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Fuller, Narrower: A New Reading of Lon Fuller's *The Morality of Law*

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Abstract

In Lon Fuller's *The Morality of Law*, Fuller identifies eight criteria which legal systems must meet and argues that they constitute an inner morality of law. Fuller argues that meeting these criteria to some minimum degree is necessary to law as a practice; that meeting them more fully produces better law; and that the minimum threshold value cannot be specified in theory, but only through a good-faith effort to make law well. Presented as a challenge to legal positivism, these claims met a hostile critical reaction, which Fuller did not effectively counter. However, Fuller's critics focused mainly on supporting assumptions grounded in Fuller's moralised conception of law, rather than on the core claim that conformity to formal criteria is associated with substantively better outcomes. This paper suggests that this core claim may be sustainable independently of Fuller's moralised assumptions, identifying an association between law, the eight criteria and respect for personal freedom of responsible action. By reference to recent developments in counter-terrorist and public order law, departures from the criteria are shown to be associated with decreasing respect for personal freedom of responsible action; this supports a modified Fulleran association between conformity to the eight criteria and the quality of legal outcomes, and hence a modestly value-laden model of law.

I. Introduction

Lon Fuller opens the second chapter of his 1964 work *The Morality of Law* with an extended allegory about the hapless King Rex and his failed attempts to make law ('Rex's subjects … remained faithful to him as king throughout his long and inept reign. They were not faithful to his law, for he never made any.').[1] Rex's attempts at law-making fail on eight distinct criteria, which Fuller argued were inherent to law as an enterprise; as such they were of normative – and not merely formal – value. The eight criteria, Fuller argued, made up an 'inner morality' of law (Fuller uses the terms 'inner morality' and 'internal morality' interchangeably). Greater conformity to law's inner morality would have a positive effect on its externally effective moral quality. Through this argument Fuller aimed to give persuasive force to what would otherwise be an unsupported intuition: that law had beneficial effects on society deriving from its nature as law, such that making law well – by standards internal to the practice of law – would tend to bring greater benefits.

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[1] Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969) 41.

This value-laden model was presented by Fuller as a challenge to the value-free model of law put forward by legal positivists. Sixty years on, the eight criteria themselves remain in jurisprudential circulation, having been widely adopted as 'a fair statement of central elements of the rule-of-law ideal',[2] but Fuller's claim that conformity to them was of moral value and would reliably produce better outcomes is largely forgotten; in a typical formulation, Joseph Raz endorses Fuller as offering a set of 'principles of the rule of law',[3] before stressing that the rule of law is 'not a moral virtue as such'.[4] Fuller's challenge to legal positivism seems to have been a flash in the pan. Not only did H.L.A. Hart and others counter Fuller's arguments strenuously and effectively; Fuller's responses were disjointed and ineffectual, ultimately reducing his position to a personal credo. Left unexplored was an alternative line of defence: the possibility that Fuller had correctly identified a linkage between formal and substantive qualities of law but erred in identifying its nature. This paper explores this possibility, putting forward a modestly value-laden model of law. Fuller's argument in *The Morality of Law* may still have something to offer, even – or especially – if its core assumptions are abandoned.

The paper is divided into five main sections. The first section reviews Fuller's arguments around the eight criteria, relating it to his foregoing discussion of morality and identifying four claims: that law is a morally valuable enterprise; that some level of conformity to the criteria is constitutive of law; that the criteria also designate an aspirational ideal internal to law; and that higher levels of conformity to the criteria are conducive to more moral substantive outcomes. The second section reviews the critical response to each of these claims and Fuller's responses to critics. The third section identifies three assumptions underlying Fuller's argument – an essentialist, a teleological and a moralistic assumption – and sketches out an alternative version of the argument based on the eight criteria, divorced from these assumptions and grounded in more parsimonious assumptions about the mode of organisation characteristic of law. The eight criteria are reduced to the three criteria of generality, knowable coherence and motivated followability, with a fourth derived criterion of defeasible justification. The fourth section sets out the implications of this narrow proposition and stresses its limits; the fifth considers potential criticisms before identifying cases in which formal departures from the criteria have been associated with decreasing respect for personal freedom of responsible action. This suggests, in conclusion, that a modestly value-laden model of law is tenable: an association between the formal properties of law and substantive outcomes can be made out, mediated by features of the mode of social organisation characteristic of law.

II. Fuller's criteria: the morality of a broad proposition

Fuller's criteria for 'the attempt to create and maintain a system of legal rules' are: that such a system should consist of general rules rather than specific commands; that the rules should be publicised to those bound by them and should be stable over time; that the rules should be intelligible and non-contradictory; that the rules should be prospective, and should more generally be possible to comply with; and that the rules should reliably be 'congruent' with the actions of those responsible for interpreting and administering them.[5]

[2] Jeremy Waldron, 'Legislation and the Rule of Law' (2007) 1 *Legisprudence* 91, 109.
[3] Joseph Raz, *The Authority of Law* (Oxford University Press 1979), 223.
[4] Raz (n 3) 226.
[5] Fuller (n 1) 38-9.

Fuller prefaces his introduction of the eight criteria with a discussion of morality; he suggests that a moral code can be subdivided into the 'morality of duty' which 'lays down the basic rules without which an ordered society is impossible' and the 'morality of aspiration' which is concerned with 'the fullest realization of human powers'.[6] The morality of duty defines mandatory requirements, the morality of aspiration demanding ideals: in one case we '[are] condemned for failure, but can expect no praise for success', in the other we are 'admired for success and at worst pitied for the lack of it'.[7] However, this division is itself artificial: the demands of any moral code offer themselves both as straightforward, mandatory duties and – when their implications are pursued further – as complex and demanding ideals. Fuller pictures a single, ascending scale of moral values, with an imagined 'pointer' marking the level where 'the pressure of duty leaves off and the challenge of excellence begins'.[8] The location of this dividing line is not predetermined, and varies between different societies and periods; indeed, Fuller asserts that debate over morality is dominated by 'a great undeclared war over the location of this pointer'.[9] Law is intimately related to morality, in both forms. On one hand, directly prohibiting some condemned behaviours makes law a 'blood cousin' of the morality of duty; on the other, 'the pervasiveness of [the] implications' of the morality of aspiration give it a major role in shaping the law as a form of social organisation, making it one of the social factors empowering people to 'live up to the excellences of which [they are] capable'.[10]

Having first set out the eight criteria *ex negativo*, as eight routes to failure in making law, Fuller identifies the criteria as an 'inner morality' of law,[11] as distinct from the morality of the goals or outcomes of a legal system. While closer approximation to the eight criteria will lead towards the attainment of 'legal excellence',[12] outright failure to meet them results in 'something that is not properly called a legal system at all'.[13] The 'inner' morality thus encompasses both duty and aspiration: the eight criteria are both a set of threshold conditions ('indispensable conditions for the existence of law') and a set of ideal desiderata ('eight kinds of legal excellence toward which a system of rules may strive').[14] As Fuller's earlier argument implies, there is no predefined cutoff point at which the threshold values of the inner morality have definitively been met and 'the challenge of excellence begins'.[15] The judgment of whether or not a system of law exists is not prior to the judgment of how well such a system is achieving 'legal excellence', but is part of the same assessment: 'the "existence" of a legal order is always a matter of degree and cannot be measured in "non-evaluative" terms.'.[16]

Four claims can be distinguished here. The most fundamental is the *valuable enterprise* claim: the claim that law is involved by its nature with the achievement of morally valuable goals. From this, for Fuller, it follows that law cannot be adequately analysed without accepting those goals as valuable – indeed, that it can only be fully understood from an internal perspective, embracing those goals. Fuller grounded this claim in an argument that purposive practices can only be understood through 'a process of

[6] Fuller (n 1) 5.
[7] Fuller (n 1) 42.
[8] Fuller (n 1) 10.
[9] Ibid.
[10] Fuller (n 1) 9.
[11] Fuller (n 1) 42.
[12] Fuller (n 1) 41.
[13] Fuller (n 1) 39.
[14] Fuller (n 1) 42.
[15] Fuller (n 1) 10.
[16] Lon Fuller, 'A rejoinder to Professor Nagel' (1958) 3 Natural Law Forum 83, 91.

evaluation by which the bad is rejected and the good retained', by definitions of 'bad' and 'good' determined by the purposes of the practice;[17] he characterised this as a merger of fact and value.[18] That law was such a purposive practice was demonstrated, Fuller argued, by the nature of legal interpretation, which turned not on logic and semantics but on a more or less intuitive engagement with the entire 'fabric of thought' developed through statutes and past cases, guided by the lawyer's own 'fidelity to law'.[19] For the claim that law's purposes were morally valuable – and were seen as such by practitioners – Fuller offered little argumentative support. He took it as axiomatic that law was 'designed to rescue man[sic] from the blind play of chance and put him on the road to purposeful and creative activity',[20] and that an adequate understanding of law required embracing the 'insight and experience' of its practitioners,[21] who could be assumed to share this melioristic outlook.

Secondly, according to the *constitutive criteria* claim, it is possible to identify a set of qualities – the eight criteria – which are not only characteristic of or appropriate to a system of laws but are necessary to its existence and will be found to at least some degree wherever a system of laws exists. Departures from the eight criteria could accumulate to the point of making law a dead letter, by creating conditions where citizens' obedience to the law is impossible or at best futile.[22] The criteria thus designated a threshold which actually existing systems of laws needed to meet, and below which a legal system might fall.

Thirdly, according to the *internal standard* claim, the eight criteria do not only specify a threshold but can be met to lower or higher degrees: every legal system must conform to the criteria to some extent, but a better system will conform to them more fully.[23] The criteria specify both a threshold and an aspirational standard, with no predefined cutoff point where the threshold – the existence condition – is sure to have been met. Consequently, it is only possible to ask whether law exists by asking whether a legal system is good enough, by standards internal to the practice of law – its 'inner morality'.

Lastly, according to the *mutual reinforcement* claim, '[the] external and internal moralities of law reciprocally influence one another'.[24] This relationship between 'inner' and substantive moralities of law obtains with respect to both the 'aspirational' and the 'threshold' reading of the inner morality. Where a legal system barely qualifying as such produces 'order', one achieving higher levels of conformity to the 'inner morality' will produce 'good order', which 'corresponds to the demands of justice, or morality, or men's notions of what ought to be'.[25] Equally, the pursuit of immoral aims through law will produce departures from the inner morality of law, ultimately leading a system of law to fall below the minimum threshold.[26] The *mutual reinforcement* claim relies on the assumption that the 'inner morality' is independently moral, so that conformity to it is morally valuable in and of itself. Fuller's grounds for making this assumption are unclear, however. While he suggests at one point that the criteria derive moral force from the moral value of good law-making,[27] this position would not support the *mutual*

[17] Lon Fuller, 'Human Purpose and Natural Law' (1958) 3 Natural Law Forum 68, 70.
[18] Fuller (n 17) 69.
[19] Lon Fuller, 'Positivism and Fidelity to Law: A reply to Professor Hart' (1958) 71 Harvard Law Review 630, 667.
[20] Fuller (n 1) 9.
[21] Fuller (n 16) 102.
[22] Fuller (n 1) 39-41, Fuller (n 19) 646.
[23] Fuller (n 1) 41.
[24] Fuller (n 19) 645.
[25] Fuller (n 19) 644.
[26] Fuller (n 19) 636.
[27] See n 53 and accompanying text.

reinforcement claim: if correct law-making is good insofar as it promotes virtuous law, the goodness of correct law-making cannot be a causal factor making law virtuous.

III. Fuller and his critics: a moral proposition under fire

Fuller's four claims underpin a value-laden model of law: the existence of law benefits society, and law made well will produce greater benefit. This view does not directly challenge the separation of law and morals upheld by H.L.A. Hart,[28] if this is taken to mean that standards of morality do not have a determining influence on rules of law, such that 'it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law':[29] Fuller specifically disclaims 'the notion that there is a "higher law" … against which human enactments must be measured and declared invalid in case of conflict'.[30] Nevertheless, to grant that law derives any normative value from its nature as law would create the possibility of concluding that the normative failings of a particular law rendered it unlawlike, and hence invalid. This would contradict the legal positivist tenet that whether a valid law exists can be established independently of any judgment on its content; indeed, Fuller's argument was put forward as a counter to models of law based on this assumption. As a result, it met strong and sustained resistance. The 'Hart/Fuller debate', conducted over several years, has entered history; in addition to Hart's responses, Fuller's arguments were heavily criticised by Ernest Nagel, Ronald Dworkin, Marshall Cohen and Robert Summers.

As we have seen, Fuller's presentation of the *valuable enterprise* claim included a claimed merger of fact and value. Nagel's response was dismissive: 'I do not find that Professor Fuller has given us any reasons for holding that in discussing purposive behavior the distinction between judgments of fact and of value breaks down'.[31] Fuller's reply was conciliatory, offering the less demanding proposition that a 'purposive system' cannot be fully described while 'eliminating evaluative elements' – a formulation which brackets the key question of whether a purposive system can be described without embracing its own canons of evaluation.[32]

Fuller's identification of law as a purposive system was also controversial. Cohen highlighted the difficulty of ascribing a purpose to the law as a whole;[33] Nagel expressed bafflement at Fuller's apparent belief that through the history of society 'a shared common purpose [was] gradually though imperfectly created and unfolded'.[34] Even if a single purpose for law could be identified, Fuller's critics baulked at the assumption that it must be moral; for Cohen, Fuller 'habitually confuses having a purpose with having a moral purpose',[35] while Hart dismissed Fuller's investment in the idea of law as a purposive system as irrational: '[Fuller] has all his life been in love with the notion of

[28] HLA Hart, 'Positivism and the separation of law and morals' (1958) 71 Harvard Law Review 593. See also HLA Hart, *Law, Liberty and Morality* (Stanford University Press 1963).; HLA Hart, *The Concept of Law* (originally published 1961, Oxford University Press 2012).
[29] Hart (n 28) Positivism, 599.
[30] Fuller (n 16) 84.
[31] Ernest Nagel, 'On the Fusion of Fact and Value: A reply to Professor Fuller' (1958) 3 Natural Law Forum 77, 79.
[32] Fuller (n 16) 86.
[33] Marshall Cohen, 'Law, Morality and Purpose' (1965) 10 Villanova Law Review 640, 647.
[34] Nagel (n 31) 89.
[35] Cohen (n 33) 647; cf Hart (n 28) Positivism 628-9.

purpose and this passion, like any other, can both inspire and blind a man'.[36] Both Cohen and Hart took aim at Fuller's belief that the law presented itself to lawyers as a cohesive 'fabric of thought' inherited from their forebears and demanding 'fidelity to law' for its interpretation, arguing that the occasions for this type of interpretive creativity are much rarer than Fuller assumed; Cohen criticised Fuller's 'unwarranted assumption that in the case of common law rules some formulation is always at the borderline between the rule that is and the rule that ought to be'.[37] Cohen acknowledged that lawyers sometimes felt a sense of what 'ought to be', but denied that this was a moral 'ought': a statement about how the law ought to be interpreted 'has no greater moral force than the statement that King Lear ought to be interpreted in the way that Dr. Johnson interprets it'.[38] Hart similarly suggested that 'there may be just the same sense that a new case will implement and articulate the purpose of a rule in interpreting the rules of a game or some hideously immoral code of oppression'.[39] (Fuller demurred from Hart's second example, professing himself unable to accept that 'the common law [might] "work itself pure from case to case"[40] toward a more perfect realization of iniquity'.[41]) Nagel conceded that Fuller's belief in 'moral purposes underlying the development of the common law' might have led him to an understanding of the legal enterprise in which 'the principles which promote a satisfactory human life … are gradually discovered through the collaborative articulation of common purposes',[42] but did not offer that understanding his own endorsement.

With regard to the *constitutive criteria* claim, the idea that the eight criteria specified conditions which a legal system needed to meet was fairly uncontroversial; Cohen somewhat grudgingly described the criteria as 'a tolerable start at producing a set of conditions necessary for the presence of a (modern) legal system'.[43] The corollary that a legal system which fell far enough below the threshold would cease to be worthy of the name was less popular: Summers pointed out that Fuller 'leaves the reader in the dark as to precisely when … an evil law cannot be a law at all',[44] while for Hart any argument supporting the potential disqualification of law on moral grounds evoked 'the romantic optimism that all the values we cherish ultimately will fit into a single system'.[45] Cohen, conversely, agreed that complete failure to meet the criteria would in fact disqualify a legal system, but maintained that this would represent a technical rather than a moral failure, and would be recognised as such by legal positivists.[46]

For Fuller, the criteria for making law were intrinsically moral, an 'inner morality' complementing the morality by which law's outcomes could be judged. Reacting to this formulation, Fuller's critics vied to produce the best *reductio ad absurdum*, Hart asking if guidelines for a poisoner would constitute a 'morality of poisoning' and Cohen

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[36] HLA Hart, 'Book Review: The Morality of Law by Lon L. Fuller' (1965) 78 Harvard Law Review 1281, 1296.
[37] Cohen (n 33) 644.
[38] Ibid.
[39] Hart (n 28) Positivism 629.
[40] While the phrase in Fuller's quotation marks evokes a much-quoted dictum of Lord Mansfield in Omychund v Barker (1744) 26 ER 15 (the common law 'works itself pure by rules from the fountain of justice'), it does not appear to be a direct quotation. In an earlier work Fuller had stated that 'the common law works itself pure and adapts itself to the needs of a new day' (Lon Fuller, *The Law in Quest of Itself* (Foundation Press 1940) 140).
[41] Fuller (n 19) 636.
[42] Ernest Nagel, 'Fact, Value, and Human Purpose' (1959) 4 Natural Law Forum 26, 40.
[43] Cohen (n 33) 648.
[44] Robert Summers, 'Professor Fuller on Morality and Law' (1965) 18 Journal of Legal Education 1, 24.
[45] Hart (n 28) Positivism 620.
[46] Cohen (n 33) 649.

postulating an 'inner morality of carpentry or murder'.[47][48] Taking a different tack, Dworkin argued that 'a would-be blackmailer' would have as much cause to follow Fuller's eight criteria as King Rex, but (in a deadpan understatement) that it would be 'misleading' to call them an '"internal morality" of blackmail' on that account.[49] For Dworkin a moral value could only be invoked when it 'supplies a moral reason' for an action;[50] the eight criteria had to be seen as either instrumental ('strategic') or definitive of the practice of law-making ('criterial'), and in either case could not be considered as moral: '[w]hen [Fuller] produces principles compliance with which is indeed necessary to law, they turn out to be strategic or criterial rather than moral principles'.[51] Hart argued that the 'morality' designation could only be valid if 'subjecting human conduct to the governance of rules, no matter what their content, were … an ultimate value': the eight criteria facilitated the practices making up a legal system and could have no more moral value than those practices.[52] Fuller subsequently took up this suggestion, proposing that law did indeed have a moral weight which the eight criteria inherited; he argued that any system of laws 'commands a moral force in the lives of men that is subject to abuse', and that this moral force gave law-makers a reciprocal responsibility 'not to frustrate or undermine the citizen's duty toward the law'.[53] As noted above, however, this argument cannot support the *mutual reinforcement* claim: if the 'inner morality' of law is to affect the substantive morality of legal outcomes, it cannot derive its own moral weight from the substantive morality of law.

The *internal standard* claim, thirdly, rested on Fuller's proposal of a single scale leading up from mandatory moral duties, through a threshold level which could not be identified *a priori*, up to praiseworthy but non-mandatory moral aspirations, with the implication that the dedicated pursuit of conformity with a moral duty will ultimately lead to higher levels of realisation of a corresponding moral aspiration. Having identified morality in general as taking this form, Fuller applied the model to the inner morality of law, suggesting that the values indicated by the eight criteria constituted both an obligatory threshold and an aspirational ideal. In response, Summers problematised Fuller's distinction between moralities of duty and aspiration, showing that some moral duties are both obligatory and praiseworthy, while others cannot be paired with any corresponding aspiration.[54] For Hart, who was unconvinced by Fuller's division of morality into 'morality of duty' and 'morality of aspiration', Fuller's insistence that the inner morality of law must take both of these forms merely piled confusion on confusion; he characterised this position as 'grotesque' and 'absurd'.[55]

Fuller's claim that a legal system realising the criteria beyond a minimum threshold would thereby become both more 'law-like' and more morally valuable was generally rejected. Dworkin, having dismissed any association between the criteria and morality, argued that to claim that greater conformity to the criteria produced greater legality was like 'arguing that whether something is a novel, or a room, or an army is always a question of degree, because size is one of the criteria of each'.[56] Conversely, Cohen dismissed this limb of Fuller's claim while making a qualified concession to the other:

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[47] Hart (n 36) 1286.
[48] Cohen (n 33) 651.
[49] Ronald Dworkin, 'Philosophy, Morality, and Law. Observations Prompted by Professor Fuller's Novel Claim' (1965) 113 University of Pennsylvania Law Review 668, 676.
[50] Ronald Dworkin, 'The Elusive Morality of Law' (1965) 10 Villanova Law Review 631, 634.
[51] Dworkin (n 50) 638.
[52] Hart (n 36) 1287.
[53] Lon Fuller, 'A Reply to Professors Cohen and Dworkin' (1965) 10 Villanova Law Review 655, 657.
[54] Summers (n 44) 5-9.
[55] Hart (n 36) 1286.
[56] Dworkin (n 49) 678.

'among legal systems we do not say that one which has achieved wider promulgation, greater clarity, fairer administration, is more a legal system. We may say it is a better one'.[57] Hart focused on the second limb of the claim, arguing that the eight criteria should be regarded as 'principles designed to maximize [the law's] efficiency' rather than as morally valuable norms, and that they should be valued 'so far only as they contribute to human happiness'.[58] As Waldron notes,[59] the line Hart draws here is blurred by his previous assertion that a legal positivist may consider 'the normal generality of law' to be desirable because the stability it produces 'is a powerful contribution to human liberty and happiness'.[60] Like his earlier concession that the eight criteria might be considered to have moral weight if legality were held to be an 'ultimate value', this is difficult to reconcile with his argument that one purposive activity was much like another, to the point where it was no more appropriate to invoke an inner morality of law than an inner morality of poisoning.

Regarding the *mutual reinforcement* claim, Summers raised the 'obvious' objection that 'law can be used for bad as well as good ends',[61] ignoring Fuller's claim that to do so would lead to ultimately disqualifying departures from law's 'inner morality', while Hart denied any 'necessary incompatibility' between the criteria and government for 'wicked ends', [62] pronouncing with mock solemnity that the inner morality of law was 'unfortunately compatible with very great iniquity'.[63] Dworkin argued that 'the authors of … laws providing for the enslavement of a minority … were not entitled to claim compliance with *any* moral principles' on the grounds that those laws satisfied the inner morality of law;[64] like Summers, he ignored Fuller's argument that such laws could not in fact meet the eight criteria. Cohen similarly insisted that '[t]here is no moral merit in depriving persons of their fundamental rights by laws that are perfectly clear and completely prospective'; he did acknowledge Fuller's assertion that no such laws were possible but dismissed it as 'simply incredible'.[65]

Both Cohen and Dworkin acknowledged that Fuller had shown correlations between morally good and formally correct law, but they denied that this association amounted to logical entailment; for Dworkin, Fuller had shown at most 'that it is easier and politically less dangerous to make or enforce good law than bad law'. [66] Cohen paraphrased Fuller as arguing 'that a tyrant will fear promulgation, and that it is extremely difficult to draft immoral legislation that is not canonically void for vagueness',[67] and retorted, 'Does Fuller deny that a brazen tyrant or a lucidly evil law is possible in principle?'.[68] Fuller's response was again to retreat, forgoing any appeal to logical necessity; he claimed that he "[had] never asserted that there is any logical contradiction in the notion of achieving evil … through means that fully respect all the demands of legality".[69] Somewhat perversely, he cited in his support a passage from an earlier reply to Hart, in which he had conceded that 'by stretching the imagination' one might envisage such a combination, before challenging Hart to show that 'history does

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[57] Cohen (n 33) 650.
[58] Hart (n 36) 1291.
[59] Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 New York University Law Review 1135, 1155-6.
[60] Hart (n 36) 1291.
[61] Summers (n 44) 25.
[62] Hart (n 36) 1288.
[63] Hart (n 28) *Concept* 207.
[64] Dworkin (n 49) 671 (emphasis in original).
[65] Cohen (n 33) 652.
[66] Dworkin (n 49) 672.
[67] Cohen (n 33) 653-4; cf. Fuller (n 1) 157-62.
[68] Cohen (n 33) 654.
[69] Fuller (n 53) 664.

in fact afford significant examples' of this occurring.[70] Fuller concluded in conciliatory tones, reducing the *mutual reinforcement* claim to a personal credo: "I believe that order, coherence, and clarity have an affinity with goodness and moral behavior".[71]

In retrospect, some of the criticisms levelled at Fuller are ill-founded, poorly-aimed or incoherent, while others – particularly from Nagel and, perhaps surprisingly, Hart – track Fuller's argument closely enough to verge on offering concessions. Still, overall, the four claims emerged from their critical ordeal in poor shape. The *valuable enterprise* claim was roundly rejected. Fuller's critics did not accept that purposive phenomena could only be understood through an engagement with their purpose; that such an engaged understanding merged fact and value; that law had a single purpose, or that it was a unified phenomenon articulated over time and space; that lawyers regularly found themselves determining what law was on the basis of what it ought to be, guided by their understanding of its purpose; or that, when lawyers did practice purposive interpretation of this type, either the process or the purpose itself had any moral significance. The *constitutive criteria* claim fared better, with a qualified welcome for the eight criteria as a statement of the necessary properties of a legal system. However, Fuller's argument that the criteria constituted law's 'inner morality' was rejected, with a general consensus that they were formal guidelines with no moral force. The *internal standard* claim was generally rejected. Fuller's contention that law might conform to the eight criteria to a higher or lower degree, and that this would correlate in some sense with better or worse law, was not found to be problematic. His insistence that a higher level of conformity to the criteria conferred a specifically moral benefit was not accepted, however, and his suggestion that this equated to law existing to a higher degree was dismissed as absurd. Lastly, the *mutual reinforcement* claim was met with flat denials of any incompatibility between immoral laws and the eight criteria, and with scepticism as to how law's formal properties might influence its effects so as to produce such incompatibility.

Of Fuller's original position all that remained were demystified and non-moralised versions of the *constitutive criteria* and *internal standard* claims, amounting in total to the claim that a system of laws will generally meet the eight criteria to a minimal degree and may meet them to a higher degree, and that a higher degree of conformity will generally be preferable. Far from necessitating a value-laden model of law, these claims can be accepted (as Cohen largely accepted them) as a proposition about the formal properties of contemporary legal systems.

IV. Responsible personal freedom and a narrow proposition

In the light of the barrage of criticism aimed at Fuller and its insipid outcome, it is not surprising that history has declared Hart the victor, with Fuller remembered as the 'necessary, albeit unpersuasive, intellectual foil for the triumph of legal positivism'.[72] As Waldron suggests, however, that triumph may have been won too cheaply.[73] Many of the most trenchant critiques of Fuller's argument target not Fuller's core claims but normative assumptions underlying them. If these assumptions are bracketed, it is

[70] Fuller (n 1) 154.
[71] Fuller (n 53) 666; cf Fuller (n 19) 636.
[72] Francis J Mootz III, 'Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition' (1999) 11 Yale Journal of Law & the Humanities 311, 339 (fn).
[73] Waldron (n 59).

possible to sketch an alternative, more narrow but coherent proposition, which the critiques of Hart and others largely pass by.

The assumptions relevant here are an *essentialist*, a *teleological* and a *moral* assumption. According to the *essentialist* assumption, firstly, the term 'law' consistently denotes an identifiable practice with a knowable 'inner logic'.[74] The consistency of this inner logic makes possible a collective learning process: '[t]he common law is not the work of any one judge, but of many, collaborating through time',[75] making the practice of law an example of 'the collaborative articulation of shared purposes',[76] even across continents and centuries. Secondly, according to the *teleological* assumption, purposive practices can only be understood in the light of their purpose. Since (according to Fuller) law is a purposive practice, it can only be adequately understood from within, on the basis of a shared commitment to its purpose.[77] According to the *moral* assumption, lastly, the value judgments involved in appraising law and the effectiveness of law – and thus in applying the eight criteria – are moral in nature. Hence a legal system more fully meeting the criteria is a better system in moral terms – and will tend to deliver, not merely better outcomes, but morally better outcomes.

Fuller undeniably held these assumptions and built them into his presentation of the four earlier claims. In other words, he argued that law is an identifiable practice defined by its purpose, a purpose which has inherent moral value (the *valuable enterprise* claim); that law must possess certain formal virtues in order to function (the *constitutive criteria* claim); that higher levels of these virtues will enable law to achieve higher levels of excellence by meeting its purpose more fully (the *internal standard* claim); and that the 'external' morality of law's substantive purposes will both influence and be influenced by the 'internal' morality of these formal virtues (the *mutual reinforcement* claim).

However, a narrow version of the four claims, largely bracketing the essentialist, teleological and moral assumptions, is also tenable. The narrow version of the *valuable enterprise* claim asserts only that the term 'law' designates an identifiable form of social organisation, which is known to produce some distinctive social benefit. The narrow *constitutive criteria* claim is the claim that a system of laws needs to meet threshold values of certain qualities, designated (perhaps not exhaustively) by Fuller's eight criteria – although the actual threshold levels will vary between social settings. The narrow version of the *internal standard* claim asserts that a system of laws may exhibit those qualities to a greater or lesser degree, above threshold levels; lastly, the narrow *mutual reinforcement* claim asserts that a system exhibiting them to a greater degree will more reliably produce the particular benefit associated with law.

In short, Fuller's proposition – referred to here as the 'broad proposition' – is that making law is a morally valuable enterprise requiring a sincere embrace of its inherent purpose; that making law successfully requires the realisation of certain formal virtues (represented by the eight criteria), while making law well requires greater realisation of those virtues; and that greater or lesser realisation of those virtues is associated with higher or lower levels of moral virtue in law's substantive purposes. By contrast, the four claims in their narrower form support the proposition – referred to here as the 'narrow proposition' – that 'law' denotes a form of social organisation which is known to produce some identifiable social good; that making law requires the achievement of certain formal qualities; and that greater or lesser achievement of those qualities, above

[74] Fuller (n 1) 150.
[75] Fuller (n 17) 74.
[76] Fuller (n 17) 73.
[77] Fuller (n 17) 74.

a given society's threshold level, is associated with the greater or lesser realisation of the particular social good associated with 'law'.

Can this narrow proposition be sustained more successfully than Fuller's broad proposition? At first sight the narrow proposition appears altogether too narrow: it fails to specify either the social good produced by law or the mechanism whereby greater realisation of the eight criteria promotes it and leaves open the question of how a single set of criteria can function both as a threshold and as an ideal. One approach to plugging these gaps is suggested by Fuller's musings on 'the view of man[sic] implicit in the internal morality of law'.[78] Fuller describes 'our whole legal system' as 'a complex of rules'—a formulation embracing tort and contract law as well as more obviously 'rule-like' areas such as criminal law[79]—and the practice of law as 'the enterprise of subjecting human conduct to the governance of rules'.[80] He argues that this entails a commitment to 'the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults'; departures from law's inner morality are 'an affront to man's dignity as a responsible agent'.[81]

In other words, Fuller proposes that it is definitive of law, as a form of social organisation, to hold legal persons accountable for their freely chosen actions in the light of known rules. It is through this respect for personal freedom and accountability that law embodies "a kind of reciprocity between government and the citizen".[82] Finnis develops this point further, arguing that a commitment to ruling by legal means requires a commitment to "reciprocity, fairness, and respect for persons": only such a commitment will motivate a government to submit itself to "the discipline of operating consistently through the demanding processes of law".[83] It follows, conversely, that the value of publicly accountable personal freedom of rationally chosen action will be respected to some extent by any functioning system of laws. This value is associated with the particular mode of organisation which law embodies and makes possible,[84] characterised by the management of behaviour through general rules.

This perspective makes it possible to flesh out the narrow proposition. The *valuable enterprise* claim becomes the claim that law is distinctively associated with respect for freedom of responsible personal action, which it produces and reproduces. The narrow *constitutive criteria* claim becomes the claim that a system of law must have certain attributes (designated by conformity to the eight criteria) in order to function in its characteristic mode, namely a mode perpetuating respect for freedom of responsible personal action – and that, if its conformity to the criteria falls below a certain level (which may be different in different social settings), it will no longer be recognisable as functioning in that mode. The narrow *internal standard* claim becomes the claim that a system of law functioning in that mode may exhibit higher or lower levels of those attributes, while the narrow *mutual reinforcement* claim becomes the claim that higher levels of those attributes, representing greater conformity to the criteria, will have the effect of more consequentially promoting respect for responsible personal freedom.

While much of Fuller's original argument has been lost in the passage from the broad to the narrow proposition, so too have the easy critical targets represented by Fuller's essentialism, his melioristic teleology of law and his insistent invocation of morality.

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[78] Fuller (n 1) 162.
[79] Fuller (n 1) 9.
[80] Fuller (n 1) 106.
[81] Fuller (n 1) 162.
[82] Fuller (n 1) 39.
[83] John Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) 273.
[84] John Gardner, 'The Supposed Formality of the Rule of Law' in John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 195.

What remains is the claim that governance by law – as distinct from (e.g.) coercion and administrative direction – is associated with respect for responsible personal freedom, such that greater achievement of certain formal qualities (the eight criteria) will both enable law to function more effectively and lead to higher levels of such respect. If conformity to the criteria is conducive to law functioning in its characteristic mode, relying on and reproducing respect for responsible personal freedom, conformity to the criteria will be an index of how well law does so; equally, the pursuit of lower levels of respect for responsible personal freedom in law will tend to be associated with a decline in conformity to the criteria. Ancillary claims are that respect for responsible personal freedom is a social good, which should either be pursued or traded off with other identifiable positives; that the mode of organisation characteristic of law requires a certain minimum degree of conformity to the criteria, such that a decline in such conformity will ultimately result in a mode of social organisation unlike that of law; and that different societies may be more or less demanding in their understanding of this threshold value. In short, the narrow proposition abandons (or leaves to the realm of personal belief) Fuller's claims that law is straightforwardly a good thing, and that law made well has morally valuable outcomes. It claims, more modestly, that the mode of social organisation distinctively characteristic of law produces the specific valuable quality of respect for responsible personal freedom, and that the eight criteria represent law made to operate well in that mode.

To test this proposition requires us to return to the substance of Fuller's criteria, and the requirements of 'the enterprise of subjecting human conduct to the governance of rules'.[85] Three broad requirements can immediately be identified. Any form of social control, firstly, must be effectual: it must not demand the impossible or (what amounts to the same thing) make demands that are so costly to enforce as to outweigh the benefits of following them. In the case of a rule-based system, this amounts to saying that the system's rules must be *followable*. Secondly, governance through rules is definitionally distinct from governance by commands or by targeted coercion, by virtue of the *generality* of rules. Thirdly, governance through rules is distinguished from governance by custom – and, again, from coercion – by the explicitness of rules: rules, unlike custom, are, by definition, *knowable*.

To organise society through rules, then, requires that those rules are general, knowable and followable, and that law's subjects are addressed accordingly: laws are 'general norms directed at, and capable of being understood and followed by, persons deemed to possess the necessary capacities'.[86] These qualities find an echo in Fuller's eight criteria.[87] Generality corresponds to Fuller's first criterion; knowability embraces publicity, intelligibility and congruence; followability includes stability, non-contradiction, prospectivity and compliability.

The criterion of *generality* amounts to a requirement that social control should take the form of general rules and not – or not only – coercion and command. Both command and coercion are characterised by 'a one way projection of power' from an individual superior to an individual subordinate;[88] even if the subordinate is commanded to obey a rule, to the extent that she is operating under instruction, the subordinate is not free to decide how – or if – a rule applies to a particular situation. The generality of law, guiding specific situations with non-specific rulings, is associated with the 'pervasive

[85] Fuller (n 1) 106.
[86] Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press 2016) 167-8.
[87] Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 Boston University Law Review 781, 785-6.
[88] Joshua Neoh, 'Law, Freedom and Slavery' (2022) 35 Canadian Journal of Law & Jurisprudence 223, 236.

emphasis on self-application' which Waldron finds 'definitive of law',[89] and thus tends to promote the responsible freedom of those subject to law. Complex societies cannot dispense with either command or coercion, but in a society organised through general rules these forms of behaviour control are confined to delimited settings (notably the workplace and the penal system, respectively). Moreover, temporarily unfree citizens retain legal rights which can be asserted against those directing or coercing them, as when an employee appeals to an employment tribunal or a convicted prisoner invokes human rights law.[90] The generality of law applies generally to the persons subject to law: in a law-governed society, there can be no person or category to whom general rules do not apply.

Fuller's criteria of publicity, intelligibility and congruence with official action are factors of *knowability*. Rules, unlike custom and coercion, offer intelligible reasons for action: legal persons must be offered 'genuinely good reasons' to act as required if they are not to be 'reduced to the status of objects of manipulation'.[91] Knowability is dependent on generality, as without generality the laws applying to different situations cannot reliably be known. Knowability in addition entails effective publicity and intelligibility: laws, changes to laws and legal rulings that are not publicised to significant numbers of those subject to them, or that are incomprehensible to them, cannot be considered adequately knowable – particularly if (as is likely) variations in access to law follow and perpetuate existing patterns of inequality or injustice.[92] For similar reasons, knowability entails congruence between law 'on the books' and the law which is enforced. Knowability will tend to reduce the extent to which legal persons can be acted on in unpredictable ways – whether by one another or by officials and other holders of power – which in turn will promote personal freedom of responsible action.

Knowability also entails that rules should be comprehensive: while some areas of life may be more intensively regulated than others, if law is to be knowable at all times there can be no area of social life which is not governed by law, or where the law cannot in principle be discovered. Since no imaginable set of rules can cover every possible eventuality, this in turn entails that existing law is sufficiently coherent to be interpreted and extended, with reasonably predictable results, when new situations arise. If law is to guide behaviour reliably, moreover, this kind of interpretive exercise will not only be required in situations not specifically addressed by any law, but in any situation where an authoritative source is not readily available. In short, in order to be generally knowable, law must not only be intelligibly written, publicly available and consistently enforced, but must exhibit knowable coherence.

Fuller's remaining criteria – prospectivity, non-contradiction, stability and compliability – are factors (thirdly) of *followability*. While every system of social control must have the property of followability to be viable, in the case of a system of rules followability is dependent on knowability and hence on generality: it is not possible to follow a law that one cannot identify or cannot understand. Followability imposes additional requirements on a system of laws: it is not possible to follow a law that contradicts itself, demands the impossible, operates retroactively or has changed since one first tried to follow it. Followability also entails that it is possible to choose to follow a law (or to break it); in Sempill's terminology, law claims to offer not just reasons for

[89] Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 1, 28.
[90] See e.g. Hirst v United Kingdom (No 2) (2005) ECHR 681.
[91] Julian A. Sempill, 'Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power' (2016) 31 Journal of Law & Politics 333, 366.
[92] Gal Amir, '"Hidden" Regulations and the Rule of Law: A Look at the First Decade of Israel' (2021) 2 Keele Law Review 45.

action but 'genuinely good reasons',[93] where the genuine goodness of the reason is for the person subject to law to judge. Persons subject to law are thus understood both as able to follow the law and as free to choose to do so (or not to do so).

Where law is enforced solely or primarily by command or coercion, behaviour is regulated by command or coercion and not by law. The followability of law is thus consistent with the motivation of law-compliant behaviour by sanctions, but not by sanctions alone: 'what justifies the threats [of law enforcement] is that they aim to induce compliance with obligations which those threatened *already* have'.[94] This is not the case when the law imposes obligations whose only justification is the fact of being imposed by law, as is the case with laws attaching affirmative conditions to particular acts, or imposing other arbitrary prohibitions or obligations. To say that a law is followable, then, is not merely to say that it is feasible for its subjects to comply with its demands, but that the law is adequate to motivate law-compliant behaviour: followability has to be understood as motivated followability.

A fourth criterion can also be identified if we consider the law in dynamic as well as static terms. The distinction is taken from the work of Hans Kelsen, who writes:

> We distinguish a static and a dynamic theory of law, depending on whether the one or the other alternative is emphasized – the human behavior regulated by norms or the norms regulating human behavior (that is, whether the cognition is directed toward the legal norms created, applied, or obeyed by acts of human behavior or toward the acts of creation, application, or obedience determined by legal norms).[95]

In this densely worded passage Kelsen counterposes two, seemingly very similar, pairs of ideas. The 'static' view of law focuses on 'the human behavior regulated by norms' and 'the legal norms created, applied, or obeyed by acts of human behavior'; the 'dynamic' view focuses on 'the norms regulating human behavior' and 'the acts of creation, application, or obedience determined by legal norms'. In other words, a static view of the law looks at human behaviour and at the norms it obeys, applies or creates; a dynamic view looks at norms and their respective acts of obedience, application and creation (which are themselves determined by higher-level norms). A static view thus corresponds to the state of a system of laws at any point in time, while a dynamic view focuses on the continuing creation and modification of laws within an overall system of laws. It should be borne in mind that Kelsen's understanding of the process of law's creation is broad: in a Kelsenian perspective, the passing of a sentence in an individual criminal case creates new law by instantiating an individual norm, and in so doing makes a local modification to the entire 'static' system of laws.

The dynamic perspective has implications for generality, knowability and followability. Generality requires that, broadly speaking, similar sanctions are applied in response to similar infractions, proved to a similar standard. Knowability suggests that it should always be possible for a person to establish their effective legal rights in a given situation; this in turn entails that it should be possible to specify how those rights are limited by the overriding legal rights of others, officials included. A society whose citizens who are formally bound by laws, but whose police force does not reliably enforce laws against some categories of citizen, or one in which powerful individuals regularly void contracts without suffering legal consequences, is not one whose law – in dynamic terms – is reliably knowable. Knowability thus mandates effective equality before the

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[93] Sempill (n 91).
[94] RA Duff, 'Inclusion and Exclusion: Citizens, Subjects and Outlaws' (1998) 51 Current Legal Problems 241, 249 (emphasis in original).
[95] Hans Kelsen, *Pure Theory of Law* (tr Max Knight, University of California 1967) 70.

law, with associated limits on official powers – limits which (like the law itself) are intelligible and adequately publicised.

The most significant impact of the 'dynamic' perspective is on followability. If a law has motivated followability, such that following its requirements is generally a free choice based on knowledge and comprehension of the law, it must generally be possible to give some explanation of any existing law which is capable of motivating a rational hearer to follow it. However, it is impossible to stipulate meaningfully that all laws should be possible to justify if challenged; it is always possible for citizens to disagree rationally, and for a rational lawmaker to be mistaken. If a justification can be demanded for any law or legal decision, it must also be possible for such a justification to be challenged, and for some challenges to succeed. Moreover, where a reasoned challenge to a law's justification has succeeded, that law must at least be amended; if a law whose justification had failed remained in force indefinitely, behaviour compliant with that law would be secured only by coercion. The key requirement, in other words, is not that all laws are justifiable, but that they may have their justification tested, with amendment predictably following when justification fails: a (fourth) criterion of defeasible *justification*. Defeasible justification grounds the 'right to challenge' which has been put forward as 'the chief protection against arbitrary or unwarranted coercion by the state'.[96]

V. The power and limits of a narrow definition

According to the reading of Fuller's claims adopted here, the mode of social organisation characteristic of law requires a legal system to exhibit at least minimal compliance with the criteria of generality, knowable coherence, motivated followability and defeasible justification. Society should be governed by general laws, applying in some form to all situations and citizens; the demands of those laws should in all situations be intelligible, should not be contradicted by official action, and should exhibit a coherence enabling them to address novel situations; laws should not only be physically possible to comply with, but be capable of generally motivating compliance; and laws should not only be justifiable in principle but open to challenge and amendment where such a justification is reasonably rejected.

This reading goes considerably further than did Fuller's own presentation of his claims, setting up a far more demanding standard than simply requiring that rules exist, can be ascertained and can be followed. However, the discussion above of the properties of social organisation by rules – as distinct from organisation by custom, command and coercion – suggests that the expansive reading is the correct one, not least because the minimal reading could also apply to other forms of social control. Dworkin's suggestion that Fuller's criteria could apply to the commands of a blackmailer illustrates the point. If knowability is understood, not as the bare possibility of knowing a law or command, but as the knowable coherence which makes it possible to extrapolate guidance for a new situation from known law, it is useless or even counter-productive to the blackmailer. This is also true of followability, if it is understood as the capacity to motivate compliance, independent of any sanction for non-compliance: it would be an odd blackmailer whose victims were motivated by the substance of their demands, not by the attached threats. What is true of blackmail is true in general of situations where one party commands and one obeys. What Dworkin intended as a *reductio ad absurdum* ultimately attests to the distinctiveness of social control through rules.

[96] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014) 266.

A society governed in the mode characteristic of law, with rules compliant with the eight criteria, will give legal force to respect for personal freedom of responsible action; progressively greater compliance with the eight criteria, by virtue of the constraints which it imposes on laws and law-makers, will be associated with higher levels of such respect. Such a 'person-centric' mode of social organisation, as well as limiting the range of actions which legal persons can take towards one another, tends to limit the actions taken by the state and other concentrations of power towards legal persons. Conversely, a mode of organisation favouring oligarchs or the state with little respect for responsible personal freedom, can be called 'power-centric'. A society organised primarily in a power-centric mode is not lawless; indeed, a legal system, depending for its existence on at least partial conformity to the criteria of generality, knowability and followability, may facilitate exercises of state power at the expense of citizens which would not otherwise be possible.[97] However, in such a society conformity to the criteria is likely to remain minimal; greater conformity will serve respect for responsible personal freedom and the 'protective perimeter' of personal rights enjoyed by legal persons,[98] and will thus militate against the development and consolidation of a power-centric mode. This argument evokes Raz's suggestion that law 'creates opportunities for much evil' in the power it gives governments,[99] and that the rule of law – which Raz grounds in a set of criteria similar to Fuller's – helps protect citizens from this possibility. Similarly, Raz's broader argument that 'the virtue of the rule of law' is to 'secure that the government acts with the manifest intention of serving the interests of the governed' is compatible with the argument that social organisation by rules relies on and perpetuates freedom of responsible personal action.[100] For government to act through law in ways that respect the generality, knowability and followability of rules, and thus respect the responsible freedom of action of the persons governed, is to act in ways that are demonstrably in the interest of those persons.

A number of qualifications should be registered here, relating to generality, personhood, context-sensitivity and value pluralism. Firstly, as Raz stresses, 'the rule of law … does not guarantee that the law is good or just'.[101] More specifically, generality neither equates to, nor guarantees, general equality of treatment, let alone general uniformity.[102] While it is in the nature of rules to be general, applying indifferently to every person or situation in scope of the rule,[103] a rule's scope also defines and circumscribes its generality, and may be arbitrarily narrow. The generality of rules is thus consistent with the division of persons and situations into multiple distinct categories governed by different rules, and the classification of any one person or situation into any such category. Hart may have been literally correct to state that Fuller's criteria are compatible with 'very great iniquity'.[104]

Secondly, while a person-centric mode is definitionally to the benefit of legal persons, over and against power-holders such as the state, the concept of 'legal person' itself is empty: there is no definitional requirement that legal personhood must be enjoyed by all adult humans or all citizens. Admittedly, by the definition of followability developed

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[97] Jeremy Waldron, 'All We Like Sheep' (1999) 12 Canadian Journal of Law and Jurisprudence 169.
[98] Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press 2007) 104.
[99] Joseph Raz, 'The Law's Own Virtue' (2019) 39 *Oxford Journal of Legal Studies* 1, 13.
[100] Raz (n 99) 14.
[101] Raz (n 99) 9.
[102] Iain Brassington, 'Edwards, Fuller and the Rule of Law' (*In Spite of the Tennis*, 5 November 2018) < https://inspiteofthetennis.blogspot.com/2018/11/edwards-fuller-and-rule-of-law.html > accessed 23 February 2025.
[103] Leslie Green, 'The Germ of Justice'. In Leslie Green, *The Germ of Justice* (Oxford University Press 2023) 153.
[104] Hart (n 28) *Concept* 207.

here, a followable law depriving part of the population of its legal rights is impossible (*pace* Dworkin). But an established society, some of whose population had long ago been 'declared to be subhuman … and as such excluded from the legal order entirely',[105] could reasonably claim to be organised in a person-centric mode, with regard to those members of society who did qualify as legal persons. Fuller was understandably resistant to this line of argument – "The morality of aspiration is after all a morality of *human* aspiration. It cannot refuse the human quality to human beings without repudiating itself."[106] – but the argument is undeveloped.

Thirdly, as Fuller's insistence that the 'threshold' value for the eight criteria is indefinable suggests, the person-centric mode must be understood as taking different forms – specifically, more and less demanding forms – in different settings. Lacey notes that, until relatively recently, the lack of general literacy and of modern means of communication made law effectively unknowable for the majority in England, despite English law 'priding itself on its respect for the rule of law';[107] by implication, any underlying core concept of the rule of law must be 'very modest'.[108] However, the person-centric mode and its merits can be invoked without either assuming it to be a timeless universal or imposing local and contemporary conceptions on other societies. By virtue of functioning as both a variable threshold and an ideal, the person-centric mode can be achieved to a limited extent in any given setting while still serving as a critical standard. In a society without law, the passage of the law 'Honourable gentlemen must be treated in appropriate ways' would represent some movement towards a person-centric mode, despite that society remaining effectively lawless as far as the majority of the population was concerned. That law could be seen as general (in its application to those who qualified to be protected by it), knowable (to those who shared the necessary background knowledge and assumptions) and followable (by those capable of acting accordingly). As such it would genuinely offer some protection for personal freedom of responsible action, insofar as that freedom was enjoyed by honourable gentlemen; this value would be infringed by the passage of further laws on the topic of the treatment of honourable gentlemen, if those laws were lacking in generality, knowability or followability. The freedom-promoting effects of a person-centric mode are always relative to a given society's understanding of legal personhood and what is due to a person; they are none the less real for that.

Lastly, despite all the qualifications entered above, the person-centric mode of organisation is presented here as a normative good, such that restrictions on it should at best be avoided, at worst recognised as involving trade-offs between rival goods. However, it is not suggested that the person-centric mode of organisation is uniquely good, or that it is capable of delivering all valuable social goods (nor was this Fuller's position).[109] By shielding individual persons from coercion and administrative direction, respect for responsible personal freedom may be a significant obstacle to the realisation of state-centric objectives delivering collective benefits.

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[105] Judith Shklar, 'Political Theory and the Rule of Law'. In Allan Hutchinson and Patrick Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Transnational Publishers 1987) 1, 2.
[106] Fuller (n 1) 183 (emphasis in original).
[107] Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the enduring resonance of the Hart-Fuller Debate' (2008) 83 New York University Law Review 1059, 1073.
[108] Lacey (n 107) 1078.
[109] Cf Fuller (n 1) 170-81.

VI. A narrow reading defined and defended

The reading of Fuller being advanced here can be summed up in the following propositions:

1. To organise a society through law is to address at least some members of that society as persons who can be held accountable for their rationally chosen actions.
2. Every system of laws, in order to function, must, to some extent, have qualities of generality, knowable coherence and motivated followability; knowability and followability further entail the quality of defeasible justification.
3. These qualities in a system of laws are conducive to a person-centric mode of social organisation, grounded in respect for legal persons as responsible agents, who are free to act as they choose but are held accountable by known standards.
4. Higher levels of generality, knowability and followability correlate with the progressive development of person-centric modes of organisation, based on respect for responsible personal freedom; where a legal system develops towards a power-centric mode of organisation, favouring power-holders such as the state over legal persons, lower levels of generality, knowability and followability will be found.
5. The benefits of a person-centric mode of social organisation are always qualified by – and exist relative to – the baseline set of rights and entitlements characterising a given society, but within that context they are none the less real.

Three possible criticisms of this reading should be acknowledged. On one hand, only a very partial defence of Fuller has been offered here. Fuller's core concept of an 'inner morality' of law has been abandoned, along with his belief in a reciprocal relationship between this 'morality' and the morality of substantive outcomes; in fact, most of Fuller's beliefs about the nature of law and its benefits for society have been discarded. What remain are the assertions that what we call 'law' operates in a certain way, which has certain benefits; that a degree of conformity to Fuller's eight criteria is required in order for it to do so; and that greater conformity to Fuller's eight criteria enables it to do so more effectively. A partisan of Fuller might feel that the narrow proposition has weakened Fuller's claims to the point of *triviality*. On the other hand, under examination the implications of the first four propositions above have ramified beyond even those inferred by Fuller from his original, moralised argument. The criteria now seem to point towards an unheard-of utopian state of harmony under law, with every citizen understanding all relevant laws, every official keeping to the bounds of their authority and every unjust law promptly repealed. In this perspective the narrow proposition is not only strong but *exorbitantly* strong. A third possible critique begins from the qualifications noted above: a society organised in person-centric mode cannot impose arbitrary divisions on its citizens or exclude some members of society from citizenship altogether, but it may perpetuate such divisions and exclusions if they are long-established and generally accepted (by citizens). Whatever the benefits of a person-centric mode, they are circumscribed by its social setting; it may even serve as legalistic cover for an unjust status quo. In other words, whether weak or strong the narrow proposition may be *irrelevant* to the demands of justice.

In response to the charge of *triviality*, the core of Fuller's proposition is taken as being the value-laden model of law according to which apparently formal criteria internal to the practice of law are conducive to valuable substantive outcomes. Fuller underpinned this model with a battery of essentialising, moralistic and teleological assumptions, from which it was only a short logical leap to postulate a reciprocal relationship between

the 'inner morality' of law and its 'external' morality. While Fuller's critics might appear to have won the day for a value-free positivist model of law, the narrow proposition suggests that a modestly value-laden model of law is also tenable, mediated by the proposed association between law and a mode of organisation respectful of personal freedom of responsible action, and hence between greater conformity to the criteria and greater respect for responsible personal freedom.

With regard to the charge of *exorbitance* – that the 'narrow' version of Fuller's argument has been spun out to dimensions beyond even Fuller's original claims – the discussion of Dworkin's 'blackmail' illustration has demonstrated that the readings of the criteria of generality, knowability and followability adopted here are more demanding than those set out in Fuller's presentation of the eight criteria. Nevertheless, it was always definitive of the eight criteria, as Fuller conceived them, that their full and conjoint realisation is extremely demanding and unlikely to be achieved. The qualities of generality, knowability, followability and justification should be considered as critical standards: yardsticks against which existing legal systems – and, especially, changes in those legal systems – can be measured. Departures from generality, knowability, followability and justification can then be seen not merely as formal changes, but as indices of a decline in respect for responsible personal freedom, and of the development or consolidation of a power-centric mode of organisation.

The charge of *irrelevance*, lastly, cannot be dismissed: rights conferred by law cannot be discussed, still less celebrated, without some consciousness of limits and exclusions imposed by the terms in which they are framed. Equally, acknowledging the limits and exclusions written into legal constructs should not preclude recognising the benefits – the gains in effective freedom and empowerment – which those constructs may offer. The model put forward here supplies terms in which infringements of existing 'person-centric' rights may be critiqued. If the narrow proposition is valid, we would expect legal innovations showing shortfalls in the formal qualities of generality, knowability, followability and justification to be associated with declining levels of respect for personal freedom of responsible action, and with the use of law to support a power-centric mode of social organisation.

While this is not the place for a detailed discussion, this association can plausibly be made out with respect to some recent legal developments in counter-terrorism and public order law. Defects of generality, firstly, are represented by measures subjecting individuals to tailored behaviour regimes, such as the 'serious disruption prevention order' introduced by the Public Order Act 2023: such an order may prohibit the individual from 'being in or entering a particular place or area … being with particular persons … participating in particular activities … [or] having particular articles with them'.[110] Orders such as these tailor behavioural control measures to the demands of the state, replacing generally-applicable rules with a personalised regime of administrative direction – made up of commands 'as ad hoc and arbitrary as the superior wants them to be' – in a direct denial of personal freedom of responsible action.[111]

Defects in knowability are exemplified by the catch-all offence of 'preparation of terrorist acts' under the Terrorism Act 2006, under which 'any conduct in preparation for giving effect to [the] intention 'to commit a terrorist act is an offence.[112] This makes it possible to criminalise individuals who have neither committed nor attempted to commit anything recognisable as a terrorist act, on the basis that a particular, legally

[110] Public Order Act 2023 ss 22(4), 27.
[111] Neoh (n 88) 236.
[112] Terrorism Act 2006 s5(1).

unexceptional action formed part of a pattern of behaviour which might in future have led to the commission of acts of terrorism, had it not been interrupted by police intervention. A law prohibiting the commission of any act which might subsequently be presented as having been preparatory to what might have been a future act of political violence is not a law whose scope can reliably be known. People whose activities or associations may bring them in scope of such a law are subjected 'to an especially humiliating condition: that of perpetual uncertainty and fearfulness because one's fate lies in the hands of official whim, which can choose at will to stigmatize conduct as criminal'.[113] The departure from knowability goes along with a denial of responsible personal freedom.

Followability, thirdly, is jeopardised by offences defined in situational terms: offences where a prior guilty act is inferred from a state of affairs. Thus the Terrorism Act 2000 criminalises possession of an article 'in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism' and possession of a document or record 'likely to be useful to a person committing or preparing an act of terrorism'.[114] As the range of articles and documents potentially useful to a would-be terrorist is impossible to define or delimit, a citizen concerned to avoid any possible prosecution can only adopt a precautionary reading of the legislation, avoiding as far as possible coming into possession of any article or document which might qualify under it. This, however, would entail supplementing otherwise law-abiding behaviour with a (potentially wide-ranging) set of affirmative duties undertaken solely to avoid prosecution – a self-imposed behavioural regime motivated solely by fear of punitive intervention, and as such a denial of personal accountability. The departure from followability leads to a denial of freedom of accountable personal action.

The criterion of defeasible justification, lastly, fails if the people called on to obey a law consistently reject the reasons offered for it, or if only prudential reasons are (or can be) offered. Any law whose justification consistently fails should itself fail (through appellate rulings and/or repeal); if such a law is enforced only by actual or threatened coercion, this violates the criterion of followability. In a plural society, not all laws can be consistently and universally justified; offending may be motivated by sincerely-held beliefs. An approach to justification in such cases was suggested by Hoffmann LJ in the anti-war protest case *Jones*:

> It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. … The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account.[115]

Hoffmann LJ's Fulleran emphasis on reciprocity between law-makers and citizens was echoed by the Supreme Court in the protest case *Ziegler*, which found that, on certain conditions, disproportionate interference with rights under Articles 10 and 11 of the European Convention on Human Rights could ground a defence of 'lawful excuse' to an offence under the Highways Act 1980.[116] However, subsequent decisions (in cases involving self-attachment to an aircraft, tunnelling and demolition of a statue) have

[113] David Luban, 'The Rule of Law and Human Dignity: Re-examining Fuller's Canons' (2010) 2 Hague Journal on the Rule of Law 29, 41.
[114] Terrorism Act 2000 ss 57, 58.
[115] R v Jones and others [2006] UKHL 16 [86].
[116] R v Ziegler and others [2021] UKSC 23.

found that any such defence is negated by trespasser by violence,[117] including property damage,[118] and in *Brown* (crucially) that such a defence can only be offered if applicable statute law explicitly provides a 'lawful excuse' defence.[119] Following *Brown*, the new protest-related offences in the Police, Crime, Sentencing and Courts Act and Public Order Act 2023 have been drafted so as to preclude any such appeal to Article 10 or 11, removing them from the scope of defeasible justification and thus denying any respect to the personal responsibility of suspected offenders.

We have identified defects of generality in the imposition of tailored behavioural regimes rather than publicly verifiable sentences. Defects of knowability are seen in offences designed to be provable against people who have committed no harmful or malicious act, making of the law a control mechanism that can be imposed at prosecutorial discretion. Defects of followability impose the burden of affirmative duties, undertaken solely to avoid prosecution, on indefinite numbers of people. Defects of justification deny any possibility of appeal to political activists found guilty of offences tailored to match their political activity. In each case, we see the forms of law being used to achieve the requirements of the state, and doing so by minimising or bypassing legal mechanisms of personal accountability for freely-chosen action. There is a clear correlation between these formal qualities of law and law-making and the lack of respect for personal freedom of responsible action apparent in substantive legal outcomes, supporting the narrow version of Fuller's proposition and a modestly value-laden model of law.

VII. Conclusion

This paper has reassessed Fuller's eight criteria, and his claim that they constitute an inner morality of law, from a theoretically parsimonious standpoint unencumbered by Fuller's assumptions concerning the inherently moral nature of the legal enterprise. Fuller's argument was analysed as consisting of four key claims: that law is by nature a morally valuable enterprise for the betterment of society; that some level of conformity to the criteria is constitutive of law as a social practice; that the criteria also designate an aspirational ideal internal to law; and that closer conformity to the criteria has a morally positive effect on legal outcomes. A narrow version of Fuller's argument was then put forward, based on an association between law as a mode of social organisation, the eight formal criteria and the value of personal freedom of rationally chosen action, with accountability to publicly known standards. The limits as well as the strength of this association have been stressed – a society may consistently respect personal freedom while being disfigured by systematic injustice. Nevertheless, respect for personal freedom remains a normative good, limiting the extent to which persons under law are subject to command and coercion. Both the value of responsible personal freedom and its association with the eight criteria are supported by recent developments in counter-terrorist and public order law, in which formal departures from the criteria have been associated with decreasing respect for personal freedom of responsible action and the use of legal means for instrumental, state-centric ends.

Sixty years on, to write about Fuller's eight criteria may seem eccentric. The hostile contemporary response to *The Morality of Law* was prompt and effective: while Fuller's criteria have lived on as formal desiderata for a functioning system of law, the argument

[117] *DPP v Cuciurean* [2022] EWHC 736 (Admin) (per Burnett LCJ, obiter) [23 ii(b)].
[118] *AG's Reference* (no 1 of 2022).
[119] *R v Brown* [2022] EWCA Crim 6 [28].

that Fuller based on them has never recovered from the critical mauling it received from Hart and others. Fuller's argument was not helped by his ready professions of faith in the moral worth of the lawyer's profession, or by his freewheeling, donnishly allusive style of argument, in which a sweeping assertion was less likely to be followed by a supporting argument than a rhetorical question, a vivid analogy or a damaging concession. Under critical fire, Fuller's tendency was to obfuscate, retreat, and reiterate his founding assumptions – assumptions which may, ironically, have been the weakest part of his argument.

In the years since *The Morality of Law* first faced its critics, those critics' arguments have been generally victorious. It is not now controversial to say that the lawyer's is not an inherently moral calling; that law is not a purposive activity aiming for the betterment of society and governed by an inner morality; or that qualities such as the generality of a rule and the feasibility of compliance with it are not conducive to moral outcomes. Often overlooked, however, is the possibility that after those essentialising, teleological and moralising assumptions have been laid aside, the novel argument that Fuller built around the eight criteria may still be standing. What remains is a modestly value-laden model of law, based on a set of claims about the virtues of a well-functioning system of law and their relation with a mode of governance characteristic of law: a mode which embodies a minimal level of respect for responsible personal freedom, and which, if developed in the directions represented by Fuller's eight criteria, will be conducive to higher levels of such respect. There continues to be an association between conformity to Fuller's criteria and respect for responsible personal freedom – an association currently visible more in the breach than in the observance. Used as a critical standard, Fuller's eight criteria may have some life in them yet.