moral and so the necessary overlap between law and morals cannot be more extensive than this.

Thus he suggests great variation in moral thinking, possibly even conjuring up incommensurable moral visions.

But Hart has already assumed that his reader will have little difficulty making sense of all his various usages of the term 'moral': that the reader will know what he means by moral rules, or moral principles etc are; that the reader will be able to tell them when he sees them and so they need no further explication. Hart has also assumed that his own legal system conforms to the requirements of at least a natural minimum moral content and certainly that it is a system which permits free and critical debate as to its nature: it is a liberal legal system. There is no supporting evidence for this supposition or anticipation of dispute. It is taken as a given. In other words he has assumed an interlocutor much like himself.

Fuller is alert to this loose usage by Hart, his failure to define his central term 'moral'. He accuses Hart of being much like his predecessors Austin and Gray for whom "'morality" stands indiscriminately for almost every conceivable standard by which human conduct may be judged that is not itself law.' They include 'The inner voice of conscience, notions of right and wrong based on religious belief, common conceptions of decency and fair play, culturally conditioned prejudices.' Hart too, he says, 'seems generally to have in mind all sorts of extra-legal notions about "what ought to be", regardless of their sources, pretensions or intrinsic worth.' But this does not prevent Fuller engaging with Hart as if there were a single commonly understood meaning of 'morality', one upon which they could both agree, and which makes sense of the question 'Should law and morals be distinct?' and enables them to debate the question as if they were asking the same question and not talking past each other.

Nor does Fuller's insistence on definitional clarity lead him to define his own meanings or to use his central terms with consistency and precision. Fuller seems to employ several conceptions of morality. First there is his 'internal morality of law', which seems to comprise such procedural requirements as coherence, consistency, orderliness, prospectivity, explanation and justification. Thus there is 'a moral logic to decision-making processes', as Lacey puts it. To Fuller, law's inner morality will pull legal decisions 'towards goodness, by whatever standards of ultimate goodness there are'. So there is law's 'internal morality', that is its 'procedural framework' and processes, and then there is something else again, some 'ultimate goodness', which has magnetic properties for law that is itself internally moral, in the more procedural sense. Fuller also refers to 'goodness' and 'evil' (both undefined).

There is also reference to what seems to be a more mundane ordinary social common sense morality, that of 'ordinary decency.' This is said to entail 'generally shared views of right conduct that have grown spontaneously through experience and discussion', though it is not clear who is party to this discussion. It entails 'ordinary standards of decency' and what 'most ordinary citizens would regard as mistaken or evil'. Further there is a religious morality invoked, God's law or higher law, which the Roman Catholics have happily been wise enough not to foist on human law, according to Fuller.

In Fuller's account, we seem therefore to have at least four varieties of 'morality'. There is ultimate goodness which is to be distinguished from something called 'evil'. There is the morality of the Catholic Church which is bracketed off from the debate because it does not, in his reckoning, generally intrude on law. There is ordinary decency. And then there is procedural morality and in Fuller's thinking, procedural morality is naturally drawn towards goodness, whether it is understood as ordinary decency or some ultimate goodness; this is not entirely clear.

Like Hart, Fuller implicitly believes that his legal system is moral. He distinguishes it from 'perverted regimes', but even these, he suggests, display 'certain hesitancy about writing cruelties, intolerances and inhumanities into law'. For there are 'demands of reality that are

the most urgent and the most obviously justifiable, which no man need be ashamed to profess'. Thus he invokes a deep universal morality to which even perverted regimes subscribe.

Conclusion of the Debate and Common Discourse of Hart and Fuller

In deciding how after was cases such as the one detailed above should have been dealt with, both Hart and Fuller believe that Retrospective legislation should have been the answer.

Hart reasoned that it is the most nearly lawful way of making unlawful what was once law. Fuller too maintained that the statute was a way of symbolizing a sharp break with the past and as a means of isolating a kind of clean-up operation from the normal functioning of the judicial process which made it possible for the judiciary to return to a condition in which the demands of legal morality could be given proper respect.

Hart and Fuller had much in common and both display a strong faith in their own legal systems and that of the other. They assumed that their laws are not iniquitous; that they are moral in perhaps the deepest sense. In this respect, Hart refers to the 'developed legal system', taking his own to be one such system. Fuller distinguishes his own legal system from 'perverted regimes' and also manages to convey to us that his own system possesses an internal procedural morality which naturally gravitates towards the good. Hart too seems to believe implicitly in the procedural justice and fairness of his own system. And both seem to believe that law, in itself, is a good thing. As Leslie Green notes in his paper, both Hart and Fuller share a belief in law and that belief can be distinguished from that of anarchists such as Kropotkin who wrote of 'the uselessness and the hurtfulness of law.'

Both theorized at a high level of abstraction about law conceived as a universal phenomenon and as a single idea. Both also take their own law, really Anglo-American law, to provide the template for all law and they share important assumptions about what counts as moral. Though neither supplies a clear and consistent definition of morality, each

already knows enough about what the other means to enable coherent dialogue to occur about the law/ morals or the is/ought distinction. Morals therefore do not need clear defining and the debate can proceed nevertheless because each is of a mind with the other: essentially they share a world view of what is right and wrong, good and evil, decent and indecent, and good and bad law. Each is not facing an incomprehensible and uncomprehending other whose meaning and vision is impossible to come to grips with.

As Fuller himself concedes, 'neither Professor Hart nor I belong to anything that could be said in a significant sense to be a "minority group" in our respective countries.' They have played a critical role in setting the terms of their debate. That debate is really about their own legal systems, their respective countries, though it is misleadingly cast in universal terms. Both Hart and Fuller share the estimable aim of articulating a coherent vision of the appropriate relationship between law and morals and of thereby achieving a moral law. As Nicola Lacey puts it, 'both...[are] committed to theorizing the "normativity" as much as the "factivity" of law.'

While Hart thinks this aim is best achieved by keeping law and morals distinct and then comparing the two and seeing if the law lives up to morals. One then knows whether it is right to obey the law. Fuller thinks it is better to require law itself to display what he terms an internal morality so that it commands fidelity. But from the entire tenor of their debate, it is clear that both believe that they are writing from within fundamentally decent legal systems, about which they need not be fundamentally ashamed, which permit learned gentlemen freely to express their thoughts. The laws they implicitly write about are developed; they are not perverted; they do not countenance cruelties and atrocities; they are tolerant and humane. And law is always a good to be striven for. They share what Suzanne Langer has called 'implicit "ways"'. These are ways which 'are not avowed...but simply followed...They are what a German would call his "Weltanschauung", his attitude of mind, rather than specific articles of faith. They constitute his outlook; they are deeper than facts he may note or propositions he may moot.'

Both assume a society ordered in a particular way with a certain orderly legal framework and system. Both want moral laws and assume that their laws are in the most fundamental ways already moral. Both have difficulty envisaging truly alien ways of thinking, the truly incommensurable. Hart refers to the undeveloped legal system and leaves it at that. Fuller refers to the perverted legal system but even then he cannot imagine it failing to conform to what he takes to be the fundamental moral precepts.

Bibliography

The Common Discourse of Hart and Fuller by Ngaire Naffine

Positivism and the Separation of Law and Morals, H.L.A.Hart *Harvard Law Review*,
Vol.71, No.4. (Feb., 1958), pp.593-629.

The Morality of Law, Lon L Fuller

Hart on Social Rules and the Foundations of Law: Liberating the internal point of view by Stephen Perry