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the Hart-Fuller Debate

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Out of the ‘Witches’ Cauldron’?: Reinterpreting the context and re-assessing the significance of the Hart-Fuller Debate

Nicola Lacey*

Abstract: Just over half a century ago, Harvard Law School provided the setting for a debate between the two most influential British and American legal theorists. H.L.A. Hart, Professor of Jurisprudence at Oxford, was invited to give the Law School’s annual Holmes Lecture. Hart took this opportunity to enunciate the kernel of his emerging theory of legal positivism, staking out his claim to be the 20th Century successor to Jeremy Bentham and John Austin. Lon L. Fuller, Carter Professor of General Jurisprudence at Harvard, and a man who had long ploughed a rather lonely jurisprudential furrow as a scholar and teacher committed to exploring the morality of law, demanded a right to reply. The rest, as they say, is history. In this paper, I revisit that history, and give it a somewhat different interpretation from the one which it has generally received. My argument is that Fuller was at an inevitable disadvantage in the debate. Because of Hart’s agenda-setting position, the terms of the debate are those of analytic legal philosophy: and the reception of the debate has, understandably, both interpreted and evaluated Fuller’s argument largely in terms of criteria internal to that discipline. But while Hart’s Holmes lecture can justly be seen as exemplary of his broader contribution, Fuller’s most original interventions in legal scholarship originated not so much in a philosophical view but rather in a broader socio-legal and interdisciplinary interpretation of legal institutions and processes. Though Fuller might have drawn on this broader work to raise questions about Hart’s approach, he did not do so as effectively as he might have done. Hence the salience to Fuller’s reputation of his role as Hart’s natural law opponent marginalises some important strengths of his scholarship. I preface this argument with a historical and biographical sketch: introducing the protagonists and their intellectual and personal preoccupations; setting the scene for the debate in terms of contemporary legal scholarship and legal education; and providing a richer context in which to assess the debate’s overall significance for legal scholarship today.

* Professor of Criminal Law and Legal Theory, London School of Economics: I am grateful to Neil Duxbury, Stanley Paulson, Kristen Rundle, John Schlegel, Robert Summers, David Warrington, and Kenneth Winston for their assistance and advice; to Marshall Cohen for permission to quote from his letter to Fuller; and to the Fellows of Harvard College for permission to quote from The Papers of Lon Fuller held in the Special Collections Room of the Law School Library. I have made every effort to trace the authors of other letters from which I have quoted, and apologise to anyone whom I was unable to contact. A revised version of this paper will appear in Peter Cane (ed.), *The Hart-Fuller Debate Fifty Years On* (Hart Publishing, 2009); I would be very grateful to hear from anyone who has comments or memories of Fuller which might inform the final version.

INTRODUCTION

Just over half a century ago, perhaps the premier law school in the English-speaking world¹ provided the setting for a debate between the two most influential British and American legal theorists. H.L.A. Hart, Professor of Jurisprudence at Oxford since 1953, and visiting Harvard for the academic year 1956-7, was invited to give the Law School's annual Holmes Lecture. Hart took this opportunity to enunciate, in economical and trenchant form, the kernel of his emerging theory of legal positivism, staking out his claim to be the 20th Century successor to Jeremy Bentham and John Austin. Lon L. Fuller, Carter Professor of General Jurisprudence at Harvard, and a man who had long ploughed a rather lonely jurisprudential furrow as a scholar and teacher committed to exploring the morality of law, and hence not infrequently accused of stirring the 'witches' cauldron² of irrationalist natural law theory, paced up and down at the back of the room 'like a hungry lion', and later demanded a right to reply.³ As the sponsor of Hart's visit, and as a man of keen sensitivities and no little degree of *amour propre*, it seems likely that Fuller felt a whiff of personal hurt as well as intellectual frustration in the face of Hart's insouciant dismissal of the natural law tradition. Whatever the origins of his feelings, there is plenty of evidence that Fuller *did* feel very strongly about Hart's lecture; and it stimulated him to produce a correspondingly trenchant formulation of the distinctive natural law position for which he was to become famous. The rest, as they say, is history.⁴

In this paper, I want to revisit that history, and to give it a somewhat different interpretation from the one which it has generally received. As a preliminary approach to this reinterpretation, let us take a moment to reflect on the quite astounding impact and status of the debate – but also on the rather different reception of its two components. We live in the world of the internet, and so – crude indicator of reception though it is – it is interesting to look at the number of references to the debate on widely used search engines trained on academic work. A clear pattern emerges from a search of Google Scholar on 9th September 2008. This generated the following results from, respectively, a general and an advanced search of the exact title of the relevant books and articles: 'Hart The Concept of Law', 91,000 and 4,880 references respectively; 'Fuller The Morality of Law', 49,000 and 1,840; 'Hart Positivism and the Separation of Law and Morals', 5,240 and 1,420; 'Fuller Positivism and Fidelity to Law', 1,260 and 911.

¹ I should immediately add that this estimation would have been resoundingly challenged by Yale! See below, text following note 72.

² The phrase was used by Fuller himself: see R. S. Summers, *Lon L. Fuller* (Palo Alto: Stanford University Press, 2004) 63, 162.

³ According to the recollection of Joel Feinberg: see N. Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004) 197.

⁴ See H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1957-8) 71 *Harvard Law Review* 593; L. Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' (1957-8) 71 *Harvard Law Review* 630.

This rough indicator of reception confirms the relative reputations of Hart and Fuller as legal philosophers at the start of the 21st Century. The published evidence of the stature of both men as legal theorists is impressive, and almost certainly provides a more accurate benchmark. Fuller's work is commemorated in four dedicated volumes, one of which is an annotated edition of a selection of his essays, some of them previously unpublished, with a substantial introduction.⁵ Each of these books devotes considerable attention to his jurisprudential scholarship. But the contrast with Hart is marked. For Hart's work has generated two festschrifts, a biography, and three monographs devoted exclusively to his contributions to legal theory; one of these books has run to a second, revised edition; and both that book and the biography have appeared in the last five years.⁶ In addition, the posthumously published postscript to *The Concept of Law* – itself barely 40 pages in length – generated an edited collection over four times that length, and one whose contributors included some of the leading scholars in contemporary jurisprudence.⁷ Even scholars who are entirely unsympathetic to his approach have devoted huge attention to Hart's work: as well as the books already mentioned, I am aware of two further books devoted exclusively to a critical assault on his theory of law.⁸ For obvious reasons, it is difficult to assess the large secondary literature in journals and edited collections discussing each man's work. But it would be fair to say that although this literature in relation to Fuller's work is substantial,⁹ it is markedly smaller than that in relation to Hart's work. While it is difficult to find contributions to the burgeoning field of analytical jurisprudence, particularly in Britain and North America, which do *not* use Hart's work as a primary point of reference, Fuller's presence in the field tends to be defined by his

⁵ K. L. Winston (ed.), *The Principles of Social Order: Selected essays of Lon L. Fuller* (Durham: Duke University Press, 1981; revised edition, Oxford: Hart Publishing, 2001); T. W. Bechtler, *Law in a Social Context: Liber Amicorum Honouring Professor Lon L. Fuller* (Deventer, The Netherlands: Kluwer, 1978); W. J. Witteveen and W. van der Burg, *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999); n 2 above.

⁶ In chronological order, they are P.M.S. Hacker and J. Raz, *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford University Press 1977); N. McCormick, *H.L.A. Hart* (London: Edward Arnold, 1981; revised edition, Palo Alto, California: Stanford University Press, 2008); M. Martin, *The Legal Philosophy of H.L.A. Hart: A Critical Appraisal* (Philadelphia: Temple University Press, 1987); R. Gavison (ed.), *Issues in Contemporary Legal Philosophy: Essays for H.L.A. Hart* (New York: Oxford University Press, 1987); M. D. Bayles, *Hart's Legal Philosophy* (Dordrecht: Kluwer Academic Publisher, 1992); n 3 above.

⁷ J. Coleman (ed.) *Hart's Postscript* (Oxford: Oxford University Press, 2001).

⁸ P. Leith and P. Ingram (ed.) *The Jurisprudence of Orthodoxy: Queen's University Essays on H.L.A. Hart* (London: Routledge, 1988); R. N. Moles, *Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Postivist Tradition* (Oxford: Basil Blackwell, 1987).

⁹ For key examples, see R. Dworkin, 'The Elusive Morality of Law' (1965) 10 *Villanova Law Review* 631; M. Cohen, 'Law, Morality and Purpose' (1965) 10 *Villanova Law Review* 640 (these two papers formed part of a symposium on Fuller's *The Morality of Law*, discussed later in this paper: see text at notes 58-60 and 105); D. Lyons, 'The Internal Morality of Law' (1970-1) *Proceedings of the Aristotelian Society* 71; F. Schauer, 'Fuller's Internal Point of View' (1994) 13 *Law and Philosophy* 294; P. Nicholson, 'The Internal Morality of Law: Fuller and His Critics' (1974) 84 *Ethics* 307; S. L. Paulson, 'Lon L. Fuller, Gustav Radbruch and the 'Positivist' Theses' (1994) 13 *Law and Philosophy* 313; J. Waldron, 'Why Law – Efficacy, Freedom or Fidelity?' (1994) 13 *Law and Philosophy* 259; K. Einar Himma, 'Functionalism and Legal Theory: the Hart-Fuller Debate Revisited?' (1998) 14 *De Philosophia* 213.

role as Hart's debating opponent.¹⁰ As even his sympathetic editor, Kenneth Winston, puts it, 'because of his passionate defence... of a modest "secular natural law" theory, Fuller has received a largely unsympathetic hearing from the scholarly community for his jurisprudential writings'.¹¹ Though argument continues about who 'won' the debate – with influential contemporary legal philosophers, including David Dyzenhaus, Leslie Green, and Jeremy Waldron,¹² all recently affirming crucial aspects of Fuller's position – a fair-minded observer of the jurisprudential scene would have to conclude that Hart, as it were, won the war.¹³

In this paper, I will reflect on why this is the case; and in particular on why the undoubted points which Fuller scored off Hart in the debate did relatively little to enhance his reputation, or that of his brand of natural law theory, in the dominant discourse of English-speaking legal philosophy in the second half of the 20th Century. The straightforward answer to this question would be that Hart simply had better arguments than Fuller, and moreover articulated those arguments better. I disagree with this view: or, to put it more precisely, I think that this view is only defensible if we judge the issue in terms of rather narrow criteria. In essence, my argument will be that Fuller was at an inevitable disadvantage, not only because he was merely responding, and hence drawn into a battle whose terms of engagement were set by Hart, but also because of the very different methodologies and worldviews through which the two men approached questions of legal theory. Because of Hart's agenda-setting position, the terms of the debate are those of analytic legal philosophy: and the reception of the debate has, understandably, both interpreted and evaluated Fuller's argument largely in terms of criteria internal to that discipline. But while Hart's Holmes lecture can justly be

¹⁰ For a recent example, see J. Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001). To students of jurisprudence, Fuller is of course equally well known for his memorable 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616 – a paper which cleverly invites the reader to examine the different conceptions of law disclosed by varying styles of judicial reasoning.

¹¹ Winston (ed.), n 5 above, 11: like Winston, I regard this as in part due to the failure of later scholars to 'place the [jurisprudential] arguments in the context of the general theory which informs the body of Fuller's work' (ibid, 11-12). Fuller himself appears to have been sensitive to the possibility that his debate with Hart would obscure other scholars' and students' vision of his broader contribution: in the revised edition of *The Morality of Law* (1969) he advises those interested in the sociology and anthropology of law to skip the chapter on the debate: see W. J. Witteveen, 'Rediscovering Fuller: An Introduction', in Witteveen and van der Burg, n 5 above, 30: see also at 21-2 on the way in which the debate dominates Fuller's reputation; and K. Soltan's comment ('A Social Science That Does Not Exist', in the same collection 387, at 408) that 'the social science Lon Fuller worked on' is a 'barely visible intellectual sideshow' which deserves to be transformed into 'a serious and large-scale enterprise' in legal scholarship. On the 'partial eclipse' of Fuller in contemporary jurisprudence, see also D. Luban, 'Rediscovering Fuller's Legal Ethics', in ibid 193, at 194-99; and K. Rundle, 'Understanding Economics: Reclaiming the legal philosophy of Lon L. Fuller' (Draft doctoral dissertation, on file with the author, University of Toronto) Chapter 1.

¹² See the papers collected in (2008) 83 *New York University Law Review*, *Symposium: The Hart-Fuller Debate at Fifty*: D. Dyzenhaus, 'The Grudge Informer Case Revisited' at 1000-34; L. Green, 'Positivism and the Inseparability of Law and Morals' at 1035-58; J. Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' at 1135-69. On the impact and status of the debate, see also N. Lacey, 'Philosophy, Political Morality and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' at 1059-87 of the same collection.

¹³ For a trenchant example of this judgment, see M. H. Kramer, *In Defence of Legal Positivism: Law without Trimmings* (Oxford: Oxford University Press, 2003) Chapter 2.

seen as exemplary of his broader contribution, Fuller's most original interventions in legal scholarship originated not so much in a philosophical view but rather in a broader socio-legal and interdisciplinary interpretation of legal institutions and processes – a set of interests which justifies Summers' assessment of him as 'the greatest proceduralist in the history of legal theory'.¹⁴ Though, as I shall argue, Fuller might have drawn on this broader work to raise questions about Hart's approach, his detailed interest in legal processes potentially giving him a certain advantage in the debate, he did not do so as effectively as he might have done. Hence the salience to Fuller's reputation of his role as Hart's natural law opponent marginalises some important strengths of his scholarship. I shall preface this argument with a historical and biographical sketch: introducing the protagonists and their intellectual and personal preoccupations; setting the scene for the debate in terms of contemporary legal scholarship and legal education, particularly at Oxford and Harvard; and providing, I hope, a richer context in which to assess the debate's overall significance for legal scholarship today.

IN QUEST OF HART AND FULLER

Who, then, were these two men whose engagement in the pages of the Harvard Law Review casts such a long shadow over jurisprudential scholarship not only in our own time as students and academics but also through that of our parents, our children and, in all probability, their children too?

Herbert Hart was born into a Jewish tailoring family in Harrogate in 1907. He had a brilliant student career at Oxford, where he read 'Greats' – i.e. philosophy, classics and ancient history. He went on to have a glittering career at the Chancery Bar in the 1930s, before becoming a highly placed counter-espionage officer in MI5 during the Second World War. In 1945, reluctant to return to a career which he had come to see as mainly involving saving rich people money, he returned to Oxford as Philosophy Fellow at New College. Here, despite suffering agonising feelings of insecurity about his capacity to take up academic work after such a long break, Hart quickly became a leading figure in the group of linguistic philosophers around J.L. Austin and Gilbert Ryle. In 1952, he was elected to the Chair of Jurisprudence, and over the next decade established himself as the world's leading legal philosopher in the analytic tradition.¹⁵

It would be difficult to overestimate the importance of Hart's year at Harvard in making this extraordinary achievement possible.¹⁶ His three years as a member

¹⁴ n 2 above, 151.

¹⁵ I leave aside Hans Kelsen, who would clearly have a claim to the position of the 20th Century's most important legal philosopher, but whose work – notwithstanding striking structural similarities to Hart's – derives from a very different philosophical tradition.

¹⁶ Hart's year at Harvard, and its impact on his career, are explored in greater detail in Chapter 8 in n 3 above.

of the Oxford Law Faculty had done nothing to unsettle his primary identification as a philosopher. This is hardly surprising when one bears in mind both the excitement then surrounding linguistic philosophy at Oxford, and the primarily ‘black-letter’ and atheoretical orientation of most of Oxford’s law teaching and scholarship. Hart’s dim view of the intellectual stature of law schools was challenged by what he found at Harvard; and his experience there provided an important stimulus to his writing. Though already the holder of England’s most prestigious position in legal philosophy, he had at the time of his arrival at Harvard in the autumn of 1956 published only a handful of articles. Both *Causation in the Law*¹⁷ and *The Concept of Law*¹⁸ existed in draft form: but *Causation* was delayed by Hart’s hesitations about some aspects of his co-author Tony Honoré’s ideas for the book; and he seems to have felt little urgency about publishing his own monograph, which he had been delivering as lectures since 1953. The year at Harvard changed all this. In the stimulating and – at least in comparison with Oxford¹⁹ - publishing-oriented atmosphere of a top US law school, Hart began to see the importance of a more active record of publication; and out of the context of his normal family and professional obligations, he embarked on a period of intense intellectual creativity, pondering or drafting during the course of the year almost all the work for which he was to become famous.

This is not to say, however, that Hart’s year at Harvard was an entirely comfortable one. The extensive diaries and letters home which survive from this period give us a clear view of his experience: wry observations of his colleagues and of the broader US environment are infused with a sense of intense intellectual excitement, but are also punctuated by characteristic moments of insecurity. Always a sensitive person, he was acutely aware not only of Harvard’s failure to subscribe to the Oxford view of philosophy as ‘queen of the disciplines’, but moreover of the local tendency to equate positivism with the ‘formalism’ which, in

¹⁷ H.L.A. Hart and A.M. Honoré, *Causation in the Law* (Oxford: Oxford University Press, 1959; second edition 1986); *The Concept of Law* (Oxford: Clarendon Press, 1961).

¹⁸ Oxford: Clarendon Press, 1961.

¹⁹ The qualification is important: Hart and Sacks failed formally to publish their significant work *The Legal Process: Basic Problems in the Making and Application of Law* (H. M. Hart Jnr. and A. M. Sacks, Westbury, N.Y.: The Foundation Press, 1994) for several decades, despite the fact that it was being used not only by them but, in mimeographed form, by other American law schools from at least 1958: and, as Summers’ monograph (n 2 above), explains in detail, Fuller himself was slow to publish some of his most important research. For example, his important ‘The Forms and Limits of Adjudication’ ((1978) 92 *Harvard Law Review* 353), published not long after his death in 1978, was first presented at the Harvard Law School legal philosophy discussion group in 1957; a revised version was prepared for use in Fuller’s jurisprudence class, and presented to a round Table on Jurisprudence at the 1959 meeting of the Association of American Law Schools; and a third version (the basis for the one which found its way into print 17 years later) was produced in 1961. Though regarding the paper as insufficiently polished for publication, he incorporated parts of its arguments in ‘Adjudication and the Rule of Law’ ((1960) 54 *American Society for International Law Proceedings* 1), and in ‘Collective Bargaining and the Arbitrator’ ((1963) *Wisconsin Law Review* 3): see Winston (ed.), n 5 above, 86. This raises interesting questions about the culture and the incentive structures which characterized contemporary law schools. But the fact remains that by the time Hart visited Harvard, it was widely recognized that publication of one’s ideas was an important part of being a successful legal academic. I am indebted to Neil Duxbury for discussion of this point.

the local reaction against the Langdell era, was so reviled: as he noted in an interview later in life, he once overheard a Harvard colleague remark, 'You know he's a positivist, but he's quite a nice man'²⁰ Neither the sociological jurisprudence of Roscoe Pound, represented at Harvard that year in both the substantial person of Pound himself and that of Hart's fellow visitor Julius Stone, nor the moralized vision of Fuller, appealed to him; and though he had some admiration for aspects of the 'process' school of Hart and Sacks and for the constitutional law scholarship of Freund, and a serious respect for the applied utilitarianism of Wechsler, it seems clear that their genre of work did not engage his deep intellectual interest.

In short, he felt somewhat isolated: and in this context, his already strong tendency to identify with philosophers in his own analytic mould was probably confirmed. It is clear in particular that he did not entirely 'click' with Fuller during the year. His diary entries give the impression that this was a matter in part of intellectual incompatibility, with Hart's rejection of natural law teaming up with a feeling that Fuller's exposition of it failed to meet the highest standards of clarity or economy of expression. But despite Hart's recollection that: 'He was rather testy. He couldn't keep his cool in arguments. But I liked him and he liked me. But he thought I was a radically mistaken positivist'²¹; one senses a lack of personal chemistry – an intuition which is confirmed by the following entry in Hart's Harvard diary: 'L. Fuller sweating [sic] opposite me [in the Faculty Club] announced he was going to comment [on the Holmes Lecture] in HLR. I felt I ought to show signs of appreciation and apprehensiveness but I didn't.'²²

Such warmth of relationship as the two men ever did achieve was generated, ironically, by the debate itself, and in particular by Fuller's prompt and effective intervention with the student editors of the Harvard Law Review when they butchered Hart's paper in a conscientious attempt to make it suitable for publication in an American law journal:

Dear Lon

I was delighted to receive your reply to my poor thing and I am about to get down to it.

Meanwhile a spot of trouble! The L. Rev. boys had mutilated my article by making major excisions of what they think is irrelevant or fanciful. They have made a ghastly mess of it and of the references to Bentham and I have written to say that must not publish it under my name with these cuts which often destroy the precise nuance. I took great care and much time over what they have coolly cut out.

²⁰ n 3 above, 181.

²¹ Interview with David Sugarman, quoted in *ibid*, 181.

²² See *ibid*, 198.

Could you induce them to be sensible? Such an interference with an author's draft is unthinkable here and I am astonished that that so gross and insensitive a thing should be possible at Harvard.

I have told them if they will undertake to restore the listed cuts I will get down to the unwelcome task of patching it up all over again. But meanwhile I will not return the proof.

So sorry but it is important to me to get precisely what I said printed. Best of wishes. I will write anyhow on your reply,

Yours ever

Herbert Hart²³

Dear Herbert

After receiving your letter I went over to the Review and found the President busily engaged in restoring your article to its original form. I am sorry for what they did, though I have to confess that this sort of thing comes close to being standard practice with articles written by American authors. Being near at hand I could save my baby from mayhem. Had I dreamed they would take such liberties with your text, I would have stood over them.

... Give my best to your wife and accept my wishes for a very merry Christmas for both of you

Sincerely

Lon L. Fuller.²⁴

One senses that Hart - exceptionally quick in argument and gifted in seminar or one-to-one debate - found Fuller's wide-ranging but less closely focused approach somewhat ponderous: an intuition which is confirmed by Hart's rather snooty comment to philosopher Morton White: 'Lon Fuller has replied at enormous length and (I think) obscurity to my Holmes Lecture. This piece of logomachy will appear in the Harvard Law Review shortly.'²⁵

²³ Hart to Fuller, 13th December 1957, The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 14.

²⁴ Fuller to Hart, 17th December 1957, The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 14.

²⁵ Hart to Morton White, December 1957.

There is no sense here that Hart felt much intellectual curiosity about what really underpinned Fuller's intellectual commitments: he was content simply to pigeonhole Fuller as a natural lawyer, and to use his position as a vehicle to illustrate what he saw as the absurdities of the natural law tradition.

Since I have written extensively about Hart's life and personality elsewhere, I will here devote more space to introducing Fuller. There is no biography of Lon Fuller, but it is possible to make a sketch of the man on the basis of materials in the Harvard Law School archive, and of Robert Summers' monograph, which gives some personal details as well as a comprehensive assessment of Fuller's work.²⁶ Born in 1902 in Hereford, Texas, Fuller's parents moved to California in 1906. Initially of modest means, during his earliest childhood his father was engaged in ranching as well as his office job. He went on however to have a successful career in banking, eventually rising to be president of the El Centro National Bank. We get a rare glimpse of Fuller's childhood environment – and of its contribution to his persisting interest in the bearing of distinctive decision-making or negotiating processes on the resolution of social problems – from the introduction to his 1965 paper, 'Irrigation and Tyranny':

I spent most of my childhood and youth in a reclaimed desert area wholly dependent on water brought from the Colorado River across many intervening miles of arid sands. Though this area – the Imperial Valley in the southeast corner of California – is counted as one of the most productive in the United States, it has only about two inches of rainfall a year, most of which seemed to us to come down in one torrent. Many of the most vivid memories of my childhood are connected directly or indirectly with irrigation and flooding. For a while we lived, or thought we lived, under the threat that the Colorado might decide to turn back into the Valley, instead of emptying safely into the Gulf of California. The ugly scars of its past misbehavior were everywhere around us, interrupting the fertile fields with miniature bad lands... I can remember being impressed at an early age by a foreign-sounding word that stood for a strange and important person, the *zanjero* [watermaster]. I never saw a *zanjero* but I pictured him as a kind of biblical figure, dividing the waters and quieting the alarms of farmers whose crops could be destroyed in a few days by a lack of moisture... In all this there was nothing remotely suggesting tyranny or autocratic government. Instead there was a strong sense of community such as I have never experienced since. The political issues under most earnest discussion were those affecting the Irrigation District, and everyone had a sense of participating in the affairs of the District. We were all parts, of one another, and we knew it.²⁷

²⁶ n 2 above; see also R. S. Summers, 'Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law' (1979) 92 *Harvard Law Review* 433.

²⁷ 'Irrigation and Tyranny' (1965) 17 *Stanford Law Review* 1021, 1021-2; the article is an extended review of a book arguing that, historically, irrigation has been associated with tyranny – hence the remark towards

Fuller's mother died when he was a small child, and he was brought up by his father and stepmother. We know little about the nature of his childhood, but we can surmise that it was a happy one, not least because Fuller himself went on to form a long-lasting and happy relationship with his first wife, Florence, whom he married in 1926, and, following her death in 1960 after a long illness, with his second wife, Marjorie ('Marnie'). Fuller's father seems to have encouraged him to have the education which one assumes he himself had lacked; in this, his early experience was strikingly similar to Hart's. And just as Hart seamlessly discarded his Yorkshire origins in favour of the genteel Oxford persona which led one of his Oxford students to remark in an interview, reporting his surprise at learning from Jenifer Hart's autobiography²⁸ that Herbert Hart was Jewish, that he had assumed that Hart was 'descended from generations of patrician public school boys',²⁹ so Fuller cultivated an East coast persona which led Hart into the mistaken description of him as a 'nice New Englander with some quite original ideas'.³⁰

But from here on Hart's and Fuller's experiences were very different. A social scientist rather than a philosopher by training, Lon Fuller majored in economics at Berkeley and then at Stanford, graduating in 1924, before moving into law and taking his JD in 1926. He headed straight for academic life, immediately securing a position at Oregon, moving on to Illinois in 1928, to Duke in 1931, and finally, in 1939, to Harvard. Here he spent the rest of his career, holding the Carter chair (formerly held by Roscoe Pound) from 1948 to his retirement in 1972. Like Hart, Fuller had some experience in legal practice: during America's period of involvement in the Second World War he worked for a Boston law firm in the labor relations field, and continued to engage in labor arbitrations until 1959.³¹ But the nature of his practice was very different from Hart's: it was far less trained on technical legal interpretation and more strongly oriented to skills of negotiation and dispute resolution. As Summers puts it in relation to legal theory, 'Fuller's was a "physiological" orientation to law, as opposed to the more "anatomical" concerns of most legal positivists.'³²

A man of tremendous energy and imagination, Fuller was actively engaged in institution-building both at and beyond Harvard, where colleagues remembered him with respect and affection as a modest, friendly man who had made a key

the end of the quotation. I am grateful to Kristen Rundle for drawing this curious and fascinating paper to my attention.

²⁸ J. Hart, *Ask Me No More* (London: Peter Halban, 1998).

²⁹ Interview with Peter Campbell; see n 3 above, 131.

³⁰ In a letter to Jenifer Hart, autumn 1956. American colleagues whom I asked about this story when researching my biography of Hart confirmed that Fuller's persona was such that he might well have been read in this way even by an American contemporary.

³¹ See Winston (ed.), n 5 above, 125: as Winston notes, Fuller was 'almost alone among Anglo-American legal scholars' in his intellectual interest in arbitration and mediation; see also M. Hertogh, 'The Conscientious Watermaster: Rediscovering the Interactional Concept of Law', in Witteveen and van der Berg (eds.), n 5 above, 364-387.

³² n 2 above, 31.

contribution to legal education.³³ Deeply involved in debates about curriculum reform at Harvard, he chaired from 1944-47 the Law School's Committee on Legal Education which crafted reforms which reshaped both the substance of the curriculum and teaching methods during the next decade, and advocated in 1946 the establishment of an Institute in International Legal Studies focused on comparative law and on educating American lawyers in the law of other jurisdictions, and overseas scholars in American law.³⁴ He was actively concerned in ensuring that adequate materials for the study of jurisprudence and of contracts should be available in affordable form to students, and was a popular teacher: 'vigorous yet kindly. He set high standards, but terror was never an element in his method'.³⁵ An energetic promoter of initiatives at Harvard such as Hart's and Stone's visits; he was also a generous operator in the long struggle to find a suitable position for Hans Kelsen when he arrived in the US as a political refugee.³⁶

Fuller was, in all senses – and in stark contrast to Hart – a political animal: an early and energetic advocate of America's entry into the Second World War, he also wrote to Charles Lindbergh remonstrating with him about his support for the German cause and urging him to abandon it.³⁷ But here as elsewhere the surviving materials give the sense of a somewhat volatile personality, as well as of someone whose temperamental as much as intellectual predisposition was to mark out and follow an approach which was distinctively his own. As Winston puts it in relation

³³ See E. N. Griswold, 'Lon Luvois Fuller – 1902-1978', and A. M. Sacks, 'Lon Luvois Fuller', (1978) 92 *Harvard Law Review* at 351 and 349 respectively. This issue of the review was a tribute to Fuller; alongside these obituaries, his own paper 'The Forms and Limits of Adjudication' (n 19 above) appeared in print for the first time, as well as an article assessing 'Forms and Limits' by his co-author M. A. Eisenberg: 'Participation, Responsiveness and the Consultative Process: An Essay for Lon Fuller' 410.

³⁴ There is a great deal of evidence of this involvement amid the correspondence held among the papers of Lon Fuller at Harvard Law School Library. For a general assessment of Fuller's views on legal education, and his institutional involvement in curriculum reform, see n 2 above, Chapter 11; on the Institute of International Legal Studies, see Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1967) 333; on the reform Committee, see Sacks, n 33 above, 350; Griswold, n 33 above, 352.

³⁵ Griswold, *ibid.*, 351. Fuller's popularity with students also surfaces in the archive: in a letter from the early 1950s, a student tells him that he has been declared, '*E pluribus Unus*', to be 'the tops' among first year instructors: Student to Fuller, 25th March 1951, The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 9. Both Griswold and Sacks emphasise in their obituaries his gifts as a teacher, and his commitment to getting across the importance of theoretical issues and of legal processes broader than the appellate cases which tend to dominate the law student's literary diet.

³⁶ In one of a number of letters to prospective university employers advocating Kelsen's merits, he amusingly described Kelsen's need for an institutional affiliation with token payment, which was a condition of his continuing to enjoy a stipend from a charitable foundation, as presenting 'the opportunity to get a scholar of world-wide reputation at truly bargain rates.' His instinct for promoting a good bargain is not, perhaps, followed up with the most consistent of cases: he continues; 'I have found Kelsen very stimulating as a colleague. He is conversationally very entertaining, and not at all the heavy Teutonic type of scholar. His lectures have been pretty abstract, and I'm afraid most of our men got little out of them. His English is quite good now, and, though there are slips in idiom, is easy to understand': letter from Fuller to Dean Paul William Brozman, Tulane University of Louisiana College of Law, January 10th 1942; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 1.

³⁷ Fuller to Lindbergh, 18th September 1940, The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 1; see n 2 above, 7.

to Fuller's work, 'Characteristically, he followed the idiosyncratic path.'³⁸ A lifelong Democrat, he nonetheless became an active supporter of Richard Nixon's unsuccessful bid for the White House in 1960, even chairing the Scholars for Nixon Committee; an advocate of an expanded and more interdisciplinary and comparatively focused curriculum at Harvard, he nonetheless distanced himself from the more full-blooded socio-legal or sociological approaches of some of his colleagues; an enthusiast for democracy, he nonetheless studied with real attention the case for economic planning and indeed the general situation of the Soviet bloc countries; a contributor to the legal defence fund for Professor Wendell Furry, who was threatened with contempt proceedings for his refusal to disclose the names of his former associates in the Communist Party to the infamous McCarthy Committee, he nonetheless took the view that Furry should have disclosed the information.³⁹ In this last instance, we see a clear reflection of his lifelong commitment to procedural forms, and a clue to the distinctive nature of the natural law theory for which he was to become famous: though he disapproved of Furry's stance, he thought him entitled to the best possible defence. In private life, his interests were more practical, less cerebral, than Hart's: in contrast with the latter's deep preoccupation with literature, architecture painting and music, Fuller enjoyed the crafts of cookery, carpentry, gardening and photography.⁴⁰

Leaving aside the unforgettable 'Case of the Speluncean Explorers'⁴¹, Fuller is best known to legal theorists today for his reply to Hart and for the more elaborate statement of his natural law position in *The Morality of Law* (which originated in the prestigious Storr lectures, delivered at Yale in 1963).⁴² But - again in contrast to Hart - Fuller's theoretical ideas did not proceed exclusively from philosophical commitments. Rather, they were deeply intertwined throughout his career with his work as a scholar of law and procedure. His published work displays an impressive imaginative range and an unusual courage in engaging with extra-legal disciplines. He authored an innovative contracts casebook, which gave a primary role to remedies - a topic which only found a real place on the agenda of English teaching in this field some thirty years later.⁴³ The book was original in

³⁸ Winston, n 5 above, 249; cf Sacks, n 33 above, 349: 'Lon Fuller was not content simply to follow existing schools of philosophy, though his views fit most comfortably among natural law thinkers, nor did he establish a new school to which other philosophers flocked. He was most interested in working out his own ideas...'

³⁹ Correspondence, 1955; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder *1.

⁴⁰ Summers, n 2 above, 9.

⁴¹ Fuller, n 10 above.

⁴² New Haven, Connecticut: Yale University Press, 1964; revised edition, 1969. Fuller's legal philosophy is also expounded in two other shorter books which deserve mention: *The Law in Quest of Itself* (Evanston, Illinois: Northwestern University Press, 1940) and *The Anatomy of Law* (London: Pall Mall Press, 1968). Other Harvard scholars whose Storr lectures also retain a place in the canon of 20th Century legal scholarship include R. Pound (*Introduction to the Philosophy of Law*) and B. Cardozo (*Nature of the Judicial Process*); see Sutherland, n 34 above, 305.

⁴³ *Basic Contract Law* (St. Paul, Minnesota: West Publishing Company, 1947); this book went into three editions (written, respectively, with Robert Braucher in 1964 and with Melvin Aron Eisenberg in 1972) in Fuller's lifetime. In the 4th edition, published by Eisenberg in 1981, Fuller's innovative structure was

giving a central place to the concept of reliance loss, and it had a key influence on Patrick Atiyah's pathbreaking work published in 1979.⁴⁴ Fuller also wrote a number of important papers on legal ethics⁴⁵ and on different legal processes which began to develop what we might call a structural or functional theory of the suitability of particular forms of process – civil adjudication, legislation, arbitration, mediation, managerial direction, decision by lot, customary governance – to the resolution of particular forms of dispute or other social problem:⁴⁶ the earliest version of what later became his famous posthumously published article 'The Forms and Limits of Adjudication'⁴⁷ was written around the time of Hart's visit to Harvard.⁴⁸ And this deep interest in the significance of processes was not a separate research agenda, but rather found consistent expression in his explicitly jurisprudential work. Much of his teaching was informed not just by philosophy but by other disciplines – notably by anthropology and economic theory.⁴⁹ And while he was a lifelong critic of the idea that legal argumentation could be reduced to, or equated with, scientific reasoning, he was by no means deaf to the relevance of social science disciplines – sociology and psychology as well as economics and anthropology – to a proper understanding of legal processes. As Winston puts it, Fuller believed that 'the effort at governance must be informed by the cumulative learning of the social sciences'.⁵⁰ By contemporary American standards, his published output was not large. But I want to argue that an understanding of his broader scholarly interests – far, far broader than those entertained by Hart – is crucial to an understanding of why the terms of the debate disadvantaged him in important respects, making it difficult to articulate some of the most original aspects of his thinking, and drawing him into incautious generalizations which both flattened the subtlety of his vision of law as a social institution and generated some rather crude philosophical positions (and indeed empirical claims).

Before returning to this substantive reading of the debate, however, it will be useful – and I trust not without entertainment value – to get some further sense of

abandoned: see Alfred S. Konesky, Elizabeth B. Mensch and John Henry Schlegel, 'In Memoriam: The Intellectual Legacy of Lon Fuller' (1981) 30 *Buffalo Law Review* 263-4.

⁴⁴ *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979). On Atiyah's acknowledgment of his debt to Fuller, see n 2 above, 14, 63, 162: for a perceptive analysis of Fuller's contracts scholarship, see generally Chapter 10; see also Winston (ed), n 5 above, 169-70.

⁴⁵ For a thoughtful analysis of this aspect of Fuller's work, see D. Luban, 'Rediscovering Fuller's Legal Ethics', in Witteveen and van der Burg, n 5 above, 193-225.

⁴⁶ See n 2 above, Chapters 6-9.

⁴⁷ n 19 above.

⁴⁸ Winston (ed.), n 5 above, 86: see n 19 above. Eisenberg, in his Harvard Law Review essay on 'Forms and Limits', places its origins yet earlier when he refers to Fuller's essay as being published 'thirty years after it was written' (at n 33 above, 426).

⁴⁹ For example David N. South recalls, in his preface to Bechtler (ed.), n 5 above, viii, that he and Fuller co-taught a course on 'Law and Social Change in Africa' which drew, inter alia, on the work of Max Gluckman: on Fuller's use of economics, see text following n 74 below.

⁵⁰ Winston (ed.), n 5 above, 14. My interpretation of the relationship between Fuller's jurisprudential work and his process scholarship chimes with Kristen Rundle's claim that, far from 'represent[ing] two separate spheres of Fuller's thought', Fuller's 'economics' and his work on legality 'give expression to a common jurisprudential vision': the posthumous publication of papers like 'Means and Ends' (Winston (ed.) n 5 above, 47-64) and 'The Forms and Limits of Adjudication' (n 19 above) obscures the fact that he was working on these related lines of thought throughout his career: Rundle, n 11 above, Chapter 1.

Fuller as a person, and in particular a sense of how he might have been expected to respond to the jurisprudential controversy which overshadowed their relationship during Hart's year at Harvard and which finds clear expression in the published 'debate'.

Here again, I want to suggest that there are some interesting differences between the two men. Beyond a few moments of excessive early-career zeal, infused with more than a tinge of Oxford philosophical arrogance,⁵¹ Hart was – remarkably, given his persistent and serious insecurities – not particularly thin-skinned about criticism of his work. Indeed, he appears to have enjoyed the debate which emerged from robust intellectual disagreement. This was, after all, the man who promoted the claim of his most vigorous critic to the Chair of Jurisprudence which he vacated in 1968.⁵² And while he certainly became sadly obsessed with Dworkin's critique of his position in later life (as indeed, to a lesser extent, by other criticisms which bore on the positivist kernel of his theory of legal obligation, notably those of John Finnis and Gerald Postema⁵³), one has the sense that this proceeded in large part from a deep commitment to, as he saw it, eliciting the truth of the matter at hand. Though a perfectly effective institutional operator when he put his mind to it – think notably of the important legacy of his publishing creation, the Clarendon Law Series – there was little of the entrepreneurial in his approach to his academic career. Notwithstanding what many observers regarded as his supreme intellectual confidence, one suspects that his own assessment of his contribution was that he had, in effect, become famous by 'selling philosophy to the lawyers': an attitude which is aptly summed up by his off-hand remark that 'the philosophers thought I was a marvellous lawyer, and the lawyers thought I was a marvellous philosopher'.⁵⁴

Conversely, a strong entrepreneurial side to Fuller emerges very clearly from the substantial archive of correspondence which survives at Harvard. The man who emerges from the letters is warm, impulsive – even a little volatile; given to forthright expressions often leavened by a sense of humour; a truth-seeker, certainly; but also an energetic promoter of his own work, a prodigious distributor of offprints, a passionate defender of his ideas – and a testy and thin-skinned adversary when feeling that he had been treated unjustly or with some lack of respect. Whether engaging with colleagues about their reaction to his work, or explaining himself to Harvard colleagues (as in an amusing two-page letter to Dean Erwin Griswold in 1951, listing and indeed elaborating no fewer than five reasons why he will be at least a month late in returning his grades⁵⁵), Fuller was

⁵¹ See for example n 3 above, 146-7.

⁵² *ibid.*, 291-3.

⁵³ *ibid.*, 345-52.

⁵⁴ Interview with David Sugarman, quoted in *ibid.*, 171.

⁵⁵ Fuller to Griswold, March 21st 1951 (six days after the grades had been due! Unfortunately, Griswold's reply does not seem to have survived: The Papers of Lon Fuller, Harvard Law School Library; box 3, folder 9). Fuller's reasons span the medical excuse, the excuse of pressure of administrative work, the excuse of extracurricular demands such as external talks, and the excuse of curricular demands such as

an energetic defender of his own cause. Perhaps the sample of letters which survives is a skewed one, but Fuller does seem to have had a tendency to get into wrangles with colleagues over their public treatment of his ideas. Yet his outbursts of pique are rather endearing, punctuated as they are by attempts to defuse the very row he is in the midst of creating, and concluded as they often are by remarkable pourings of oil on troubled waters, even amounting to straightforward climbing down. Probably the most spectacular examples relate to two philosophers, each, as it happens, by the name of Cohen. Here is Fuller, writing to Morris Cohen in 1941 about his reaction to *The Law in Quest of Itself*.⁵⁶ It is a letter which both typifies the style of his engagement with his critics, and already reflects, many years before his debate with Hart, a distinct sensitivity to being cast as an 'irrationalist' natural lawyer:

Dear Professor Cohen:

I am returning herewith the manuscript of your review of my book. I am genuinely disappointed that you found so little in the book to approve. My disappointment is all the more marked since I have been an open admirer of your philosophy for many years. I was, however, not unprepared for your adverse judgment. In the first place, rumors had reached me that you viewed the book quite critically. In the second place, a third reading this spring of your "Reason and Nature" made me aware of a widening gulf between my own thought and yours. My divergence from your thought is in a direction you would call "irrationalism".

The fact that a fundamental difference in philosophic viewpoint underlies nearly all our disputes about specific points makes it difficult for me to comment on your review. I must say in all frankness that it seems to me neither entirely fair nor entirely accurate in its treatment of my book. However, I suppose no one who had received as severe a criticism as this review contains would be likely to think otherwise.

After disclaiming any pretension to a thorough rebuttal, but nonetheless picking his way in some irritation, and some detail, through a number of specific objections, there is a classic Fullerian concession:

having to bone up on economic theory for his new seminar. Judging by the warmth of his obituary, the incident doesn't seem to have affected Griswold's high opinion of Fuller (n 19 above).

⁵⁶ 'Should Legal Thought Abandon Clear Distinctions?', reproduced in Cohen's *Reason and Law* (New York: Free Press, 1950): see Winston (ed.), n 5 above, 293-4. Winston reproduces in full the longest of Fuller's exchanges with other scholars about their reaction to *The Law in Quest of Itself*: a letter to his Harvard colleague Thomas Reed Powell which spans nine printed pages in *ibid*, 294-303. Powell's original letter is even longer (*ibid*, 293) and gives us some sense of the time which contemporary scholars thought it proper to devote to correspondence with colleagues. My extracts from Fuller's correspondence should of course be interpreted in this light.

Speaking more seriously, I am convinced that I was mistaken in assuming that my use of this quotation would not be interpreted as classifying you with the positivists. It was simply a piece of carelessness on my part for which there is little excuse. I am genuinely sorry for it....

Showing an again typical sensibility to what others are saying about him, he notes that

Some one reported to me that you had said of my book, "Everyone knows that it is difficult to distinguish the is and the ought, but why anyone should revel in that fact is more than I can understand."

And he ends in characteristically frank, conciliatory and generous style:

I hope you will forgive any touches of bitterness which may have crept into this letter, for I genuinely do not feel any personal animosity. I cannot feel that because it is obvious to me that your adverse judgment of my book arises from convictions which are very deep with you. Nor shall I let your review obscure a fact that is plain in my own mind, which is that I have derived a great deal from your work; it has shaped my thought in more ways than I could myself enumerate.

Sincerely yours,

Lon L. Fuller⁵⁷

Twenty-four years later, in a set-to with another Cohen and with Ronald Dworkin about their treatment of Fuller at a symposium and in arrangements for a subsequent publication discussing his work, the tone of exasperation at not being properly understood is remarkably similar, though here it is underpinned by a vein of deep indignation at what he sees as procedural injustice. Fuller's complaint consisted in his not having received the critical paper to which he was to reply in due time, for either the seminar or the final publication; in the critics having spoken for too long, hence cutting down the time available to him; in Cohen having failed to respond to his letters; and in the critics having amended their papers after the seminar without giving him adequate opportunity to amend his own rebuttal. The episode begins with a four-page, single-spaced salvo from Fuller to Dworkin, copied to Cohen. Opening - under cover of conciliation - with a rather *de haut en bas* remark that he feels, as the person with most experience in organising such events, some responsibility for the 'misunderstandings' which have arisen, Fuller details all his grievances, culminating in the following explosion:

⁵⁷ Letter from Fuller to Professor Morris R. Cohen, August 6th 1941; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 9.

To my mind you have been somewhat thoughtless in this whole affair, but I do not mean to suggest any plot. All I want to say is that you are now insisting that I hold my copy fast, and introduce no changes of substance, while your close associate is improving his statement and I cannot change my rebuttal to meet his changes without at the same time making new answer to what you said at the meeting and in the U.[niversity] of P[ennsylvania]. Review. This you say would violate our agreement.⁵⁸

He then moves on to specify, in some procedural detail, the terms on which he proposes that the issues be resolved. Of what must have been a longer correspondence, only a handwritten – emollient but firm – note from Dworkin survives; but meanwhile Cohen weighs in on his own behalf:

Dear Professor Fuller

In view of the false statements of fact, and the extraordinary inferences you draw from admitted ones I feel that I must tell you how the affair looks to me. (I shall not speak to your criticisms of Dworkin who, as you know, can take care of defending himself.)⁵⁹

There follows a forensic self-defence against all charges. Fuller's response is a characteristic climb-down:

Dear Professor Cohen

I thought matters had reached the maximum temperature before your letter arrived, but I see I was mistaken.

I'm sorry if I seemed to imply bad faith throughout, and that I made "false statements of fact". [Note the lawyerly inverted commas there...] Things were badly balled up, and the basic difficulty was that no one assumed the role of laying down ground rules.

After reiterating in radically toned down form the sources of his original anger, and asserting his disagreement with Cohen's summary of his views, he concludes

I don't think I am quite so obsessive a character as you depict [sic] me, and I see (perhaps through self-deception) some inklings of an intellectual development that you deny to me. Perhaps in some more leisurely context I shall have occasion to return to the points you make. Meanwhile I hope you bear no rancor, for I certainly do not.

⁵⁸ Letter from Fuller to Ronald Dworkin, June 17th 1965; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 13.

⁵⁹ Letter from Marshall Cohen to Fuller, 24th June 1965; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 9.

Sincerely⁶⁰

In short, one has the impression that Fuller quite relished the odd skirmish with colleagues. This judgment is confirmed by his remark to Robert Summers, in a casual encounter at Phillips Book Store in Harvard Square, where Summers was working to support himself during his student years. Recognising Summers from his jurisprudence class, Fuller said ‘Well, I am tangling with an Englishman in the Harvard Law Review soon. I think he is wrong, and wrong clearly!’ He made similar remarks in the class itself. As Summers puts it, Fuller’s combative disposition gave him ‘a penchant for polemics’.⁶¹

Yet more interesting from the point of view of our retrospective interpretation of his debate with Hart is his correspondence with other scholars about the Harvard Law Review articles. Fifteen such letters appear in the archive, several of them consisting in warm exchanges with people⁶² who had written to express approval of Fuller’s position, and to opine that this was – as one admiring correspondent put it - ‘incomparably the liveliest issue (up to p. 672) your publication has put out in donkey’s years’.⁶³ Fuller’s letters show a real sensitivity to Hart’s attack, while being tempered by ostensible fair-mindedness with a tinge of the backhander about it. Here is a representative example:

Dear Mr. Bayley

Thank you very much for your letter. I was greatly cheered by it. As you recall, Professor Hart’s favourite jibe at his opponents was that they were not clear, that they perceived things dimly, etc. At one time I had in my article a quip about “those high standards of clarity which Professor Hart so rightly prizes and so often exemplifies.” Restraints of international courtesy led me to change “often” to “generally,” thereby forfeiting the whole point of the remark.

I must say I did enjoy Hart’s visit here last year, and the running arguments we have all year long. I’m sure we have learned much from each other.⁶⁴

⁶⁰ Letter from Fuller to Marshall Cohen, 28th June 1965; Cohen replied graciously on June 29th, and there the story ends – though see Fuller’s note to Hart about the symposium, quoted below at fn. 97; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 9.

⁶¹ Personal communication with Robert Summers, 8th August 2008.

⁶² See, for example, letter from Derham to Fuller, 28th April 1958; Fuller’s prompt reply, May 5th 1958; The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 15.

⁶³ Harry Jones to Fuller, 8th March 1958, The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 15.

⁶⁴ Letter from Fuller to Frank S. Bayley, March 3rd 1958, The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 15.

Fuller's interdisciplinary sensibility would have appreciated the following letter from a colleague at Smith College:

When I was at Oxford this past year, I took the opportunity to go to Hart's class on legal theory. At the end of one of the sessions I summed up his position as that of "natural law with minimum content." This he thought rather amusing, but I am not so sure you can put your foot on the biological bottom rung of the ladder and stop there, as he seems to wish to do. My feeling was that greater acquaintance with psychological theory might make him willing to go up another step, but then one cannot be sure.⁶⁵

Typical of Fuller's more combative engagements is his letter to Jerome Hall:

Dear Jerome

I have been asked by the Buffalo Law Review to write a "comment on, or reply to, Professor Hall's criticism of your position." Since I think you are entitled to know why I declined that invitation, I am enclosing a copy of my letter to the Editor-in-Chief.

I know that every writer who is criticized is inclined to think his views have been distorted, and I cannot claim a sufficient introspective objectivity to be sure that I am free of this kind of bias. But frankly, and utterly without rancor, I do think you have given the reader a most distorted view of my writings. Let me give a few illustrations.

Two and a half pages of closely typed examples follow, rounded off with a reference to Cohen's comment about Fuller's revelling in the difficulty of distinguishing between 'is and ought': a jibe which was still rankling 17 years after it was delivered. And the whole is concluded by the typical Fullerian step back from the brink of all out warfare:

Please don't think I am angry. In the first place, I like and admire you and your work too much for that. In the second place, I have got so used to this sort of thing that I have lost the capacity for anger, even when it comes from an unexpected source... Anyway, as you and I both know, most readers are so far from comprehending the issues in a dispute like this that no one can predict their reactions. Probably many readers will shout, "Hurrah! That's my man," when they learn (quite incorrectly) that I urge lawyers to argue rightness and to ignore rules of law.

⁶⁵ Letter from John Chapman to Fuller, 18 September 1958; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 8.

I hope we can get together soon again

Sincerely,

Lon L. Fuller⁶⁶

As in this exchange with Hall, Fuller repeatedly displays acute sensitivity about being understood as a ‘witches’ cauldron’-style metaphysical natural lawyer. Here is another example:

...in all candor, the task of responding to your comments is rendered very difficult for me because the views you attribute to me seem to my perhaps prejudiced eyes so remote from what I said as to interpose an almost insurmountable obstacle to communication. When I read, for example that it is my general position “ that law is not ‘law’ unless it is related to that unchanging omnipresence in the sky”, I can’t help wondering whether you read the article that I wrote... Now, about the Nazi situation. I may be naïve, but I have spent a good deal of time in Germany and I think I know something of the German character. I did not counsel any foolish, self-destructive act after the Nazis were firmly in the seat. Indeed my comments were generally not directed to this problem at all, but cleaning up the situation after the war. Insofar as I made any comment about what might have been done while the Nazis were consolidating their power, I was, I believe, rather cautious. (See the last full paragraph on page 659.)⁶⁷

Intellectually, one of the most intriguing items in the correspondence about the debate is a long letter from the natural lawyer Alexander d’Entrèves. I shall return to this letter in my substantive analysis of the debate. In the mean time, it is worth reflecting on how much Fuller must have enjoyed the following remark, made in the context of d’Entrèves’ argument that the kernel of the Hart/Fuller engagement lay in the question of whether or not, and in what sense, values ground legal obligation:

It is this point about the “ground of obligation” of the law which I would seize upon also in discussing the burning issue of the German predicament. Let me say, by way of preface, how warmly I share your feelings about Hart’s “strokes of the oar”. I confess that in both hearing and reading his strictures

⁶⁶ Letter from Fuller to Jerome Hall, April 28th, 1958; The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 3.

⁶⁷ Fuller to Abram T. Collier, March 31st 1958; The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 15.

on Radbruch and on German “liberalism” I could not help feeling sorry for the incurable smugness of our English friends.⁶⁸

SETTING THE SCENE: HARVARD LAW SCHOOL IN THE MID-FIFTIES, AND FULLER'S AND HART'S PLACE IN THAT CONTEXT

We saw earlier that, in their different ways, both Fuller and Hart were ploughing a lonely furrow in the context of the prevailing jurisprudential climate of Harvard Law School.⁶⁹ Both sought to tread a path between the vices of formalism and what they saw as the excesses of realism and of sociological jurisprudence; both rejected the idea that legal argumentation could be aligned to scientific reasoning; both, albeit in different ways, were committed to theorising the ‘normativity’ as much as the ‘facticity’ of law: Hart through his critique of the predictive nature of both Austin’s positivism and American Realism and through his account of the ‘internal aspect’ of rules; Fuller through his natural law position. Both, moreover, were firmly committed to applying philosophical techniques to law (both Hart and Fuller, for example, were present at the inaugural American conference on legal and political philosophy held in October 1952, and Fuller was the instigator, along with Paul Freund and Henry Hart, of a legal philosophy reading group at Harvard). The extent to which they shared such common causes helps to explain why Fuller reacted so sharply to what he suspected (rightly) to be a lack of intellectual respect on Hart’s part: for Hart, unlike for Fuller, jurisprudence was all about legal philosophy – and Fuller was not a philosopher. But equally important, I suggest, is the way in which the pressures of life as an academic in an elite environment can conduce to feelings of vulnerability even among relatively stable and securely placed people.

Space precludes me from giving anything more than a brief sketch of Harvard at the time.⁷⁰ Both socially and institutionally, Harvard was peculiar in all senses of the word. For a start, its status in American elite culture at the time far exceeded that of any comparable university in Britain. This is summed up by the well known story of a late nineteenth President of Harvard, who asked his secretary to place a telephone call to the then US President, Teddy Roosevelt. When the President picked up the phone, the secretary said, ‘I have the President for you, Mr. Roosevelt’. As well as status, Harvard had wealth unimaginable even to the richest

⁶⁸ Alexander d’Entrèves to Fuller, 8th April 1958; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 13.

⁶⁹ This is confirmed in Fuller’s case by the following comment in Sacks’ obituary (n 33 above, 350): ‘During most of the time that he and I were colleagues on this Faculty, his impact on me and others did not grow out of his convincing us that his answers were right. His success lay in convincing me that his questions were right.’

⁷⁰ My account is drawn from a reading of issues of the Harvard Law Record and Bulletin for the middle years of the 1950s. See also Sutherland, n 34 above, Chapter X of which deals with the Erwin Griswold’s period as Dean from 1946 (at 313 – 59).

British universities. This wealth and status generated a mesmerizing array of extra-curricular activities. In the pages of the Law School Record, reports of improving reading and discussion groups, of debates on important matters of the day such as capital punishment, and of visits from luminaries of both the political and the intellectual worlds, nestle up against news of social and sporting events and of fundraising activities. On 21stth February 1957, Thurgood Marshall lectured on the contribution of political inactivity on desegregation to racial bigotry, while just a week later, a debate about the dangers of radioactive fallout and of nuclear weapons generally was seamlessly followed by one of the regular Faculty Wives' Fashion Shows. Beyond the important phenomenon of the fashion shows, it goes without saying that Harvard was at this time a steadfastly male-dominated institution. Women had been admitted to the Law School for the first time in 1950,⁷¹ but Hart's and Fuller's casual references to 'the Law Review boys' in letters quoted elsewhere in this paper suggest that women still had some way to go to achieve full membership in the School – notably in the minds of its professors. The Harvard Law Record on the 22nd June 1956 reported the birth of a child to a first year student and his wife in the following terms: 'A possible infanticide was averted Sunday night when a son was born to FH Condon'. This Delphic statement was illuminated by a cartoon, by none other than Mrs Condon herself, with the caption, 'If my wife has a ----- daughter, I'll drown her'.⁷² (Notwithstanding the report, it seems unclear whether it was the child or the mother who was at risk).

In terms of the curriculum, the quality of the discussion at Harvard makes the complacent contemporary world of legal education at Oxford seem, frankly, to belong to the Dark Ages. Regular efforts were being made both to give students further writing experience and to broaden the syllabus – often with an eye on what was happening at Yale, where Dean Eugene Rostow was widely regarded as an exemplary innovator in legal education. In a report from the Harvard Law Record on 22nd March 1956, the curriculum changes at Yale are cited as moving towards greater integration of law and social studies in the light of the need for lawyers, in new world order, to think how to improve the administration of justice and methods of economic control. There was a need for 'creative originality in scholarship', and for comparative and international law to help in analysis of policy problems. Just a year later, on 14th March 1957, Yale's law teaching methods were again in the Record's sights, and were described as aiming to give 'broad-gauged, policy-oriented exposure to law, not as a self-contained verbal system, but as a social phenomenon in its full perspective of history, philosophy and social science'. At Harvard, this engendered a general drift towards a more empirical and wide-ranging syllabus – a move which Fuller supported, while he worried about the reductive approach to legal reasoning invited by too ready an embrace of social

⁷¹ See Sutherland, *ibid*, 319-320: as Sutherland notes, Harvard Law School had by this time been home for many years to one of the country's leading women scholars, Eleanor Glueck, and invited Soia Mentschikoff as visiting professor a couple of years before admitting women as students.

⁷² Harvard Law Record, 22nd June 1956, 4.

science approaches, and about the amoral instrumentalism which seemed to be a side-effect of the continuing reaction against formalism.

In the Record, Fuller described his second year Jurisprudence course as introducing students to the 'ends of government: In examining the premises underlying the legal system, the student should gain an overview of the system's aims and its relation to the whole life of man in society'.⁷³ Fuller also referred to his commitment to relating the course to the work of practising attorneys, by tackling 'problems of human organisation that run through all of a lawyer's work', and not confining student's attention to appellate decisions, which in his view represented failures of planning and negotiated problem solving rather than the epitome of the legal form.⁷⁴ But this, he acknowledged, was a difficult task given the varying backgrounds of the students: 'As I see it, the whole of legal philosophy should be animated by the desire to seek out those principles by which men's relations in society may be rightly and justly ordered'. He ruefully reported scepticism on the part of some of his students, who were inclined to the view that 'the *mores* can make anything right and anything wrong'. There is, of course, a large clue here to Fuller's hostility to positivism: already isolated amid social science oriented teachers who saw their task as overcoming students' moral dogmatism, Fuller realized that his own course, which was explicitly concerned with justice, went against the grain. But Fuller himself was a contributor to the broadening of the syllabus even beyond his jurisprudence course. For example, in the year of Hart's visit, he was teaching a seminar on the relationship between freedom and planning which pondered among other things the question of whether markets could exist under socialism. In his views on the law curriculum we see clear evidence of what were perhaps Fuller's most enduring and innovative intellectual preoccupations: his interest in the institutional form – or, to be more precise, forms - through which social governance realizes itself; his perception of the links between distinctive procedural forms and substantive outcomes; and his view of the dependence of law upon informal social practices.⁷⁵ This interest went back to the very earliest part of his career, and it is strongly reflected in later commentators' assessment of Fuller's contribution: indeed the title of Winston's edited collection of Fuller's essays – *The Principles of Social Order* – is drawn from a work which Fuller was planning at precisely the time of his debate with Hart, and in which he hoped to develop his ideas about both the inextricable links between

⁷³ These and the following quotations are from the Harvard Law Record for 28th March 1957.

⁷⁴ See Griswold, n 33 above, 352.

⁷⁵ See G. J. Postema, 'Implicit Law', in Witteveen and van der Burg, n 5 above, 255: see in particular p. 256 and 268: '[L]aw cannot hope to facilitate self-directed social interaction unless it remains substantially congruent with and integrated into ordinary social practices and conventions in the community it serves. Fuller's conclusion, then, is that enacted, pedigree-validated, authoritative norms ("made law") represent only the surface phenomena of law' Law has a social depth which we must recognize if we are to understand adequately the nature and modes of functioning of these salient surface phenomena.' Fuller's view of law's dependence on its social environment also appears to have been a focus of his course with David South: see n 49 above. It is interesting to speculate on whether this insight inhibited his willingness to raise social science questions in the debate with Hart: the stability of law in the Nazi era raises questions about the fit between this sociological and the natural law dimensions of Fuller's views.

institutional means and substantive ends and the importance of law as a form of ‘social architecture’.⁷⁶

The broad range of Fuller’s interests is strongly reflected in the surviving correspondence. Whereas the bulk of Hart’s intellectual correspondence was with philosophers, Fuller also had an extensive correspondence with sociologists, psychologists and economists. In 1965, a sociologist from MIT wrote to him about *The Morality of Law*:

as a sociologist interested in the “empirical import” of ideas and especially concerned with problems of procedural due process, I found your analysis of legality immensely enlightening. It would easily lay the groundwork for significant comparative and historical research.⁷⁷

In a comment which illuminates the close relationship between Fuller’s theory and the phenomenological approach in sociology, he continued:

As you probably know, many sociologists are philosophically Janus-faced and I might even say schizophrenic: they claim that in theory and research they are positivists, eschewing normative and teleological propositions and seeking to discover uniformities and mechanisms about social life; however, as purposive human beings in a world bursting with social problems, they, too, are concerned about the prevention of war and the elimination of tyranny, poverty, and injustice. Notwithstanding their positivist stance, the problems they chose to work on often betray a variety of value judgments... ‘From an “empirical” and “behavioral” point of view - - if you will pardon these well worn terms - - a social scientist can study a legal system both as a “purposeful enterprise” and as a “manifested fact of social power”. Further more, from a sociological standpoint, the concept of law can be stretched to include the internal systems of rules regulating the behavior of members of non-governmental organizations - - what I speak of as “private legal systems” in my essay in *Law and Sociology*.

In the light of this sociological position, one might wonder at Fuller’s apparent lack of attraction to some form of synthesis with Hart’s position: while Hart’s ‘external aspect’ might capture the reality of ‘law as a manifested fact of social power’, the ‘internal aspect might capture the reality of law as a ‘purposeful enterprise’. But of course Fuller was committed to that ‘purposiveness’ being morally driven in quite a robust sense: his reputation as a natural lawyer is, after all,

⁷⁶ The book was never completed, but parts of it appear in Winston (ed.), n 5 above, as Winston explains on page 15: see also his introduction (at 26–33) for a discussion of the procedural and problem-solving orientation (at 31) of Fuller’s scholarship. See also n 2 above, Chapters 6-10; Witteveen and van der Burg n 5 above, Part IV.

⁷⁷ William M. Evan to Fuller, July 15th 1965; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 16.

not undeserved, and both moral and structural/functional concerns pervade his work throughout his career.⁷⁸ This sort of linkage is nicely illustrated by his correspondence with Erving Goffman. Fuller wrote to Goffman trying to 'inveigle' him into reading 'three pieces of mine' (including 'Irrigation and Tyranny' and his draft paper posthumously published as the influential 'The Forms and Limits of Adjudication'⁷⁹). His letter makes it clear that he was drawn to Goffman's work on social roles and their attendant responsibilities, but was puzzled about how to apply them to the role of arbitration, to which he had given so much practical and academic attention over the last quarter century:

Taking the "morality" out of this discussion (in 'Irrigation and Tyranny'), the idea remains that the doing of a given social task may be made impossible, or awkward, by the unavailability of an apt role for its discharge. There are suggestions of this idea in the literature, especially in anthropology, but I know of no full-blown, explicit discussion of it.... The problem I am concerned with is this: Sociological studies of role tend to assume that the responsibilities that go with a role are imposed on the performer from outside himself; "social norms" tell him what he should do or not do. Now this conception fits very badly the role of the arbitrator as it appears to him. He does not consult social norms, for there really are none. He must take account of the expectations of those who submit their cases to him... In short, he has to find his own way: he must analyze the implications of his job and carve the job out so that his performance of it will not cause injury and confusion. This idea, I must confess, I find nowhere even hinted at in the literature of sociology.

Unless Fuller is talking specifically about arbitration, this is a strange comment given the pre-occupation of functionalist sociology with just such an issue. But it is perhaps explained by the concluding part of his letter. Going on to register his bewilderment that the moral aspects of such roles do not register in the sociological debate, he wonders:

⁷⁸ Cf. F. Schauer, 'Fuller on the Ontological Status of Law', in Witteveen and van der Burg, n 5 above, 124, at 125: 'Because Fuller is simultaneously understood both as a proponent of (a version of) natural law and also as someone very interested in the seemingly nonnatural and pragmatic topic of institutional design, one possibility is that Fuller's interest in law was multifaceted, encompassing questions of high abstract theory as well as questions of "low" institutional design. But Fuller's own statements belie such an interpretation. Rather, he seems to have believed that there was some important unity of this thought about institutional design and his thought about the essential nature of law'. Like Schauer, while entertaining doubts about whether this unity can be established, I think it is impossible to assess Fuller's arguments without understanding his belief in it. This distinctive mixture of concern with morality and institutional design pervades the whole of Fuller's career; his focus on morality was not displaced by a growing concern with institutional design: rather, the two concerns went hand in hand. I should note here that I have deliberately chosen to avoid using the word with which Fuller indicated this aspect of his enterprise – 'economics' – on the basis that such currency as the term had at the time Fuller was writing has since evaporated, and that my interpretation can readily be cast in more generally used language. See also n 50 above.

⁷⁹ n 19 above.

Can this be because of a moral dread of talking or thinking about issues that may be called “moral”? But there seems no taboo against a supposition that moral standards are imposed on the role-occupant by something called “society” which forms those standards by procedures not only not examined, but not even hinted at. Would not a more realistic appraisal seek to understand the job, and its “moral” demands, as it looks to the man who has to perform it and who has to draw his guidance from his own insight, powers of analysis and sense of responsibility?⁸⁰

While Fuller’s interest in the role of extra-legal as well as legal norms on legal decision-making motivated the exchange with Goffman, his deep preoccupation with the structural distinctiveness of different decision-making processes brought with it an interest in the emerging field of public choice and game theory. This is evident from an interesting correspondence with the (later) Nobel Prize-winning economist James Buchanan and his colleague Gordon Tullock in 1964 – a correspondence which gives a sense of the breadth of Fuller’s interests. Yet in this exchange, Fuller’s bewilderment and even anger at the absence of what he saw as an appropriate moral dimension to the social sciences, so clearly echoed in the exchange with Goffman, drops entirely out of the picture, in favour of an agenda apparently squarely within the four corners of what we might call positive social science:

Dear Professor Buchanan:

I have been reading with great pleasure and profit *The Calculus of Consent*. I had previously read the works of Arrow, Downes and Black and was therefore generally familiar with the approach underlying your book. But you and Tullock have developed it greatly...

For some years now I have myself been working on a problem that is a close cousin to those which are discussed in *The Calculus*. I have an unpublished and rather unsatisfactory article entitled, *The Forms and Limits of Adjudication*. What I am trying to do in that article is to analyse the kinds of problems that are fit material for solution by adjudicative forms. Just as economists have examined what can and what cannot be done through free contract and open markets, and “fence-row cultivators” have analysed what can and cannot be done through elections, as a lawyer I have raised the same sort of question about adjudication. This question goes beyond the ordinary limits of domestic law and extends to labor and commercial arbitration, to international tribunals and — above all — to administrative tribunals and agencies. So far as I know I

⁸⁰ Fuller to Erving Goffman, October 26th 1966; The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 12.

am the only scholar who has attempted to tackle the problem in this broad form.

I am not clear whether matrices such as those used in game theory would be useful in dealing with this sort of problem. I hope soon to have a talk with Tom Schelling about it.... Incidentally, I have a book coming out in the fall entitled *The Morality of Law* which, in its final chapter, deals at some length with problems of institutional design in the law.⁸¹

Buchanan replied promptly:

Dear Professor Fuller...

I enjoyed reading the noted parts of your paper on collective bargaining. And I can appreciate the relationship between your analysis and our own. Let me indicate my interpretation of this relationship. You are trying to examine, and ultimately, to array the various tasks that are suitable for processes of adjudication. We are trying examine and to array the tasks that might be suitable for either voluntary market adjustment or collective action, by which we really mean voting. Look first at the simple yes-no or either-or issue. Here adjudication can work, as you say, and so can ordinary majority rule. But no mutual adjustment, or interaction process can. Now let us change the model slightly so that we can include two, not one, either-or issue. [sic] Here some possible mutual interaction can enter into the analysis, to the extent that intensities differ. Adjudication can still work reasonably well, but some mutual adjustment may be more efficient. Then, as we increase the number of separate issues... we approach more and more to the clear conclusion that some form of mutual interaction, be this log-rolling through political process, or a form of market, is more efficient than adjudication by third parties who cannot "read" intensities of preference.

Tullock and I ...want to work out, if possible, the formal conditions for "optimality" or "efficiency" that are possible when a group must simultaneously deal with n [multiple] issues, not a simple issue as most political analysis assumes. Note that this is really our version of what you, after Polanyi, call polycentric tasks.⁸²

As the letter to Goffman shows – and for reasons which I have neither the biographical nor the historical information to unearth - Fuller's concern to find not merely a practical or functional but also a moral logic to decision-making

⁸¹ Fuller to James M. Buchanan, January 8th 1964; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 2.

⁸² Buchanan to Fuller, 13th January 1964; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 2.

processes was something which ran very, very deep with him: the analytic separation which Hart found so convincing had no appeal to him whatsoever. But how was this moral concern to be reconciled with his interest in institutional forms and their suitability to the resolution of problems of a particular structure which underpins his exchange with Buchanan? That this was a persistent concern for Fuller is reflected in Winston's judgment that his 'principal concern is...the discovery of natural laws of social order, that is, the compulsions and opportunities necessarily contained in particular domains of objective social reality, in certain ways of organising men's relations with one another'.⁸³ But when Fuller thought in terms of institutional design, his concern was not merely with optimality in Buchanan's and Tullock's sense: rather – like Ronald Dworkin – he thought of particular institutions and processes as having 'integrity' in the sense not only of a distinctive logic which lent itself to the efficient resolution of certain kinds of problems, but also of its serving certain kinds of values: reciprocity, fairness, 'avoiding injury and confusion' and so on.⁸⁴ In the grip of a powerful impulse to synthesise his passionate moral concerns and his interest in and grasp of the dynamics of institutions, he was drawn to craft a natural law theory out of the unlikely material of legal processes.

THE ANATOMY OF THE DEBATE: PHYSIOLOGY ON THE DISSECTING TABLE?

Joel Feinberg described Fuller's demeanour at the Holmes lecture which opened 'the debate' as that of a 'hungry lion': a stance which is more than explained by the sense of incomprehension which Fuller felt from his anti-formalist, sociological colleagues and – perhaps yet more woundingly – from Hart: a man who asserted the genuine normativity of law, yet nonetheless derided the natural law position. Hungry lions, however, are presumably not best placed to make wise strategic decisions about the timing and object of their hunt for food. And my suggestion in this section is that, in selecting Hart as his prey, by demanding a right to reply to the Holmes Lecture, and by using it as a platform from which to proclaim a natural law position, Fuller was risking an encounter in which his credentials as a legal philosopher was bound to be the primary focus, and in which he found little opportunity to draw on his broader expertise and interests.

Let us first refresh our memory of the contours of the debate as it took place. Hart used the lecture to map out his distinctive vision of legal positivism. In particular, he defended analytical jurisprudence in the positivist tradition deriving from Bentham and Austin against the charges laid by the two groups of legal

⁸³ Winston (ed.), n 5 above, 12.

⁸⁴ As Neil Duxbury has pointed out to me, one problem for Fuller was his lack of appreciation of the ways in which each of these values might conflict with one another.

theorists whom he saw as its main antagonists at Harvard. He rejected the charge, current in much American Realist jurisprudence, that legal positivism provides a mechanistic and formalistic vision of legal reasoning, with judges simply grinding out deductive conclusions from closed sets of premises. And, as against the claim of modern natural lawyers – notably Fuller - he defended the positivist insistence on the lack of any necessary, conceptual connection between law and morality, and denied that this betrayed an indifference to the moral status of laws. Indeed, he claimed that there are moral advantages to making a clear separation between our understanding of how to determine what the law *is* and our criticisms or vision of what it *ought to be*.

This underlying disagreement with Fuller was thrown into relief, given poignancy and made immediately accessible by the fact that it took place in the shadow of widespread discussion of the legitimacy of the Nuremberg Trials, and centred on a vivid example. This was the case of the 'grudge informer': a woman who, during the Third Reich, had relied on prevailing legal regulations to denounce her husband as a political dissident. After the war, the woman was charged with a criminal offence against her husband. The question, as Hart presented it, was whether her legal position should be governed by the law prevailing during the Third Reich – a law now regarded as deeply unjust; or by the just law prevailing before and after the Nazi regime.⁸⁵ In short, the case raised in direct and striking form the question whether law's validity is dependent on its credentials as just or otherwise morally acceptable. Hart defended the view that since the woman had committed no crime under the positive law of the time, the only legally valid way of criminalizing her would be by passing a piece of retrospective legislation. Although this was, on the face of it, an unjust solution, it might nonetheless be the morally preferable thing to do: the lesser of two evils. And this solution had the distinctive advantage that it avoided blurring the distinction between 'what the law is' and 'what the law ought to be'.

Perhaps awkwardly for Fuller's argument that the positivist position sidelined crucially important moral issues, at the foundation of Hart's argument lay not so much an analytic as a substantive moral claim. It is, according to him, morally preferable, more honest, to look clearly at the variety of reasons bearing on an ethically problematic decision rather than to close off debate by dismissing certain considerations as irrelevant: arguing that something never was the law because it ought not to have been the law. There is a liberal aspect to this argument: it is up to citizens to evaluate the law, and not merely to take it that the state's announcing something as law implies that it ought to be obeyed. But there is equally a utilitarian strand to Hart's position: an implication that things will turn out better, in terms of resistance to tyranny, if citizens understand that there are always two separate questions to be confronted: First, is this a valid rule of law? Second, should it be obeyed? Predictably, no evidence was adduced in support of the

⁸⁵ As H.O. Pappé argued in an early commentary on the debate ('On the Validity of the Judicial Decisions in the Nazi Era' (1960) 23 *Modern Law Review* 260) and as David Dyzenhaus has more recently confirmed (n 12 above), Hart's was in fact a simplistic reading of the legal issues in the case.

second, empirical aspect to his argument. But it had a piquancy. This was not only because it gave the lecture a moral dimension but because a famous German jurist, Gustav Radbruch, had argued influentially that the experience of the Third Reich should turn us all into natural lawyers. The positivist position, he argued, was linked to the unquestioningly compliant ‘might is right’ attitude widely believed to have assisted the Nazis in their rise to power.

One can hardly imagine an intellectual morsel more tempting to a hungry natural law lion. Fuller, duly picking up Radbruch’s claim, and weighing in in his defence, argued that the Nazi law under which the woman had acted was so evil that it could not even count as a valid law. In his view, law – the process of subjecting human conduct to the governance of rules – was informed by an ‘inner morality’. Unlike the theological traditions, Fuller’s was not a dogmatic, substantive natural law position: rather, it was a position which built out from certain valued procedural tenets widely associated with the rule of law. These included the requirements that laws be coherent, prospective rather than retrospective, public, possible to comply with, reasonably certain in their content and general in their application. It was this universal ‘inner morality of law’ which provided the necessary connection between law and morality, and not the ‘external’ or substantive morality which infused the content of law in different ways in different systems. The ‘inner morality’ guaranteed a law worthy of ‘fidelity’, underpinned the existence of an obligation to obey the law, and marked the distinction between law, which addresses its subjects as responsible moral agents,⁸⁶ and arbitrary power, which does not. And, Fuller claimed, Hart’s own position could not consistently deny some such connection between law and morality. For in his argument about the open texture of language, Hart claimed that judges deal with ‘penumbral’ cases by reference to a ‘core’ of settled meaning. This, Fuller argued, suggested that legal interpretation in clear cases amounted to little more than a cataloguing procedure. Yet even in a very simple case such as a rule providing that ‘no vehicles shall be allowed in the park’, the idea that judges can appeal to a ‘core’ meaning of the single word, ‘vehicle’, was problematic. In deciding whether a tricycle or an army tank put in the park as a war memorial breached the rule, the core meaning of ‘vehicle’ in ordinary language would be next to useless in judicial interpretation: rather, judges would look to the purpose of the statute as a whole. Anticipating in important respects the work of Ronald Dworkin, Fuller argued that these questions of purpose and structure would inevitably introduce contextual and evaluative criteria in the identification of the ‘core’.⁸⁷ But Hart of course, in the debate and beyond it, took strong objection to Fuller’s central assertion: namely that law, understood as the process of subjecting human conduct to the governance of rules, was invariably informed by moral

⁸⁶ I draw this aspect of Fuller’s claim, which reveals an important continuity between his and Hart’s political visions, from K. Winston’s ‘The Internal Morality of Chinese Legalism’ (2005) *Singapore Journal of Legal Studies* 1, 9.

⁸⁷ On Dworkin’s debt to Fuller, see n 2 above, 14.

purposes.⁸⁸

On the specific point about adjudication, and about the illusory quality of the 'core meaning' of legal terms, on which he is widely viewed as having scored some significant points over Hart, Fuller was on Hart's weakest, and his own strongest, ground: the elaboration of theoretical conceptions of law which take seriously its distinctive institutional form and processes. The main preoccupation of positivist analysis is to provide an 'anatomy of law':⁸⁹ i.e. to explain, as Joseph Raz put it in his first book, how to identify the 'momentary legal system':⁹⁰ all the norms valid in one system at any one point in time. By contrast Fuller's own concern was with the living 'physiology of law': with the institutional processes through which human conduct is subject to legal governance. Hart's lack of interest in law's institutional form – an interest which, significantly, finds some expression in the working notebook for *The Concept of Law*, but which has more or less disappeared in the book itself⁹¹ – made it extremely difficult to defend himself against Fuller's attack, or indeed against Ronald Dworkin's later account of adjudication.⁹² In the absence of any sophisticated account of the judicial role, it was difficult for Hart to carve out a path between a formalist vision on the one hand and a vision of broad discretion implying, in effect, judicial legislation on the other.

As we have seen, Fuller, by contrast, had a long-standing and deep-rooted interest in adjudication as an institutional form: adjudication lent itself readily to the resolution of certain kinds of issues, while those embedded in practices characterized by 'heavy and complex interdependence'⁹³ – marriage, corporations, public housing – lent themselves rather to resolution through mediation. The nature of this interest – best reflected in his posthumously published article 'The Forms and Limits of Adjudication'⁹⁴ – is nicely illustrated by his correspondence with Buchanan and Tullock referred to in the last section. But a paper articulating a natural law critique of positivism was not a good vehicle for showcasing these broader aspects of Fuller's ideas: his subtle and differentiated vision of forms of legal institution, and his sense that institutional design, in law as elsewhere, made a difference to outcome; that certain forms of institutional process lent themselves to the effective resolution of particular sorts of issue.

Of course, Fuller was not alone among contemporaries in seeing law and legal interpretation as informed by substantive purposes: the 'process school' represented by his colleagues Henry Hart and Albert Sacks also accepted this proposition. But Fuller went one important step further than his process school colleagues in arguing that there was particular reason to think that, when certain procedural forms were respected, those purposes would be morally attractive

⁸⁸ Or indeed by any purposes beyond the very thin conception of social survival or order, sketched in his later elaboration of the 'minimum content of natural law': *The Concept of Law*, n 17 above, Chapter IX.

⁸⁹ As Summers puts it: n 2 above, 31; see also text at note 32 above.

⁹⁰ J. Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1970).

⁹¹ See n 3 above, Chapter 9.

⁹² R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

⁹³ See Winston (ed.), n 5 above, 125.

⁹⁴ n 19 above: n 19 and 48 above give details of the decades-long genesis of this article.

ones. His position was therefore vulnerable to the objection that while the inevitably purposive aspect of law may imply a certain analytic link between means and ends, between is and ought, this link is not necessarily a moral one. But as we have seen, Fuller was determined to bring his moral and his procedural concerns together: for him, the (absolutely persuasive) insights that form was inseparable from substance – in the sense that form helped to shape outcomes – and that procedural forms are often shaped by values, therefore became, in the context of the debate, the (logically dubious) proposition that, analytically, means and ends, is and ought, are inseparable. This further led him into doubtful empirical claims, with the persuasive insight that certain forms may conduce (under certain circumstances) to the realisation of certain values, or that failure to respect certain procedural forms entails distinctive moral wrongs, being overstated as a claim about the likelihood of certain procedures *ensuring* morally good outcomes at least over time – as in the claim that conformity with the procedural tenets of the ‘inner morality of law’ would tend to ‘work the law pure’ in a substantive sense. Fuller’s interest in institutions, along with his interest in economic and social theory and in anthropology, gave him a keen sense of the way in which institutional forms enhanced certain kinds of governance – a sense which finds only crude expression in the debate, in the form of the contrast between law and managerial direction. But while one can sympathise with Fuller’s view of the importance of the evaluative commitments of actors within institutions, to reduce this to a conceptual proposition about the inextricability of is and ought was both to undersell his own arguments and to invite – as he had already discovered in 1941 – philosophical contempt.

It is interesting to compare Fuller’s formulation of the ‘procedure/morality’ nexus in the debate with Hart with his more institutionally focused statement of it in ‘Irrigation and Tyranny’⁹⁵ seven years later. Addressing himself to ‘certain fundamental problems of method and of theory that are shared by law, sociology, economics, political science, and social psychology’,⁹⁶ and in the context of an argument which questions a supposed link between irrigation and tyranny, Fuller raises the question of whether the existence of certain procedural forms would make a difference to the chances of the power inherent in systems of irrigation being abused. For example, where governments levied an irrigation tax which took the form of a share of farmers’ crops, this arrangement ‘would seem to create an overlapping of interest between the government and the farmer that might put some brake on tyrannical abuses.’⁹⁷ Fuller further argued that values like reciprocity, embodied in established procedures, could act as constraints on power: “informal” or “real” power is subject to intrinsic limitations even in its most direct and brutal manifestations... the holder of power will find himself

⁹⁵ n 26 above.

⁹⁶ *ibid*, 1021.

⁹⁷ *ibid*, 1025.

hedged in by a network of reciprocities that trace the limits of his control.⁹⁸ So far, even an economist would find little to object to in the argument. But of course, Fuller wanted to push the argument further; and in a trenchant sideswipe at ‘converging streams of ethical philosophy’⁹⁹ ranging from Kant through utilitarianism to emotivism and non-cognitivism in ethics, he proclaims the idea of an ‘institutional or procedural morality’ and enjoins philosophers to enrich their abstractions with the ‘simple picture of human beings confronting one another in some social context, adjusting their relations reciprocally, negotiations, voting, arguing before some arbiter, and perhaps even reluctantly deciding to toss for it...’. His conclusion that

The development of moral insight through participation in institutional procedures is nowhere more clearly revealed than in the negotiation of complex agreements, such as those involved in treaties or collective bargaining contracts. The good negotiator in such a case must not only make a genuine effort to understand the declared aims of the opposing party, but must be capable of some sympathetic participation in those aims¹⁰⁰

is more controversial, particularly if we understand it – as it is clear Fuller means us to do – as a conceptual as well as an empirical claim. But even this falls well short of the generalised propositions about the nature of law which underpin his reply to Hart.

Perhaps more puzzling is Fuller’s failure to drive home the advantage that his sophisticated view of law’s institutionalised forms might have been expected to give him on the jurisprudential question of what distinguishes law from other systems of social rules such as those of a club, a sport or an organised religion. While Hart attempted in *The Concept of Law* to delineate some basic differences between law and morality as systems of rules, his account of law’s distinctiveness from other systems of social rules depends – leaving aside the distinction between primary and secondary rules, which applies just as readily to other such systems – on the distinctiveness of legal sources encapsulated in the ‘rule of recognition’. Indeed it is hard to see how he could have gone much further than this, given his lack of interest in law’s institutional form. As d’Entrèves put it, pondering the relationship between effectiveness, validity and existence, Hart’s article was far from clear on ‘What, in other words, is the ultimate distinguishing feature that makes a law a “law”...’.¹⁰¹ Fuller, surely, could have provided a far richer account

⁹⁸ *ibid*, 1028.

⁹⁹ This and the following quotation, *ibid*, 1033.

¹⁰⁰ *ibid*, 1033-4.

¹⁰¹ D’Entrèves continued (n 68 above): ‘For my part, I must confess that, *pace* Kelsen, I have never been able to understand how a law can be “valid” unless it is effective, nor how it can be “effective” unless it is accepted...’.

This in d’Entrèves’ view linked with another topic which might be seen as the core issue of natural law theory, and on which both Finnis and Dworkin were to cause Hart considerable unease in later years, yet which the debate skirted around: that of the grounds on which laws are accepted as valid, and become

of law's distinctiveness; but in sticking closely to the terrain as Hart had delimited it in the Holmes lecture, this important jurisprudential issue more or less dropped out of view in the debate.

In short: whatever the merits of his argument, Fuller's attempt to build a natural law theory out of his longstanding interest in, and grasp of, the shaping power of procedures was doomed, in the tradition of analytical jurisprudence, neither to satisfy more substantive natural lawyers nor to appease legal positivists.

THE END OF THE AFFAIR

As the immediate fall out of the debate settled, the relationship between Hart and Fuller improved, thanks in part to the activities of the student editors of the Harvard Law Review (about which, by the way, there are a number of amusing blogs on the internet...¹⁰²). In the context of this more friendly atmosphere, Fuller took Hart's robustly critical review of Fuller's *The Morality of Law*¹⁰³ - more or less – on the chin:

I was delighted to see so sharp a joinder of issue... All I can say of Miss Purpose is that the Old Girl still looks good to me. One of her enduring

effective. In d'Entrèves' account, we see a genre of broad historical speculation which neither Fuller nor Hart was prepared to hazard:

'It is this point about the "ground of obligation" of the law which I would seize upon also in discussing the burning issue of the German predicament...The real cause of the distortion of the "positivistic philosophy" in Germany seems to have escaped you. In my view it was not positivism as such and the slogan "law is law" that caused all the trouble. Positivism prevailed in Italy too, and yet it would be absurd to make it responsible for Fascism. I can remember more than one case when "fidelity to law" proved to be an efficient safeguard of "human freedom and dignity" in this country [i.e. Italy]. What the Germans did was to see a particular "value" expressed in that slogan, taking it as an adequate, a sufficient, and indeed a metaphysical ground of obligation of law itself: it was as the emanation of "the state" that positive law became to them something sacred. It may well be that behind such developments lay deep "ideological" predispositions: Hegelianism seems to be endemic in Germany as Machiavellism is in Italy. Yet such "theories of power" have worked in opposite directions in the two countries. Machiavelli has led the Italians to a pessimistic, indeed to a cynical attitude towards the State and politics. Hegel has taught the Germans to rever [sic] power as such and to see in the State the highest ethical value.

The question, then, as it seems to me, is not one of one kind of "positivism" against another... It is a question, rather, of the choice between one ground of obligation and another, between the values that make law a "good" law thereby ensuring its "acceptance"... Perhaps, from a strictly legal point of view, you and Hart are right in feeling uneasy with the medicine adopted, the recourse to a "higher law" to declare Nazi laws null and void, and actually to assert (retrospectively) that they ought never to have been accepted as valid. Yet, as a historian, I think I can see some justification in this kind of solemn act of atonement. At any rate, you will forgive me for saying that this seems to me to have been a better course than the one which you and Hart would have preferred, the recourse to some form of retroactive legislation. This I believe would have been a truly "unethical" remedy, for it would have struck at the root of one of the most fundamental principles not only of the *Rechtsstaat* alone, but of all modern "free" and "liberal" society, the principle *nulla poena sine lege*. Why did you indulge in this after-thought after having so clearly indicated the correct solution on p.660, first paragraph?' Alexander d'Entrèves to Fuller, 8th April 1958; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 13.

¹⁰² See e.g. volokh.com/posts/1155511746.shtml.

¹⁰³ 'Book Review of *The Morality of Law*' (1965) 78 *Harvard Law Review* 1281.

charms is that she is a very complex creature indeed, subject to unpredictable moods of surrender and withdrawal. I believe deeply in her without pretending that I really understand her. So the high romance of which you complain will probably continue despite your thoughtful warning that our liaison promises trouble¹⁰⁴

From now on, the two men's correspondence settled into a friendly, co-operative and often jocular pattern – a transition assisted not only by Fuller's helpful intervention with the Law Review but, perhaps, by their shared sense of bewilderment at the rapidly developing critique which both were experiencing at the hands of Ronald Dworkin. Fuller for example wrote to Hart about the symposium which had caused so much trouble between him, Cohen and Dworkin,¹⁰⁵

I thought you might be interested in this symposium on my book. As you will see, Dworkin takes a new tack – vague and self-contradictory laws can do no harm because they are not laws at all. The absurdity of this view – *reached abstractly and outside any institutional context* – suggests to my prejudiced mind doubts about the whole attack on my conception of legal morality.¹⁰⁶

They exchanged views about this and about plans for the wider dissemination of jurisprudential ideas in forms accessible to students;¹⁰⁷ they quizzed each other for references (tellingly, Hart seeks Fuller's help in tracing a quotation from Nietzsche, while Fuller seeks Hart's for one from Bentham).¹⁰⁸ Fuller could never resist the odd dig at Hart:

In the current issue of the *Journal of Legal Education* there is a review by a man who has studied under both of us. At this distance in time it is a little hard for me to estimate how much damage my course did to him, but the review seems to me to reveal the truly devastating effects on a mediocre mind of too much exposure to ordinary-language philosophy.¹⁰⁹

¹⁰⁴ Fuller to Hart, 3rd February 1965; The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 14.

¹⁰⁵ Published in the *Villanova Law Review*: see references at n 9 above.

¹⁰⁶ Fuller to Hart, October 18th 1965; The Papers of Lon Fuller, Harvard Law School Library, box 3, folder 14: the emphasis is mine, and is designed to draw attention to the fact that Fuller's way of approaching questions of legal theory – unlike either Hart's or Dworkin's – was contextual rather than abstract.

¹⁰⁷ See for example Fuller to Hart, April 27th 1964; Hart to Fuller, May 5th 1964; The Papers of Lon Fuller, Harvard Law School Library, each from box 3, folder 14.

¹⁰⁸ Hart to Fuller, 6th February 1965; Fuller to Hart, February 17th 1971; The Papers of Lon Fuller, Harvard Law School Library, each from box 3, folder 14.

¹⁰⁹ Fuller to Hart, October 18th 1965; The Papers of Lon Fuller, Harvard Law School Library; box 3, folder 14.

But the tone remained fundamentally friendly. The surviving correspondence peters out in 1971 – not long before Fuller’s retirement, during which his hitherto robust epistolary output was diminished by his rapidly declining health. There is a tinge of nostalgia in Fuller’s side of this last exchange:

Are you by any chance going to the World Congress on Legal and Social Philosophy (grandiose title!) [in Brussels]... I hope so, for I would most enjoy another get-together with you.

Sincerely, Lon Fuller¹¹⁰

No, I’ll not be in Brussels in September – but almost certainly at a conference in S. Francisco about that time. Some sociological-cum-philosophical concern with criteria of responsibility. If you pass through Oxford and/or London in summer do let me know. I’d love a talk. Best wishes, Yours, Herbert Hart.¹¹¹

So ends the story of their relationship. Their work, of course, continues to shape contemporary jurisprudence to a quite remarkable degree. But the philosophical paradigm which Hart made so influential dominates the jurisprudential field; while the broader interests which Fuller enjoyed have yet to find an equally central place on the agenda of legal theory.¹¹² Perhaps we should attribute this to Fuller’s failure to put his procedural work into the form of a fully synthesised monograph or series of articles in his lifetime.¹¹³ Or perhaps we should attribute it to his reputation having become so inseparably intertwined with the debate with Hart. While trusting that the extraordinarily prosperous fortunes of the Hart-Fuller debate will continue, I venture to hope that Fuller’s vision of a theorised legal scholarship which engages in a serious way with law’s institutional forms, and which draws on the insights of other disciplines in doing so, will experience the greater prosperity which it merits in years to come.

¹¹⁰ Fuller to Hart, February 17th 1971; The Papers of Lon Fuller, Harvard Law School Library; box 3, folder 14.

¹¹¹ Hart to Fuller, March 23rd 1971; The Papers of Lon Fuller, Harvard Law School Library; box 3, folder 14.

¹¹² Fuller’s contracts scholarship, and to some extent his work on legal processes, have on the other hand had a significant impact, particularly on American legal scholarship. This broader legacy is strongly reflected in the most recent collection reappraising his work: see Witteveen and van der Burg, n 5 above.

¹¹³ William Twining has summed up Hart’s career as that of ‘a luminous mind with a narrow agenda’ (n 3 above, 361). It would be unfair to Fuller to suggest that the opposite applies to him; but it would perhaps not be far off the mark to suggest that his was an imaginative mind whose published output was significantly, and not entirely positively, affected by the occasionally unmanageable ambition of his agenda.