STANDING TALL

Hommages à Csaba Varga

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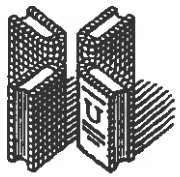

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Lon Fuller's Legal Structuralism

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Anglo-American general jurisprudence remains preoccupied with the relationship of legality to morality. This concern addresses two different questions. First, are moral considerations incorporated into what jurists take as "legality"? And second, are legal units binding independent of the moral content of the units? Both questions are usually addressed separately and, of recent years, with a greater weight attributed to the first. More often than not, jurists have concentrated on the nature and identity of law as distinguished from something called "morality" without sufficient attention to what is signified by "morality". Lon Fuller's works suggest that legality is related to two different senses of morality and neither is shared by contemporary interpreters of Fuller. For Fuller takes morality as hanging upon the territorial-like boundary of a presupposed legal structure. Fuller's structuralist theory of law offers the opportunity to better understand the identity and nature of binding laws. I shall privilege several elements of his theory: the relation of legal units to a structure, the nature of a structure, the constituents of a structure (territorial space, its pillars and its matter); the forms of the legal structure; the centrifugal and centripetal structures, the structure and traditional theories of morality, the role of the legal official in a structure, and why the internal knowledge in the structure is binding.

Fuller relates legality to two different senses of morality. Both senses of morality depend upon the judiciary and the judiciary's construction of the structure. The one addresses the judiciary's prejudgments within the boundary of the structure.[1] The second concerns the exteriority of the boundary. Both presuppose a territorial view of legal knowledge. An appreciation of such a view of legal knowledge helps to explain why the most sympathetic early reviews of Fuller's *Morality of Law*[2] admitted to confusion about Fuller's sense of morality and further attributed fallacious arguments and incredible claims to Fuller.[3] In order to clarify Fuller's senses of the morality of law, I shall first outline what he means by a 'structure'. Second, how is the structure related to legal knowledge? Third, what are the various forms of the structure? Fourth, is the structure centrifugal or centripetal? And finally, why is the structure binding?

[1] The internal sense of morality as a prejudgment is examined in William E. Conklin 'Lon Fuller's Phenomenology of Language' *International Journal for Semiotics of Law* 19 (2006), pp. 93–125.

[2] Lon L. Fuller *Morality of Law* [1964] rev. ed. (New Haven: Yale University Press 1968).

[3] Ernest Nagel 'Fact, Value and Human Purpose' *Natural Law Forum* 4 (1959), pp. 26–43 on pp. 41 & 43.

1 A Structure

FULLER uses different terms interchangeably to describe the space inside the boundary of legality: "structure", "pattern", "legal order", "system", "a framework", "a network", and "processes". Without a presupposed structural boundary presupposed in an ethos, FULLER explains in the *Morality of Law*, a lawyer or judge would not be able to recognize a valid from an invalid law:

> "[a] total failure in any one of these eight directions does not result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."[4]

By themselves, according to FULLER, assumptions and expectations cannot guide officials. After all, they are unwritten in the sense of being unconscious. As FULLER argues in *Legal Fictions*, "[i]f we dealt with reality as it is, in its crude, unorganised form, we should be helpless."[5] FULLER continues this passage with the following point: "if we were surrounded by a formless rain of discrete and unrelated happenings, there would be nothing we could understand or talk about." Our words and writing are contextualised inside a pattern. And the role of the legal official is to identify that pattern, classify its boundary and pillars, and to fill in the gaps in its boundary.

FULLER examines the importance and nature of a structure in the judgement of Justice Handy in the infamous 'The Case of the Speluncean Explorers'.[6] Judge Handy claimed that there are "a few fundamental rules of the game that must be accepted if the game is to go on at all."[7] Although Handy is ambiguous as to whether these fundamental rules were procedural or substantive, he insisted that they were preconditions to the analytic enterprise of officials (and legal philosophers). The effect of the analytic method was that officials, such as Judges Tatting and Keen, analysed or decomposed the rules signified by statutes and precedents to the point that "all the life and juice have gone out of it and we have left a handful of dust".[8] As Judge Keen had expressed the objectivist character of the dead analytic method, the obligation of the judiciary is "to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice".[9] Such shared assumptions bond individuals with each other and with the institutional authors of rules. Such a bonding was necessary for the analysis of rules. The critical problem was, according to Handy, that it was unrealistic to pretend that a judge (or a prosecutor, a jury, or the executive of a business or government department) made decisions "within a rigid and formal framework of rules that prevents factual error, excludes emotional and personal factors, and guarantees that all forms of the law will be observed."[10] According to Judge Handy,

[4] Fuller, p. 39.
[5] Lon L. Fuller *Legal Fictions* (Stanford: Stanford University Press 1967), p. 104.
[6] By Lon L. Fuller, 'The Case of the Speluncean Explorers' *Harvard Law Review* 62 (1949), pp. 616–645 and *The Problems of Jurisprudence* (Westport: Foundation Press 1949), pp. 2–27 on p. 21.
[7] Fuller 'The Case...', p. 638.
[8] Fuller, p. 638.
[9] Fuller, p. 633.
[10] Fuller, p. 640.

"forms and abstract concepts" were a means, not ends in themselves.[11] The ends varied from the social contingency of the aspirations in one structure as opposed to another.

There needs to be a science of legal structuralism, according to FULLER. FULLER calls such a science, "eunomics". FULLER himself defines "eunomics" as "the science, theory, or study of good order and workable social arrangements."[12] The *Shorter Oxford Dictionary* defines "eunomics" as "law abiding; (socially) well adjusted or ordered." *Oxford* contrasts this with "dysnomic". The word "eunomy" is defined as "a political condition of good law well-administered". "Eunomy" is considered synonymous with "good order which that constitution brought about." Eunomics aims to identify the form of a structure whose boundaries and baselines (*sc.* pillars), if exceeded, compromise the integrity of the structure. Such a form is not necessarily nor even primarily linked with the conscious intent of the founders of a structure. Indeed, as noted above, the condition of order or structure is not posited in a consciously willed act. Rather, the purpose of any one official, including the founders of a written constitution or the legislators of a coercive order, is entangled with the "purposiveness" of the structure as a whole.[13] This "purposiveness" links with FULLER's privileging of the intentionality of the subject. Intentionality emanates from the reciprocal expectations of the interpreters and addressees of texts. Legitimacy inheres in such intentionality. Minimal baselines or pillars set the conditions as to what rational choices to make and what choices not to make. Accordingly, the posit of a binding law is not possible without the implicit mutually accepted, intermeshing matter which confers structural form.

2 The Structure's Territorial Knowledge

In order to demarcate legal knowledge from non-knowledge, a structure needs three elements: a boundary, pillars for its foundation and matter with which to build the structure. The three elements work to induce territorial knowledge. Space is enclosed inside the boundary. The space is recognisable. What is internal is legal knowledge even if the internality includes desirable or "ought" purposiveness. What is exterior to the building-like structure is chaos or non-law. The pillars establish the foundation or constitutional law of a society. The matter of the structure is constituted from unwritten and unspoken assumptions and expectations.

[11] Fuller, p. 639.
[12] Lon L. Fuller 'American Legal Philosophy at Mid-Century' *Journal of Legal Education* 6 (1954), pp. 457–485 at p. 477.
[13] Because he also takes the structure for granted, STURM erroneously associated purposiveness with a particular individual and the individual's particular act. Douglas Sturm 'Lon Fuller's Multi-dimensional Natural Law Theory' *Stanford Law Review* 18 (1966), pp. 612–639 on pp. 614–615. There was a "natural law" in each person. *Ibid.*, p. 621. Indeed, STURM went so far as to suggest that "the term 'law' designated the normativeness of the complex purposive system that constituted one's character; the term 'natural' indicated that this normativeness subsisted independently of one's acknowledgement of it, yet was more or less discoverable, as well as alterable, by means of one's powers of reflection and intuition." *Ibidem.* In like vein, STURM claimed that "what FULLER seems to be saying" was that all human beings were "living, purposing and communicating beings" *Ibid.*, p. 618.

2.1 The Boundary and Territorial Knowledge

FULLER accepts that legal knowledge is territorial. He frequently uses territorial vocabulary to describe a structure. A structure, for example, is said to have a "surface" and a "depth". The structure has a "foundation". The foundation has heavy "baselines". The baselines function like the wall that surrounds a fortress.[14] The wall of the structure excludes non-law. The central task of officials is to identify and clarify the surface, depth, baselines and wall of the structure and, secondly, to fill the gaps in the boundary.

The structure takes the form of a "pyramid". The imagined shape of a pyramid encloses "mutuality of recognition" amongst officials on the pyramid.[15] A void lies external to the pyramid. Indeed, until there is a pyramidal legal structure, "space" does not exist. Disorder, rather than order, reigns. The pinnacle of the pyramid replicates the highest official. All subordinate officials and authorities in the pyramidal organization increase in number and decrease in authority.[16] Even commentators of FULLER, such as GERALD POSTEMA, attribute territoriality to describe FULLER's legal theory. POSTEMA reconstructs FULLER's legal theory in terms of "anchors", "the soil" and "roots".[17] FREDERICK SCHAUER also reads in territorial metaphors to describe FULLER's legal theory: the official is said to decide "to enter" into legality as if it had a basement door.[18] Without a consciousness of the structure as if it occupied a territorial space, the judge, lawyer and philosopher would be helpless.

Legal knowledge is only recognizable if it is believed to lie inside the boundary of the structure of legality. In *Legal Fictions*, FULLER writes that if we associate brute facts of a "crude, unorganised form" with what we take as legality, "we should be helpless".[19] Why? Because such brute facts are mere disorganised scriptive fragments. And they are disorganized because they cannot be located within the boundary of a prior structure. Their exteriority to the boundary of a structure renders them uncontrollable and uncontrolled by human agents. The structure is believed to precede what is later intellectualised as a legal unit.

It is this border or boundary of the structure that separates legality from disorder. Any instrument that claims to be legal but which is located external to the structure's boundary is described as "perverted law", in FULLER's view. The boundary of a structure separates legitimate from illegitimate interpretation. Interpretation is "reasonable" or "unreasonable" if it remains inside rather than outside the boundary.[20] The boundary of the implied structure delineates which institutional agency or official should decide a

[14] Fuller *Morality of Law* [note 2], p. 210.

[15] Lon L. Fuller 'Human Interaction and the Law' {reprint: *American Journal of Jurisprudence* 14 (1969), pp. 1–36} in *Principles of Social Order* Selected Essays of Lon L. Fuller, ed. Kenneth I. Winston [1981] rev. ed. (London: Hart 2001), pp. 231–266 at p. 237.

[16] See generally Fuller 'Human Interaction', p. 254.

[17] Gerald J. Postema 'Implicit Law' {*Law and Philosophy* 13 (1994), pp. 361–387 reprint} in *Rediscovering Fuller* ed. Willen J. Witteveen & Wilbren van der Burg (Amsterdam: Amsterdam University Press 1999), pp. 254–275 at pp. 378 & 361.

[18] Frederick Schauer 'Fuller's Internal Point of View' *Law & Philosophy* 13 (1994), pp. 284–312 on p. 306.

[19] Fuller *Legal Fictions* [note 5], p. 104.

[20] Note that, consistent with EDMUND HUSSERL and the phenomenology of language generally, I use "mean" or "meaning" or "meant object" to denote the *praejudicia* and expectations, nested in the experiential body, that one brings *into* a sign. I use "signify" or "signification" to denote the cognitive construction of a concept that is the referent to the sign. See William E. Conklin *Phenomenology of Modern Legal Discourse* (Aldershot & Brookfield USA: Dartmouth/Ashgate 1998).

problem, how the problem should be resolved, the reasons that "count" as resolving the problem and the like. Legal rules "must be brought into, and maintained in, some s y s t e m a t i c interrelationship; they must display some c o h e r e n t s t r u c t u r e or a c o h e r e n t s y s t e m of thought", FULLER remarks at one point.[21] When the pattern of expectations and understandings is coherent, then one can say that a structure or order exists. The unwritten expectations have taken form, albeit an unconscious form.

Conversely, any self-conscious writing, such as a statute or a judge's reasons for decision, is not recognized as binding and, therefore, as a legal unit if it cannot be traced to the boundary of the structure. Even a social scientist, let alone a legal official, would be unable to comprehend the signification of social data "until the structure subject to it stands before him and he is able to comprehend its meaning", as FULLER put it.[22] And a scientist cannot predict (for example, "when *a* occurs *b* follows") unless the scientist can identify the analytical units, *a* and *b*. But "often we cannot even identify *a* and *b* except by some perceived s t r u c t u r e or causal connection which unites them."[23]

The boundaries demarcate how valid state action may proceed.[24] FULLER is conscious of this assumption and, moreover, he goes to great lengths to explain why law is morally good once one appreciates that it is the "legal structure" with which he identifies law. The implied structure constitutes what are legal units. And any text or interpretation that lies outside the boundary of the structure falsifies or perverts legality. Without the collectively shared significations which recognize legal knowledge inside the boundary of the structure, there would be no legality. It is precisely FULLER's focus upon the structure that explains why NICOLSON considers that FULLER starts with "statements which merge fact and value, in the sense that they are classifiable as neither factual nor evaluative, and in which value statements are analytically contained."[25]

2.2 The Pillars of the Structure

A structure cannot exist without pillars. To this end, FULLER identifies several important pillars of a structure for it to be a legal structure.

A pillar is at the basis of the framework of a structure. The pillar, once cemented into the ground, establishes the referent for the walls (or boundary lines) that are to be constructed. Accordingly, the pillars address "aspirations" rather than rules. Without the "pillars", officials cannot reach a consensus that certain duties or rights are owed to the individual inhabitant. Without pillars, what one might consider as a contract or lease

[21] Lon L. Fuller *Anatomy of the Law* (London: Praeger 1968), pp. 20 & 94.

[22] Lon L. Fuller 'Afterward: Science and the Judicial Process' *Harvard Law Review* 79 (1966), pp. 1604–1628 on p. 1619.

[23] *Ibid.*, p. 1624. Emphasis added.

[24] This point renders NICOLSON's claim that "FULLER starts from the assumption that law is morally good" somewhat shallow.

[25] Peter P. Nicolson 'The Internal Morality of Law: Fuller and His Critics' *Ethics* 84 (1973–1974), pp. 307–339 at 319–320.

or by-law is unrecognisable. In the absence of pillars, the form of the structure is either "perverted" or "parasitic".[26]

The "larger" problem for officials and jurists is to clarify "the directions of human effort essential to maintain any system of law, even one whose objectives may be regarded as mistaken or evil."[27]

This is the point where FULLER's eight pillars of a legislative structure come into play: there be general rules; that the rules be promulgated; that the rules be prospective; that the rules be clear; that the rules not require one to commit contradictory actions; that the rules not require actions that are impossible to perform; that the rules remain relatively constant over time; and that there be a congruence of the rules as declared in writing and with those as practised.[28] The effect of these eight conditions is to ensure a vertical reciprocity between officials and subordinate agencies, on the one hand, and a horizontal reciprocity amongst officials and addressees of the officials' utterances, on the other.

In his initial statement of the eight pillars, FULLER suggests that the contradiction between any two pillars would lead to the consequence that a statute would not exist as a legal instrument.[29] Such a non-existent statute would be a mere fragment of writing. When HITLER was elected the Chancellor of Germany, according to FULLER, officials and citizens were said to share an implicit structure about the rule of law in a liberal democracy. The Nazi regime, under the pretence of a liberal regime in the Weimar Republic, constrained this structure, FULLER believed. Nazi statutes and military orders perverted the implied structure of social meanings that the Weimar officials had taken for granted. Nazi laws contradicted the collectively shared meanings of ordinary citizens.[30]

FULLER describes the invalidity of Nazi laws in different ways on several occasions. Why the Nazi statutes and actions did not exist as legally binding, according to FULLER, was that Nazi rules and actions lay exterior to the structure implied from the ethos of the Weimar republic of the 1920s. A legal structure, to be a structure in both liberal and communist societies, must have rules, certainty, predictability, accessibility and other conditions. If a formal legal order institutionalized such shared pillars of meaning, the officials could gain a closer access to the "best" or most solid legal order. Again, such a requisite is not an ideal of the rule of law, as NIGEL SIMMONDS and others suggest. Rather, the eight conditions of a legal structure are the pillars or foundation of the structure. The structure is not good in the sense of the Greek virtues of Beauty or Wisdom or Courage or Justice as intrinsic ends. As FULLER writes in his posthumously published essay 'Means and Ends',[31] "while a quest for the principles that underlie good social order animates everything said in this book, it nowhere attempts to answer questions like the following: what

[26] The actions of the "Green Shirts" of the "Grudge Informer" case, for example, perverted any semblance of a structure. See generally Lon L. Fuller 'Means and Ends' [1960] in *Principles of Social Order* [note 15], pp. 47–64 on p. 48; as well as his *Anatomy of Law* [note 21], p. 20 and *Morality of Law* [note 2], Appendix.

[27] Fuller *Morality of Law*, p. 4.

[28] FULLER cautions that there may be more.

[29] Fuller *Morality of Law*, p. 39 and *Anatomy*, pp. 61–62.

[30] FULLER is unclear whether these were the expectations of German citizens or citizens of liberal democracies other than Germany.

[31] Fuller 'Means and Ends' [note 37]. FULLER intended this as an Introduction to a second edition of Fuller *The Problems of Jurisprudence* [note 6], pp. 2–27.

is the highest human good? What is the ultimate aim of human life"?[32] Rather, the legal structure is necessarily good in that one cannot have binding rules without a coherence of the rules with the boundary and pillars of the structure: "coherence and goodness have more affinity than coherence and evil".[33]

As such, the Nazi statutes of the 1930s could not be analysed and then reintegrated into analysable units of a coherent structure because the Nazi statutes were external to the Weimar liberal legal structure. As such, the Nazi statutes just did not legally exist. They were void for want of an implied structure to give them signification. In contradiction with the rule of law in a liberal democracy, only coercion could make the Nuremberg Laws "real". But such a "reality" was fictional *vis-à-vis* the implicit liberal structure of the Weimar ethos. The structure, not discrete and self-standing rules, constituted legal reality. As such, the Nazi laws were unreal or dead fictional constructs superimposed upon social reality. In particular, the Nazi laws were "perverted" or non-existent since they were artificially superimposed upon a liberal legal structure which presupposed a role for citizens and non-citizens.

2.3 The Matter of the Construction

If legality depends upon the boundary and pillars of a structure, what is the "matter" from which officials build its walls and pillars? Do officials construct the structure with rules? Principles? Policies? Arguments? This is the fundamental point that differentiates FULLER from the stream of general jurisprudence today. For, FULLER draws from the very anthropological morality that his contemporaries and ours excluded from legality. The "glue" to the structure involves the unconscious assumptions and expectations that participants take for granted as they interpret texts and analyse statutory and judicially created rules.

The matter of a structure is not made from rules, as COLLEEN MURPHY has recently claimed.[34] Nor is the matter synonymous with "implicit rules", as JEREMY POSTEMA claims.[35] Nor is it even recognized, without more, as "unwritten law", as ROD MACDONALD claims.[36] The assumptions and expectations are what GEORG HANS GADAMER described as *prejudicia*.[37] Any rule, implied rule, principle, policy, social interest or doctrine is legal by virtue of its relation to the boundary and pillars that give form to the structure within which the said unit is situated. And the matter of the structure is given form by the assumptions and expectations that participants take for granted.

The *prejudicia*, for FULLER, are constituted from collectively shared values which one shares with others to constitute a community or social ethos. So, for example, relying

[32] *Ibid.*, p. 48.

[33] Lon L. Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' *Harvard Law Review* 71 (1958), pp. 593–672 at p. 630.

[34] Colleen Murphy 'Lon Fuller and the Moral Value of the Rule of Law' *Law and Philosophy* 24 (2005), pp. 239–262.

[35] See especially Postema 'Implicit Law' [note 17] discussed in Nigel Simmonds *Central Issues in Jurisprudence* (London: Sweet & Maxwell 1986), p. 118.

[36] Roderick A. Macdonald 'Legislation and Governance' in *Rediscovering Fuller* [note 17], pp. 279–311 on pp. 286 & 287.

[37] Georg Hans Gadamer *Truth and Method* trans. Garrett Barden & John Cumming (New York: Crossroad 1985), pp. 238–240.

3 Two Forms of a Structure

The forms of a structure vary with the genre of the assumptions and expectations of a social organisation. So, for example, dispute resolution is one structural form presupposed in certain circumstances. Here, FULLER has in mind mediation, contract formation and the exchange of goods and services. Another is legalism. Legalism involves adjudication, legislation, mediation, arbitration, voluntary associations, contract (of which property is a supplement), managerial direction, markets and elections. As society develops, a "creeping legalism" overtakes dispute resolution.

3.1 Dispute Resolution

Each form of a dispute resolution possesses its own implicit structure. Officials and parties proceed in each structure without necessarily reflecting about their role, how they reason, what evidence is admissible, what reasoning is *intra vires*, or what counts as closure to a dispute. The officials and parties just act. They take for granted how officials communicate within the particular form of meanings. The voice of the form is "silent" or "tacit". The silent meanings lie in the unconscious of the institutional milieu.[47]

A contract, for example, will stipulate the parties, the persons affected, the date of enforcement, remedies of enforcement and the like. But the contract may well codify the reciprocal expectations that the parties in the particular business or even society generally assume. The consequence is that the formal agreement might well distance the parties from their otherwise implicit expectations in the sub-structure. The old, friendly expectation that a party to a contract would be given the time to walk across the street to find an alternative source of funding for one's business might well formalize procedures and rules that must now be fulfilled to satisfy the formalities of legality. The risk, according to FULLER, is that an institution or its rules will become so formalized as to become estranged from the reciprocity needed for the parties to function effectively as partners in a business.

Similarly, adjudication takes for granted a style of communication that distinguishes it from the political genre and the mediation genres.[48] If a court failed to give reasons or if it gave reasons that were not argued by the parties, the decision would weaken the implicit structure.[49] Similarly, the silent language shared amongst inhabitants in a democracy would be undermined if the political process were effectively restricted to only some of the inhabitants or if the electoral process had serious financial constraints for the candidates. Similarly, for its part, mediation attempts to bring parties toward each other. Mediation helps parties to recognize each other as meaning-constituting, finite beings. With mediation they gain a new and shared perception of their dependence upon each other, according to FULLER.[50] This recognition of the other helps the parties to redirect their

[47] See esp. Fuller 'Human Interaction and the Law' [note 15].

[48] See generally, Lon L. Fuller 'Forms and Limits of Adjudication' {*Harvard Law Review* 92 (1978), pp. 353–409 reprint} in his *The Principles of Social Order* [note 15], pp. 101–139 at p. 109.

[49] Fuller, pp. 121–122.

[50] Lon L. Fuller 'Mediation – Its Forms and Functions' {*Southern California Law Review* 44 (1971), pp. 305–338 reprint} in his *The Principles of Social Order* [note 15], pp. 141–173 on pp. 151–155.

energies into a more constructive relationship. Mutual respect, trust and understanding thereby bond the parties together in mediation. They may well remain strangers to each other (and financially poorer) with adjudication. The adversariness of adjudication appeals to a third party to reconcile differences. But the recognition of the other is absent in the two monologues that continue until a settlement is reached or a judicial decision rendered.

3.2 Legalism

The second form of a structure, legalism, involves assumptions that crystallize as the rule of law. As one example, the institutional structure represents legalism, whatever the content of the rules posited by state institutional sources. The state's institutions posit objectives in "a downward thrust of control".[51] FULLER sometimes likens this downward thrust to "managerial direction". Each institutional level plays a distinct role in the whole structure.[52] *Gemeinschaft* shifts to *Gesellschaft*: formal procedures displace shared assumptions. Formalism is "the furniture", not the bonding glue, of society, he writes. We need to note at this point that FULLER's sense of a structure in his *The Morality of Law* is a structure of collectively shared assumptions rather than of institutions. Without formalism, we are stuck in the informal "opaque' and "open-ended bargaining" that we experience in as unwritten meanings.[53] With formalism, conscious reflection displaces the implied assumptions that had heretofore preceded the reflection.[54]

Against this background, the eight conditions of the enactment and adjudication or rules represent formalism at its best.[55] Behind the formalism there is a spectrum of interpretations that can be considered "fit" or "coherent" with the pre-institutional and pre-rule reciprocal assumptions. The latter guide the official as to her/his role as he or she interprets statutes and precedents. The legal "is" ultimately rests in what is unwritten, not in what is written. This "is" precedes legalism. Even statutes and precedents merely manifest the deeper structure of meanings which confer order to the otherwise scriptive fragments. As FULLER ends *The Morality of Law*, such unwritten understandings help us to communicate and to co-ordinate efforts with other human beings.[56] Through communication, "we inherit the achievements of past human effort". But by communicating, we expand or contract the "boundaries of life itself".

4 The Role of the Legal Official in a Structure

A legal structure only exists, FULLER claims, if the participants share certain assumptions concerning the legitimacy of judicial institutions. It is not a coincidence that FULLER's

[51] Lon L. Fuller 'The Role of Contract' in his *The Principles of Social Order* [note 15], p. 172. Also see Lon L. Fuller 'Some Unexplored Social Dimensions of the Law' in *The Path of the Law from 1967* ed. Arthur E. Sutherland (Cambridge, Massachusetts: Harvard Law School 1968), pp. 57–70 at p. 58.

[52] See esp. Fuller *Anatomy* [note 21], pp. 20–22.

[53] *Ibid.*, p. 75.

[54] *Ibidem.*

[55] Fuller *Morality of Law* [note 2], p. 170.

[56] *Ibid.*, p. 186. As quoted in text corresponding to note 74.

upon GEORG SIMMEL, FULLER suggests that even the state does not exist without a "tacit reciprocity" between ruler and ruled.[38] Such reciprocity is embodied by religious, political, social and ethical assumptions. One's duties to another are just one aspect of such an overall structure. A structure is constituted from a sense of obligation, not posited from external sources. Such a sense of obligation grows as officials and non-officials communicate, negotiate, mediate, bargain, intimidate and litigate against and with each other. I understand your request or your communication because we share assumptions that help to compose a part of the structure whose boundary, pillars and matter we take for granted.

If all ends are means to other means, then which means count as laws? Those ends are legal if they can be recognized as internal to the boundary of the structure that participants take for granted. The "purposiveness" of a rule or policy or social interest is constituted from collectively shared values. Such values are embedded internal to the boundary of a structure. Such collectively shared values, just as the structure itself, exist before the individual lawyer or judge ever comes on the scene as a professional.

The collective memory of participants is an important element of the matter of a legal structure. CARL JUNG differentiates such collective memories from personal memories.[39] The latter can be remembered. Collective memories, however, cannot be remembered since they have not been personally experienced. Collective memories may well be formed through myths and symbols (as opposed to signs) framed with reference to the past. And yet, the myths and symbols are present in the consciousness of the participants. This presence inculcates a bonding through myths and symbols. The bonding temporally explains why one cannot fit the collective memories in a discrete time and place. "Made laws" manifest, institutionalize and embody the bonding. FULLER's sense of morality as aspirational, then, is not a speculative quest for an intellectually transcendent goodness.[40] The structure, even if it is constituted from gestures rather than from verbal and written language, limits what choices are available to an official. The structure legitimizes some issues and excludes others as illegitimate. FULLER shudders at the prospect that lawyers would inquire speculatively into a metaphysics about goodness and then claim that such speculation involves legal reasoning and that the Good is the ultimate source of legal reality.

The unconscious matter of the structure constrains the official to decide or to act in a certain manner. The matter does so in three circumstances. First, a family, contract or business relationship exemplifies a horizontal relationship in that the parties do not need some external institution, such as a parliament, to confer authority onto them. Second, officials may be vertically related so that those officials higher in a pyramidal hierarchy confer authority on lower officials to act legally. Third, in a governmental context, officials communicate with each other according to prior collective expectations about their respective roles. The collective values construct the boundary of a structure that the analysis of a rule ignores. What appears to be "juristic and normative", according to FULLER,

[38] Fuller *Morality of Law* [note 2], p. 61.

[39] Carl Jung 'The Concept of the Collective Unconscious' in *Literature in Critical Perspective* ed. Walter K. Gordon (New York: Appleton-Crofts 1968), pp. 504–508.

[40] Here, CLITEUR simplifies and misdirects his association of FULLER's sense of morality with the Greek quest for the good life. See Paul Cliteur 'Fuller's Faith' [note 22], pp. 120–123.

"is in fact an expression, not of a rule for the conduct of human beings, but of an opinion concerning the structure. Before one can intelligently determine what should be, one must determine what is, and in practice the two processes are often inseparably fused."[41]

It might appear from the above that the social sciences could best identify the boundary, pillars and matter of the structure. FULLER insists, however, that this is not so. Rather, FULLER's intellectual heritage and his effort are phenomenological.[42] If the official empirically observed the matter, the official would presuppose that the matter is objective and detached from the official. This perceived objectivity, according to FULLER, is erroneous and misdirected. The matter of the structure lies behind the subject, not the object. The subject is the centre of the structure.

Indeed, FULLER's method is discontinuous with the sciences in that the sciences control decisions by virtue of the conditions of an experiment. On the one hand, the official's collective assumptions and expectations are like nature. Further, FULLER does not offer the jurisprude a rigorous methodology that characterises psychology or sociology. Further, consistent with COLEMAN, FULLER refrains from suggesting that philosophers must justify the content of the matter. On the other hand, FULLER's language hardly connotes a legal objectivity independent of the official or the philosopher.[43] The structure, however, is not a naturally created phenomenon. The assumptions and expectations that constitute the matter of the structure emanate from the subjectivity of the officials. As officials interpret texts—and FULLER gives great weight to interpretation—officials build the boundary and pillars of the structure.

Thus, the attribution of naturalism to FULLER closes off intellectual inquiry just when FULLER begins his analysis of a legal structure.[44] For, FULLER incorporates elements into legality that a scientist would exclude as subjectivist. Indeed, FULLER himself expresses a deep suspicion of naturalism. For naturalism excludes the possibility that a structure is humanly constructed. Naturalism, FULLER claims, postulates a hierarchical and objective code of axioms that ignores its human construction.[45] The usual association of the Good with transcendent forms misses FULLER's insistence that his sense of morality is grounded in social realism, not in some intellectually constructed objectivity. Indeed, when FULLER describes the eight conditions for enacted laws, he likens them to the naturalness of the skills of a carpenter who wishes to build a house to fulfil. The purposiveness of the house is to remain standing over the years.[46] Naturalism does not offer such a role for the carpenter. FULLER does.

[41] Fuller *Legal Fictions* [note 5], p. 131.

[42] See generally, Conklin 'Lon Fuller's Phenomenology of Language' [note 1], pp. 93–125, esp. pp. 106–107.

[43] For the possibility of a naturalist view of vocabulary, see Philippa Foot 'Moral Beliefs' in *Proceedings of the Aristotelian Society* 59 (1958–1959), pp. 410–425.

[44] COLEMAN especially attributes naturalism to FULLER's project. See, e.g., Jules Coleman *Practice of Principle* (Oxford: Oxford University Press 2001), p. 193, note 21. RAZ attributes naturalism to HART's method. Cf. Joseph Raz 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in *Hart's Postscript* Essays on the Postscript to The Concept of Law, ed. Jules Coleman (Oxford: Oxford University Press 2001), pp. 1–37 at p. 6.

[45] Lon L. Fuller 'Reason and Fiat in Case Law' *Harvard Law Review* 59 (1945–1946), pp. 376–395 on p. 380.

[46] Fuller *Morality of Law* [note 2], p. 96.

eight conditions of a structure exemplify precisely the sorts of factors that both the analytical method and a liberal legal order take for granted in the ordinary course of events. The eight conditions of rule-making do not address the question, "what is the good life?" Nor do they appeal to the ethical sceptic who might claim that any judgement expressing one state of affairs over another is emotionally grounded and, therefore, not a judgement at all. Nor might the eight conditions be characterized as issues of economic efficiency such as one might attribute to an expert of poisoning,[57] a carpenter,[58] or the assembler of a machine.[59] Nor might the eight conditions be considered intrinsically valued "moral canons" (or universal maxims, as Kant would call them). The eight conditions represent the pillars of a legal structure. If a particular state action or instrument were estranged from the pillars, state action would be seriously illegitimate. Such action would foster disorder.

A legal official's role, then, is immersed in meant objects of language.[60] Officials play different roles depending upon shared meanings about governance, private associations, and different forms of dispute settlement. The separation of their roles for different substructures is essential for there to be "a sound p u b l i c order of law."[61] Before an official declares that a legal duty applies to an individual, the official must make a deliberative judgement. To make such a deliberative judgement and to communicate it with others, though, there needs to be assumptions shared amongst dialogical partners.[62] If meanings are no longer shared, then duties no longer exist. Assumptions and expectations postulate an implicit boundary within which officials feel constrained when they make a decision. If the officials' role is linked with such assumptions and expectations, the role is efficacious.[63] The official acts with an internal sense of his or her role, as an ideal type, in the overall structure of expectations regarding institutions as ideal types. How does the official accomplish such a feat when the official is immersed in the ethos that is the object of analysis? Here, FULLER suggests that the justification of an action is very important because such a justification makes the unconscious meanings conscious.[64]

The justification of a judicial decision, then, rests less with the justice of the content of the particular decision and more with the relation of the decision to the boundary of the legal structure. As FULLER states in *The Anatomy of Law*:

[57] H. L. A. Hart 'Book Review: *The Morality of Law* by Lon Fuller' *Harvard Law Review* 78 (1965), pp. 1281–1296.

[58] FULLER uses the analogy, although it is shifted into the paradigm of economic efficiency in the interpretation of Maurice R. Cohen 'Should Legal Thought Abandon Clear Distinctions?' in his *Reason and Law* (New York: Free Press 1950) {reproduced as 'Law, Morality and Purpose' *Villanova Law Review* 10 (1965), pp. 651–666}.

[59] Robert S. Summers 'Professor Fuller on Morality and Law' {*Journal of Legal Education* 18 (1966), pp. 1–27 reprint} in *More Essays in Legal Philosophy* General Assessment of Legal Philosophy, ed. Robert S. Summers (Oxford: Clarendon Press 1971), pp. 101–130 at p. 129.

[60] What FULLER intends by a 'meaning' is examined in Conklin 'Phenomenology of Language' [note 1], pp. 104–107 & 109–111.

[61] Fuller *Anatomy of Law* [note 21], p. 20. His emphasis.

[62] Fuller *Morality of Law* [note 2], p. 21.

[63] Lon L. Fuller 'The Needs of American Legal Philosophy' [1952] his *The Principles of Social Order* [note 15], pp. 269–283 on p. 273.

[64] SUMMERS especially emphasizes the role of justification for FULLER in Robert S. Summers *Lon L. Fuller* (Stanford: Stanford University Press 1984), p. 147.

> "Those responsible for creating and administering a body of legal rules will always be confronted by t h e p r o b l e m o f s y s t e m. The rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationship; they must display some coherent internal structure. This is a requirement of justice itself."[65]

When a rule is contextualized in a structure, its "inconveniences" and "injustices" may possess virtues attributed to the system as a whole.[66] In like vein, if an official gestured, spoke or wrote in a manner that another official could not understand, the former would undermine the latter's dignity "as a responsible agent".[67]

5 *The Structure and Traditional Theories of Morality*

We are finally ready to address the structural displacement of the traditional theories of morality. Three such theories become apparent: deontological morality, the good and the subjectivist posit of arbitrary values. When one re-reads the interpreters of FULLER's contributions to legal theory, the structuralist character of FULLER's legal theory is amiss.[68] As a consequence, although interpreters invariably assume what they take as "morality", their assumption is read into FULLER's works. Sometimes, for example, "morality" is taken to involve deontological rights and duties. On other occasions, "morality" is said to involve a quest for the Good. On still other occasions, morality is held out as "naturalism" in the sense that morality is held out as resting upon objective social "facts" external to human control. A still further association is sometimes made between morality and posited subjective values. FULLER's view of morality is none of these, as I shall argue in section nine below. The precise understanding of "what is morality?" is invariably taken for granted and, in its stead, the jurist asks whether it is possible to have one coherent legal structure without the necessity of incorporating a factor exterior to the legal order for its validity or legitimacy. FULLER addresses each theory of morality in his writings. He openly challenges them as reflective of what he signifies by the "internal morality of law". For, a structure precedes any speculation about the nature of an individual's moral action. One cannot assess the goodness or the deontological duties of an individual without relating the action to the territorial space and the pillars of the presupposed structure. The boundary distinguishes an internal from an external morality. The internal morality includes "anthropological" or phenomenological elements.

Unless there is congruence between authored laws and the boundary, the statutes and precedents are characterised in two ways. For one thing, they may be considered "perverted" (ARISTOTLE's term, as well as FULLER's). The writing is not recognised as knowable because it exceeds the boundary of the implicit structure. And it is unrecognizable because it dwells exterior to the boundary of the implied structure. Similarly, a rule is

[65] Fuller *Anatomy* [note 21], p. 94. His emphasis.

[66] *Ibid.*, p. 104.

[67] Fuller *Morality of Law* [note 2], p. 162.

[68] It is apparent that NAGEL, a philosopher of science as well as of law, especially read FULLER in a manner which missed FULLER's structuralism. See esp. Ernest Nagel 'On the Fusion of Fact and Value: A Reply to Professor Fuller' *Natural Law Forum* 3 (1958), pp. 77–82.

"parasitic" if one form of a legal structure (say, mediation) draws "moral sustenance" from another form of a structure (say, adjudication).[69] Legislated and judicially created rules may be "perverted" and "parasitic" whatever the goodness in the content of the rules or the rightness of an individual's legislated action.

A perverted enacted law is a dead law. FULLER is bent on explaining how legality can be alive. As FULLER writes in the *Anatomy of Law*,

> "[w]hen the tree of law is dead from the roots up, a legal system has ceased to exist. When only a twig is dead, we not only do not declare the whole tree dead (which is understandable), but we treat the twig itself as if it were still alive (which is puzzling)."[70]

When does one know that a legal order is "dead"? What does it signify that a legal system is considered "challenged to its core" or that a legal order has "fundamental" qualities? We analyse the "branch" as if it remained an element of the form of a live organism but that the roots of the structure are dead? The relevant factor is the structure of implicit assumptions and expectations of the participants. Put differently, legal obligations must be knowable inside the territorial boundary and they must also be consistent with the pillars of the structure. Such boundaries and pillars demarcate what counts as good analysis and weak analysis, the legitimate role of the lawyer and judge as opposed to an illegitimate role, the sorts of legislated rules that exist and those that do not exist, how a judge should approach a social circumstance that has not arisen before, the purpose of a professional legal education, existent laws from perverted laws, and the like. One just cannot "understand reality without discerning in it structure, relatedness, or pattern", he writes in his essay 'American Legal Philosophy at Mid-Century'.[71]

This structuralist view of the relation of morality to legality radically differs from traditional theories of morality. One such theory is deontological ethics. A deontological duty, such as "respect the other as a person", is a-contextual. The duty is universal by virtue of its abstraction from social contingency. FULLER argues, however, that duties exist only when situated in context-specific circumstances. As a consequence, duties cannot be deontological. Three factors reinforce the context-specific circumstances that condition the possibility of a legal duty according to FULLER. First, the members of a group must voluntarily create the duty. Second, the duty must be shared equally. Third, parties must owe the same duty to the other over time. The legal official's role, according to FULLER, is to be able to advise whether officials have fulfilled the three conditions. If the conditions are met, then the duties are enforceable. As FULLER argues, "it seems absurd to say that such a duty can in some way flow directly from knowledge of a situation of fact."[72] FULLER claims, after all, to be describing a legal order as a situation of fact. FULLER associates "facts" with efficacy. In order to understand the notion of duty, in brief, there is "implicit" in the efficacy of the duty a notion of reciprocal expectations.[73]

[69] Fuller 'Forms and Limits of Adjudication' [note 15], pp. 101–139 on pp. 136–139.
[70] Fuller *Anatomy* [note 21], p. 10.
[71] Fuller 'American Legal Philosophy at Mid-Century' [note 24], p. 477.
[72] Fuller *Morality of Law* [note 2], p. 13.
[73] *Ibid.*, p. 21.

Aside from context-specific circumstances surrounding a duty's very existence, the official must make a deliberative judgement before the duty is applied to another individual. To make such a deliberative judgement and to communicate with others, there needs to be shared assumptions.[74] If meant objects are no longer shared, however, then duties cannot exist.

FULLER does not deny a role for deontological duties and rights in a legal structure. The question with which FULLER is concerned, as he says in *The Morality of Law*, asks

> "where does duty leave off and the morality of aspiration begin?"[75] An aspiration ontologically precedes a duty. Duties crystallize in legal consciousness when they are enforced according to a pattern or structure of reciprocal expectations. This pattern presupposes "an anonymous collaboration among men by which their activities are channelled through the institutions and procedures of organised society".[76]

In *The Anatomy of Law*, FULLER continues this line of thought:

> "[t]hose who participate in the enterprise of law must acquire a sense of institutional role and give thought to how that role may most effectively be discharged without transcending its essential restraints. All of these are matters of perception and understanding need not simply reflect personal predilection of inherited tradition".[77]

The role of tradition and of shared assumptions in that tradition contrast with the resolution of intellectual contradictions by the analysis of rules. The latter project, though, begs "what kind of order is it that we are institutionalising?" As with MICHEL POLANYI's study of the role that the scientist plays in interpreting scientific data, according to FULLER, so too the legal official plays a role that is integral to an interpretative "enterprise".[78]

If duties cannot be deontological, then might we rightly conclude that FULLER's theory of law sides with traditional natural law? The traditional natural view, grounded in ARISTOTLE, AUGUSTINE and AQUINAS, associates natural law with the Good. Many interpreters of FULLER's works have missed his structuralism by reading such a traditional natural law view into his works.[79] FULLER addresses such an approach in his 'The Needs of American Legal Philosophy' (1952).[80] FULLER insists that there is no one intrinsic Good valued in and for itself. It would be grossly misdirected to understand FULLER's structuralism as a traditional quest for the Good. Even an intrinsic Good, he claims, is a means to

[74] *Ibidem.*
[75] *Ibid.*, p. 10.
[76] *Ibid.*, p. 22.
[77] Fuller *Anatomy* [note 21], p. 116.
[78] *Ibid.*, pp. 120–122.
[79] FULLER's association of morality with goodness is sharply described in one Jurisprudence text, for example, as "secular natural law". George C. Christie & Patrick H. Martin *Jurisprudence* Text and Readings on the Philosophy of Law, 2nd ed. (St. Paul, Minnesota: West Publ Co. 1995), p. 214. Also see Anthony D'Amato 'The Limits of Legal Realism' *Yale Law Journal* 87 (1978), pp. 468–513 on 506–513. CLITEUR most certainly associates FULLER's sense of morality with the Good life in Cliteur 'Fuller's Faith' in *Rediscovering Fuller* [note 17], pp. 100–123 at p. 122. Also see Peter Teachout 'Uncreated Conscience: The Civilizing Force of Fuller's Jurisprudence' in *Rediscovering Fuller*, pp. 229–254 at pp. 241 & 252; Wibren van der Burg 'The Morality of Aspiration: A Neglected Dimension of Law and Morality' in *Rediscovering Fuller*, pp. 169–192 on pp. 174–176; and also Douglas Sturm 'Lon Fuller's Multi-dimensional Natural Law Theory' *Stanford Law Review* 18 (1966), pp. 612–639 on p. 621.
[80] Fuller 'The Needs of American Legal Philosophy' [note 13].

other ends. Further, a Good is not posited by one's emotional or non-cognitive personal values. Because each end is a means to another end, it is inappropriate to say that an end (and therefore a means) is subjectively posited, he writes. We cannot exclude cognitive factors in the choice of ends since ends are the means to other ends. The means are merely "an internal convenience of thought", not "a pretended objective reality".[81]

FULLER's "original" use of the term "morality" is, finally, apparent if one read it as a disguised effort to privilege and rationalize subjective values. ROBERT SUMMERS does do so.[82] So too, KAROL SOLTAN[83] and MARC HERTOUGH[84] adopt this reading of FULLER. FULLER insists throughout his works, however, that he is highly dissatisfied with the mere subjective posit of values as constitutive of legality. The values are undoubtedly elements of a structure. But FULLER's project suggests that the official and philosopher must endeavour to become conscious of such values. The values may well provide the foundation of a legal structure. But the role of the official in a liberal legal structure is to recognize such pre-legal values and question their coherence with others in the structure. The key question is whether the subjectively posited values reinforce the foundation and boundary of the implicit structure. We are left with the prospect that, as with MOFFAT, FULLER "tends to throw us off, because he seems to be pitting one kind of morality (procedural) against another (substantive). We begin to suspect that FULLER has used the term 'morality' the way I have defined M-2, as an honorific title and not really a matter of morality at all."[85]

Thus, for FULLER, one cannot distinguish the notion of a structure from the notion of Goodness or deontological action when one addresses the nature of a legal unit. One has to relate the unit to a territorial-like structure. And to be a structure, the structure necessarily possesses characteristics with which one might consider a Good structure: predictability, clarity, rules, prospectivity, an autonomous subject and the like. Unless legal officials address what HART and DWORKIN called "anthropological morality", they will not be aware of the all-important territorial-like structure within which they may reason. Legality, as understood through the language of the structure, fuses "oughts" with the "is", and necessarily so.

6 Competitive Structuralist Theories

LON FULLER is not the only Anglo-American jurisprude to privilege the structure in which a legal unit is situated. H. L. A. HART, JULES COLEMAN, RONALD DWORKIN and JOSEPH RAZ, to name only four, also discussed the relation of a legal unit to a structure. In the case of HART and COLEMAN, the structure was composed of rules. RAZ emphasised the role of an institutional structure in his early works and an inter-related structure

[81] *Ibid.*, p. 258.
[82] Robert S. Summers 'Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law' *Harvard Law Review* 92 (1978), pp. 433–449 at p. 448.
[83] Karol Soltan 'A Social Science that does not Exist' in *Rediscovering Fuller* [note 17], pp. 387–424 on p. 397.
[84] Marc Hertough 'The Conscientious Watermaster: Rediscovering the Interactional Concept of Law' in *Rediscovering Fuller*, pp. 364–386 on p. 385.
[85] Robert Moffat 'Lon Fuller: Natural Lawyer After All' *American Journal of Jurisprudence* 26 (1981), pp. 190–201 at p. 210.

of concepts in his later works. And DWORKIN elaborated a theory of a narrative structure in his *Law's Empire* and accompanying articles. FULLER's structuralism, though, radically differed from these acknowledgements. For one thing, FULLER understood the content of the structure as drawn from what HART and DWORKIN excluded from legality as "anthropological morality". Although I shall elaborate what this sense of morality entails in my Section two, Fuller had in mind what GEORG HANS GADAMER considered "prejudgements" or *prejudicial*. The matter of the structure is nested in the collective unconscious of a community. Second, in contrast with HART and COLEMAN, FULLER privileges the interpretative act. Third, the role of the legal official is drawn from the socially contingent boundary and pillars of the structure. Finally, the official, as a subject, is the centre of the structure. This centre contrasts with the ready-made objectivism that characterizes the conceptual, institutional and narrative structures of his contemporaries.

As an example and only as an example, H.L.A. HART emphasized the role of a s y s t e m in the concept of law. The system was composed of two types of rules: primary and secondary rules. The foundation of the modern legal order was grounded upon the rule of recognition. Having privileged the systematic character of a modern legal order, HART proceeded to exclude the phenomenological experience of bonding that he categorised as "pre-legal". HART described the phenomenological element as "psychological" and, as such, alien to the idea of a concept. Concepts alone constituted legality. His consistent example between the excluded phenomenological and the included conceptual character of legality distinguished between "feeling obliged" and a "legal obligation". HART posited that the feeling of being obliged lay "buried" in the word "obligation".[86] So too, the psychological feeling lay "latent" in the word 'duty'.[87] Such a "buried" and "latent" phenomenological language presented "the figure of a b o n d binding the person obligated".[88] Despite the importance of the buried experiential bonding to the legal structure, though, HART deferred to the cognitive legal unit as if it were self-standing, independent of the phenomenal experience. The system of primary and secondary rules was constituted from such discrete, self-standing concepts.

JULES COLEMAN, who claimed to have followed HART, offered less energy in attributing a structural character to legality. What he shared with HART, though, was a determined effort to exclude anthropological morality from legality. Both the legal official and the philosopher took concepts as the sole constituent of legality. COLEMAN emphasized that "practical lives" are "conceptually mediated".[89] Even legal philosophy, according to COLEMAN, concentrated upon the clarification and intellectual distinctions amongst concepts.[90] Social differences amongst human beings were excluded from such an intellectualist enterprise. Even the effort to justify intellectual distinctions was excluded from legality because a justification of the content of a concept could not be made without ad-

[86] H. L. A. Hart *The Concept of Law* ed.—with Postscript—Penelope A. Bulloch & Joseph Raz (Oxford: Clarendon Press 1994), p. 87.
[87] *Ibid.*, p. 87.
[88] *Ibidem.* His emphasis.
[89] Coleman *Practice of Principle* [note 14], pp. 10–11, note 13.
[90] *Ibid.*, p. 13.

dressing the phenomenal world presupposed in the content.[91] Essentialism characterised COLEMAN's description of legal methodology.[92] Concepts defined "essential features" of a concept and a context-specific experience was reduced to such features of the concept. If officials were to incorporate content-specific meant objects into legality, they would impute a subjective value to the object that the analysed concept denotes.[93] Indeed, any effort to associate legality with social behaviour was "not really a form of philosophical inquiry at all."[94] Anthropological factors must be excluded from legal knowledge.[95] Instead, the analysis of a concept was "the most familiar and fruitful way in which legal philosophy contributes to our understanding of legal practice."[96] What rendered the claim of philosophy to legal studies was that the study made "the normative language of law i n t e l l i g i b l e to us." The intellectual differentiation of concepts was the only possible philosophy of law: "[t]here is nothing else that needs to be done..."[97]

So too, RONALD DWORKIN, who constructed his theory of legal reasoning in reaction to HART's and who defended it against COLEMAN's,[98] shared with HART and COLEMAN the refusal to recognise "anthropological morality" as a constituent of legality.[99] The interpretative act abstracted from beliefs and non-cognitive experiences.[100] Indeed, experience could only be "cognitive experience," DWORKIN took for granted.[101] DWORKIN is emphatic from his very first published essays that the "popular morality" (which would be an important element of anthropological morality), nested in unwritten values and assumptions, is excluded from binding laws. The referent of one argument was another concept, not the anthropological morality that FULLER privileged as the matter of the structure. Even aesthetics, for DWORKIN, was a matter of conceptualising or intellectualising a b o u t the world of immediate experience.[102] Such an intellectualisation permitted judges and lawyers to justify, to argue, to rebut and to transcend their immediate personal convictions in favour of the chains of principles (justificatory arguments) of the narrative structure. The role of the official was to intellectualise a b o u t social practices: "creative interpretation takes its f o r m a l s t r u c t u r e from the idea of intention [...] because it [the interpretation] aims *to impose* purpose o v e r the text or data or tradition being interpreted".[103] And again, Hercules

[91] Jules Coleman 'Methodology' in *Oxford Handbook of Jurisprudence and Philosophy of Law* ed. Jules Coleman & Scott Shapiro (Oxford: Oxford University Press 2002), pp. 311–351 on p. 314.
[92] *Ibid.*, pp. 311–351.
[93] *Ibid.*, p. 183.
[94] *Ibid.*, p. 178.
[95] *Ibid.*, p. 160.
[96] *Ibid.*, p. 175.
[97] *Ibid.*, p. 160.
[98] See generally, Ronald M. Dworkin 'Thirty Years On' in *Harvard Law Review* 115 (2002), pp. 1655–1687.
[99] See generally, by Ronald M. Dworkin, 'Does Law have a Function? A Comment on the Two-level Theory of Decision' in *Yale Law Journal* 74 (1965), pp. 640–656, 'Lord Devlin and the Enforcement of Morals' *Yale Law Journal* 75 (1965–1966), pp. 986–1005 {subsequently published as 'Liberty and Moralism' in his *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press 1977), pp. 240–258 and 'Philosophy, Morality and Law – Observations Prompted by Professor Fuller's Novel Claim' *University of Pennsylvania Law Review* 113 (1965), pp. 668–690.
[100] Ronald M. Dworkin *Law's Empire* (Cambridge, Massachusetts: Harvard University Press 1986), p. 112.
[101] *Ibid.*, p. 235.
[102] *Ibid.*, p. 236.
[103] *Ibid.*, p. 228. Emphasis added.

> "tries to impose order over doctrine, not to discover order in the forces that created it. He struggles toward *a set* of principles he can offer to integrity, a s c h e m e for transforming the varied links in the chain of law into a v i s i o n of government now speaking with one voice, even i f t h i s i s v e r y d i f f e r e n t from the voices of leaders past."[104]

What constrained the official's actions were the cognitive experiences which s/he incurred as a p a r t i c i p a n t i n t h e i n t e r p r e t a t i v e p r o j e c t.

Fuller's original theory of legal structuralism (at least in Anglo-American legal philosophy) is conspicuous when one turns to DWORKIN's own review of FULLER's *Morality of Law* in 1965.[105] DWORKIN complained that Fuller's "internal" sense of morality lacked a "derivative or reflective" character. Only self-conscious justificatory standards constituted morality.[106] Borrowing HART's term, such moral standards were "criterial", according to DWORKIN. FULLER's sense of morality was what DWORKIN described as pre-reflective or even primitive.[107] Social bonding, for DWORKIN, could arise from argument and self-conscious reflection rather than from inarticulated collective values such a FULLER held out, according to DWORKIN. Beliefs were internal to the human being *as an interpreter* of the narrative structure. FULLER's appeal to unwritten assumptions and expectations opened the door to the arbitrary subjectivism or what DWORKIN disparagingly earlier described as "prejudice."[108] Such prejudices drew from the emotional, not the cognitive; from the experiential body, not the mind[109] that the passions of the experiential body must be exiled from legal analysis. Even a "practice" was considered the j u s t i f i c a t i o n a b o u t a s o c i a l p r a c t i c e, not the embodied meanings which human subjects may share through a bonding practice. DWORKIN restated the exclusion of popular morality when he distinguishes constructive interpretation from conventional interpretation:

> "[f]or when I speak of the community being faithful to its own principles I do not mean its conventional or popular morality, the beliefs and convictions of most citizens. I mean the community has its own principles it can itself honour or dishonour, that it can act in good or bad faith, with integrity or hypocritically, just as people can."[110]

Thus, from his earliest essays, DWORKIN consistently excluded anthropological morality from the narrative structure.[111]

JOSEPH RAZ, in his earlier and some later writings and in reaction to DWORKIN, offered a third sense of a structure: namely a bureaucratic, institutional structure. Such an

[104] *Ibid.*, p. 273. Emphasis added.
[105] Dworkin 'Philosophy, Morality and Law' [note 86], pp. 668–690.
[106] *Ibid.*, 683. Also see pp. 684 & 685.
[107] It is interesting that FULLER compared his understanding of "interactional relations" with the bonding of what he called "primitive" tribes. See, e.g., Fuller 'Human Interaction and Law' [note 15], pp. 239–244. See generally, Conklin 'Lon Fuller's Phenomenology of Language' [note 1], pp. 93–125.
[108] Dworkin 'Lord Devlin and the Enforcement of Morals' [note 86], pp. 986–1005.
[109] Dworkin 'Does Law have a Function?' [note 86], pp. 640–656.
[110] Dworkin *Law's Empire*, [note 100], p. 168.
[111] See, e.g., by Ronald M. Dworkin, 'Taking Rights Seriously' in his *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press 1977), pp. 184–205 and 'Liberty and Moralism' *ibid.*, pp. 240–258.

institutional structure pre-existed judicial reasoning.[112] If a rule were posited by the appropriate institutional source—such as a government agency or minister or court—then the rule was considered valid or authoritative. Each rule belonged to a system of institutional sources.[113] All human beings and all physical objects within the border of the territory were potential legal category. Each category could be de-composed into increasingly minute categorical elements on the territorial space.

A social realism was said to cover the institutional structure in that the structure was synonymous with "social facts".[114] This rendered a non-contingent, objective character to legal reasoning. Contingency only occurred on the exterior to the structure: b e y o n d t h a t , a l l i s c o n t i n g e n t". The "social fact" of an institutional structure thereby rendered objectivity to what one would otherwise consider the arbitrary posit of a value by a judge. As Joseph Raz emphasises in different essays, "[w]hen we ask about the nature of law we aim to discover how things are independently of us [...] our preferences or value judgements are immaterial."[115] Once a judicial decision was rendered, the decision excluded any deliberative re-examination of the values imputed in the content of the decision.

The distinction between metonymy and metaphor is relevant here. With metonymy, the analysed concept or rule stands for the structure as a whole. Such a metonymy permeates the works of HART, COLEMAN and RAZ. In the case of HART and COLEMAN, the concepts were inter-related into a system or structure of concepts (*sc.* rules). In his later writings, RAZ also described how legality is "a system of reasoning or a network of intelligible connections between interconnected ideas...that manifest their intelligibility".[116] In DWORKIN's case, the concepts are framed as arguments and each argument stands for a narrative structure. The structure, DWORKIN writes, excludes and includes, underplays and privileges some ideas over others, "as if this [structure] were the product of a decision to pursue one set of themes or visions or purposes, one 'point', rather than another."[117] A structure even lies behind an individual text, such as a statute or a judicial decision. Even constitutional rights against the state are created, as DWORKIN writes in 'Law's Ambition for Itself', "not by the bare text of the Constitution, nor by the specific, concrete intentions of the 'framers', nor by their own fiat, but instead by t h e c o n s t i t u t i o n a l s t r u c t u r e itself working itself pure". Only in his earlier work noted above, does RAZ entertain that the legal structure, as an institutional social fact, is greater than the sum of its discrete members. The four jurists—and I take them only as archetypical examples of

[112] By Joseph Raz, 'Authority, Law and Morality' in his *Ethics in the Public Domain* Essays in the Morality of Law and Politics (Oxford: Clarendon Press 1994), pp. 210–237 and 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in his *Authority of Law* (Oxford: Clarendon Press 1979), p. 269.

[113] RAZ began his first book, the *Concept of a Legal System* for example, with the claim that "every law necessarily belongs to a legal system..." Raz *Concept of a Legal System*, p. 1.

[114] Raz *The Authority of Law*, p. 38. Here, he also describes his legal theory as positivist because the activities of human beings, through their institutions, posit the laws.

[115] Joseph Raz 'The Relevance of Coherence' [1992] in his *Ethics* [note 112], pp. 277–325 at p. 287.

[116] Joseph Raz 'Rights and Individual Well-Being' in his *Ethics* [note 112], pp. 44–59 at p. 47.

[117] Dworkin *Law's Empire* [note 100], pp. 38–39. Ronald M. Dworkin 'Law's Ambition for Itself' [McCorkle Lecture] in *Virginia Law Review* 71 (1985), pp. 173–187 on p. 175. Emphasis added.

contemporary Anglo-American jurisprudence[118]—recognize that "morality" is incorporated into legal reasoning without asking "what is on the other side of the boundary of the legal structure?" At best, one might find a reference to "morality" as lying on the other side of the boundary. I wish to address the nature of that structural boundary. Perhaps HART failed to recognize this factor when he described his fear that his starting-point (a rule) radically differed from the starting-point of LON FULLER (anthropological morality): "I am haunted by the fear that our starting-points and interests in jurisprudence are so different that the author and I are fated never to understand each other's work."[119]

7 The Centrifugal and Centripetal Structures

An ambiguity seems to overcome FULLER's structuralist theory of law. On the one hand, the boundary, pillars and matter of the structure pre-exist the official. The official enters the scene too late, as it were, to radically change them. The boundary, pillars and matter seem to be "out there", separate from the official and uncontrollable by the official. And yet, on the other hand, a legal structure, FULLER insists, is not ready-made as if a gift of nature. Rather, it is the assumptions of the officials that constitute the matter of the structure. In order to grasp how FULLER breaks from the apparent ambiguity, I shall distinguish between a centrifugal and a centripetal structure.

A centrifugal structure has a centre which magnetically attracts external matter as it swirls in a circle. The best example of a centrifugal structure is the candy floss that one purchases at a county fair. Like the candy floss, the floss swirls about a centre. Slowly, the centre gains in solidity until the floss takes shape. Chaos remains outside the stick of floss. The matter of the floss, its boundary and its pillar is attractive to any participant who perceives the candy as a structure. So too, when they have completed their project, the officials have constructed a structure from the chaotic matter. A boundary and pillars characterize the legal structure with the legal official at its centre. Once the boundary and pillars are constructed, there is a "constitutional law" that demarcates legal from pre-legal phenomena. Human agents construct the boundary, pillars and matter of the structure as they interpret texts, communicate with each, analyse rules, apply the rules and argue cases before arbitrators, judges and other officials. The interrelations and successions of rules and institutions are systematised into a coherent order.[120] As FULLER explains in *Legal Fictions*, "[i]nstead of that [ready-made structure], our minds have the capacity for altering, simplifying, rearranging reality." FULLER continues that our minds alter and simplify what we take as legal reality or the "is".[121]

The consequence of the centrifugal project is that we officials are the centre of the structure. This is so even though the structure seems to be objective and pre-existing of any legal official or the reasoning of that official. What may well have started out as the

[118] Also see, e.g., by Sean Coyle, 'Hart, Raz and the Concept of the Legal System' in *Law and Philosophy* 21 (2002), pp. 275–304 and 'Our Knowledge of the Legal Order' *Legal Theory* 5 (1999), pp. 389–413.

[119] H. L. A. Hart 'Lon L. Fuller: *The Morality of Law*' in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press 1983), pp. 343–364 on p. 343.

[120] Fuller *Morality of Law* [note 2], p. 105.

[121] *Ibid.*, p. 104.

subjective posit of a value or *prejudicia* is transformed into objectivity once such expression is located with similarly situated *dicta* within the boundary of the structure. Such a relationship excludes a special sense of morality from legality, then. There is an internal morality and an external morality. A valid judicial decision or action must be located inside the implicit structure of collective expectations.

FULLER's centrifugal structure contrasts with the centripetal structure where the former centre lies on the fringe of the structure. Instead, the boundary "out there" is taken as reality. The boundary, not the official, is the generating source of the structure. A ready-made objectivity characterizes the structure. The conceptual, narrative and institutional structures, as elaborated by HART, COLEMAN, DWORKIN and RAZ, are centripetal in nature. In HART's case, the primary and secondary rules are situated in an objective reality. In COLEMAN's case, the objectivity is so entrenched in the boundary that the structure never accesses the official's meant objects. In DWORKIN's case, the official's subjective values would offend the objectivity of the narrative structure. Indeed, there remains a "law beyond the law" that presents the object of desire to complete the gaps in the narrative structure. In RAZ's case, both the structure of concepts and the institutional structure are believed to exist beyond the subjectivity of the official. By RAZ's sources thesis, a judicial decision or action is objective by virtue of its posit by an appropriate institutional source. Once again, the structure is centripetal. Only FULLER's structure is centrifugal. Herein lies the originality of FULLER's structuralist legal thought.

Only if the judicial decision or action lies internal to the boundary of the structure and only if the source of the decision is the official her/himself, only then will there be a "real right", as FULLER puts it. FULLER's implied legal structure, nested in assumptions and expectations, is centrifugal. An argument must be brought from a centre (the judge/lawyer) *to* the boundaries of the structure. The generation of the structure lies in this centre of the structure. The centre of a centripetal structure, in contrast, is located in the circumference of the structure. The circumference is real. The official merely supplements the real. The centripetal structure forgets about the collective *prejudicia* of the lawyer or judge or non-lawyer. Anthropological morality must be excluded from the structure as immaterial to the centripetal structure.

The anthropological morality is immaterial because the most objective unit purged of all socially contingent content. What is most important is not some speculation about the structure as a whole but the discrete, self-standing concepts that compose the centripetal structure. A judicial decision or statute functions as a metonymy *vis-a-vis* the structure as a whole. The interpretative act of the official stands for the structure. There is no room for metaphoric allusions to the boundary and pillars since the boundary and pillars are the God-given reality. Instead, the role of the official is to analyse the concepts which s/he knows as if they were walled in a centripetal structure. With a centrifugal structure, in contrast, officials, being the centre of the structure, create and alter what they would take in a centripetal structure as an externally independent of the subject. The boundary of the centripetal structure is taken as a "God-given" reality.

Despite the contingency of the official's interpretative act, FULLER claims that official assumes the boundary of a (centrifugal) structure as a "given". There must be some stability and determinativeness in the boundary or else one would not have a structure, even

a centrifugal structure. Accordingly, officials reach conclusions that are binding. For, the decisions are congruent with the boundary of the structure.

That said, the judicial decisions may be patently false or unjust conclusions. How so? First, officials appeal to rules and rules reduce context-specific experiential meanings into categories. Such a categorical world may construct a new reality.[122] But the new reality may fundamentally contradict the existing structure or be an aberration from its pillars and boundary. Second, "borderline cases upset our classifications".[123] Accordingly, a rule may be false if it is incongruent with the boundary of the centrifugal structure. If an official considers that a rule falsifies legal reality (that is, the rule does not join with the "practice" of deferring to the structure's boundary), this is only because the official pictures the rule as external to the territorial boundary of the centrifugal structure.

8 Why is the Structure Binding?

The most important aspect of an implied centrifugal structure is the bonding or "shared commitment" that holds its members together: the shared commitment to the boundary of the structure is "the g l u e that holds together [...] the f u r n i t u r e of society".[124] H. L. A. HART was "haunted" by such a bonding which he left behind in his exposition of the concept of a modern legal order. For, collectively shared assumptions constitute the glue. An individual's inclinations, dispositions and *Weltanschauung* will be at one with collective values. The unconscious is made conscious by the "repeated acts of human judgement at every level of the system".[125] The "structural constancies" that repeat themselves are treated as "uniformities of the factually given".[126] The constancies appear "natural" or ordered precisely because of their repetition. In this manner, a statute or other legal instrument is not efficacious unless one could relate the instrument to the structure of unwritten expectations.[127]

Such a social bonding sustains contracts and public institutions. Assumptions cement the social bonding necessary for the efficacy of a legal order.[128] What happens to a legal structure that lacks the requisite social bonding? Such a prospect is "disastrous".[129] Why so? Because legal formalism would prevail at the cost of the necessary social bonding that renders the formalism efficacious. The legal scholar must direct her/his studies to law in action rather than law in books.[130] The most important element such law in action asks "how are officials and the public bonded to the rule of law?" The rule of law is made conscious by such notions as due process, equality before the law, freedom of speech, the

[122] Fuller *Legal Fictions* [note 5], p. 115.
[123] *Ibid.*, p. 102.
[124] Lon L. Fuller 'Two Principles of Human Association' {in *Voluntary Associations* ed. J. Roland Pennock & John Chapman (New York: Atherton Press 1969) [Nomos XI] reprint} in his *The Principles of Social Order* [note 15], pp. 81–99 at p. 85. Emphasis added.
[125] Fuller *Anatomy* [note 21], p. 39.
[126] Fuller *Morality of Law* [note 2], p. 151.
[127] *Ibid.*, pp. 155–157.
[128] Fuller *Anatomy* [note 21], p. 47.
[129] *Ibid.*, p. 39.
[130] *Ibid.*, pp. 8–11.

requirement of evidence, adjudication, and the expectation that officials on the pyramid will be constrained by rules.[131]

Indeed, in a review of two Russian legal scholars, FULLER goes so far as to suggest that the felt bonding nested in a structure underlies the very existence of all legal systems, not just a bourgeois legal order.[132] To consider law as a "matter of the authoritative ordering of social relations from above", he continues in the review, is erroneous.[133] The belief that legality is artificially superimposed upon individuals misses "the essence" of law: namely, the reciprocal exchange or what I have called the addressive experiences that induce the social bonding necessary to have an authoritative legal structure. FULLER understands the term "morality" in just this sense of an immanent rather than a posited set of obligations.[134] Even socialist law is built upon unwritten meanings, he suggests. Such unarticulated meant objects characterize private trading, governmental relations with corporations, and the payment to workers who are compensated for their performance of work. Exchange, institutional relations and economic compensation disappear when the last vestiges of economic reciprocity dissipate.

One needs to appreciate that FULLER's antagonist is a legal method that is satisfied with the intellectual differentiation of concepts. Rules are a form of concepts. HEGEL called this legal method, *Verstand*. Intellectual differences displaced social differences. Intellectual differentiation seemed to result in an inevitable or natural conclusion. But intellectual differentiation was only possible because of deeper unconscious assumptions about the structure boundary that excludes some forms of reasoning and includes others as relevant to legal knowledge. For a rule to be analysable, there must be constancy through time. Further, there must be congruence between the law in action on the one hand and the law in books on the other.[135] The whole analytic project could claim to represent the legal "is", FULLER insists, only if the participants collectively shared assumptions about the baselines, surface, depth, and boundary of the structure within which the analysing lawyers worked. Without shared interactional expectancies, the subject becomes a "stranger" or "true outsider" to laws.[136] Conversely, if a lawyer or judge interprets a text in the spirit of the shared structural boundaries, "interpretation can often depart widely from the explicit words of the Constitution and yet rest secure in the conviction that it is faithful to an intention implicit in the whole structure of our government".[137] "Is" and "Ought" become inextricably mixed.[138] And the shared "is" and "oughts" give form to the structure that officials take for granted when they parse and analyse rules.

[131] Lon L. Fuller 'Irrigation and Tyranny' {*Stanford Law Review* 17 (1965), pp. 1021–1042 reprint} in his *Principles of Social Order* [note 15], pp. 217–218.
[132] Lon L. Fuller 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory' *Michigan Law Review* 47 (1949), pp. 1157–1167.
[133] *Ibid.*, p. 1160.
[134] *Ibid.*, p. 1162.
[135] Fuller *Morality of Law* [note 2], pp. 33–41.
[136] Fuller 'Human Interaction and the Law' [note 15], p. 240.
[137] Fuller *Morality of Law* [note 2], pp. 102 & 104.
[138] See, e.g., Lon L. Fuller *Law in Quest of Itself* [1940] (London: Beacon Press 1966), p. 64.

9 Conclusion

FULLER leaves legal philosophy with a double sense of "morality". First, a phenomenology of language, constituted from assumptions and expectations, constructs the boundary and pillars of a territorial structure. What is known inside the boundary is a legal unit. This internal knowledge mixes the "is" and "oughts" so that the naturalistic fallacy collapses. There is a morality of law because of the subjective values and other "oughts" lie internal to the boundary of the implied structure. Legal knowledge, for FULLER, is a territorial knowledge despite his phenomenology of language. This sense of internal morality is enough to have confused FULLER's critics. But FULLER offers a second sense of morality. For, if there is a structure or order, there must be a disorder. FULLER leaves one with the prospect of a morality which remains exterior to the boundary of the legal structure. Such a pre-legal and non-legal exteriority is unrecognizable as law.

Despite the clarity of FULLER's structuralism, there remains a small paradox. FULLER presupposes that lawyers and judges construct the internal morality of a structure. But morality, as the exteriority to a structure, also hinges upon the construction of legal officials because the exteriority depends upon the judicially created territorial boundary. Lawyers and judges construct the exterior non-law in the same moment that they construct the boundary and pillars of the structure. They do so as they communicate, interpret, adjudicate and resolve disputes and posit social policies of the state. If that is so, the non-law is never a "given" which officials need accept as a "second nature", as PLATO (in *The Laws*) and HEGEL put it. The relation of law to morality is a misdirected enterprise. For, legal officials themselves contrast morality as they construct the structural boundary between law and morality.

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