Reply

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It is my privilege to respond to the four comments on my paper, 'Legal Subjects and Juridical Persons: Developing Public Legal Theory through Fuller and Arendt,' that have been prepared by Michael Wilkinson, Pauline Westerman, Wouter Veraart, and Thomas Mertens for the purpose of this symposium. I am indebted to each for their thoughtful and careful efforts. Though constraints of space demand that some issues will invariably be left unaddressed, I have aimed in what follows to deal with the main points raised by each commentator, as I have identified them. I attempt to do this, moreover, in a manner that highlights and responds to certain recurring themes and connections between the comments themselves.

A reply to **Michael Wilkinson's** commentary – 'Political Jurisprudence of Institutional Normativism: Maintaining the Difference Between Fuller and Arendt' – must begin with a summary of Fuller's jurisprudence that is there presented. This Fuller, who we might call 'Wilkinson's Fuller,' is a theorist who offers us a civilized, or slightly moralized, version of legal positivism. It is, however, ultimately indistinguishable from positivism because of how its commitments boil down to an intrinsically authoritarian view of law. That is, what we can take from Fuller is a top-down, a-political, 'normativism' in which all starts and ends with law.[1] Talk of reciprocity and interaction, therefore, if not wholly misplaced, is kept at the margins. Moreover, as Fuller's interpreter, my own aims should equally be read in this vein. As Wilkinson puts it, 'law's institutional frame performs the role in Rundle's jurisprudence of what Arendt elsewhere labels "the absolute," that which is categorically outside our individual or collective grasp.'

This idea of an 'absolute' is a key theme of Wilkinson's commentary. It is especially important to his insistence that, on Fuller's conception, to be a legal subject is to be inherently passive, or, at least, *politically* passive. Wilkinson's point here is that to the extent that Fuller's legal subject engages his capacity for action at all, it is as the bourgeois egoistic man who seeks the legal condition purely for the purpose of securing private rights, rather than as part of a project of public world-building in concert with others. In short, the jurisprudence of Wilkinson's Fuller is one that offers us a vision of the legal realm in which the private is the end-game, in which there is no 'public' idea of the political realm, and, indeed, no apparent interest in or possibility of the priority of politics.

There are three elements of this analysis that I see to be closely related, and so their interconnections need to be teased out as the basis of a response to Wilkinson. The first is the suggestion that Fuller's legal subject is 'passive'; the

1 I return to this 'normativist' classification below.

second is the idea that Fuller's jurisprudence is reducible to the priority of private ordering; and the third goes to the charge of 'normativism,' and all the (non-)prospects for politics that this idea implicates.

It will come as no surprise that I reject the portrayal of Fuller's legal subject as 'passive'; indeed, it is a portrayal for which I see little textual support in Fuller's writings. In *Forms Liberate*, I spent considerable time analysing Fuller's working papers on this point, and among other things these papers make clear that in the view of law and the conditions for it that Fuller subscribes to, the legal subject is 'not a subservient member of a population ready to be told what to do,' but quite the opposite. In the lead article for this symposium I developed this point by suggesting that we might understand Fuller's 'fidelity to law' analysis as reflecting an explicit commitment to the subject's right to assert her personhood in conditions where the site of lawgiving authority does not respect her as an agent. Still, it is possible that these matters do not go directly to the point that Wilkinson wants to make by speaking of the 'passivity' of Fuller's legal subject. His point, rather, goes to the political significance of legal subjectivity in the 'public' sense of concern to Arendt. On his reading of Fuller, this is apparently absent. Indeed, Wilkinson would likely say that such an assertion of personhood in the face of legal authority simply serves the subject's interest in her private world; a space in which fidelity to law is expressed only to the extent that it serves her interest in 'stable commercial exchange' and other quintessentially private priorities. Such, we would expect Wilkinson to argue, would be consistent with the irredeemably 'private' orientation of Fuller's jurisprudence.

It would be wrong to suggest that there is absolutely no basis for arriving at the categorization that Fuller was concerned with things private rather than things public in an Arendtian sense. Whether the model of the 'private' one has in mind here is of the kind we might associate with Hayek's jurisprudence,[2] or drawn from other bodies of thought in which conceptions of law are clearly oriented towards the priority of private ordering, there are surface reasons, in Fuller's texts, for arguing along these lines. It is well known, for instance, that Fuller, like Hayek, expressed an interest in 'spontaneous' and 'autonomous' forms of ordering. There are equally moments in his writings that sound decidedly libertarian in character, for instance, when he says in his 'Reply to Critics' that law is 'basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.'[3] And so, it might be argued, such statements go

2 It is important to clarify here that I raise the spectre of Hayek as a way of exploring Wilkinson's more general point: Wilkinson himself does not argue that Fuller's jurisprudence should be aligned with Hayek's.

3 Lon L. Fuller, 'A Reply to Critics,' *The Morality of Law* (New Haven: Yale University Press, 1969), 210.

some distance towards explaining why Fuller is on occasion referred to as a friend of libertarians.[4]

Yet one must surely undertake a highly selective reading of Fuller's writings if his jurisprudence is to be analogized to such a position, because it does not take much scratching at the surface to find that there are as many obvious *dis*similarities as there are similarities.[5] For instance, one finds in Fuller's writings no inherent Hayekian suspicion towards legislation and its genesis in a democratic politics.[6] Equally absent is Hayek's strong polemic against the very idea of 'social justice' and its legislatively-led economic redistributions. Here, to the extent that Fuller was at times regarded as a 'conservative,' he insisted that his concerns were motivated not by an 'unavowed economic royalism,' but rather by regard for the need to be guided by an awareness of the problems of 'absorbing reform' when choosing *how* such reforms are best pursued.[7] Much more, therefore, is required if one is to argue, as Wilkinson appears to, that Fuller's jurisprudence yields a conception of law and of the rule of law that is oriented above all to the security of private property and 'stable commercial exchange.'

It is perhaps more helpful, then, to consider the purposes that this characterization of the end-game of Fuller's jurisprudence as irredeemably 'private' serve within Wilkinson's analysis. Here, I think, the answer is clear: this portrayal of Fuller is key to ensuring that Fuller's project is insulated from any connection to Arendt's, on the basis that the conception of politics underlying his jurisprudence (reducible to things 'private') is simply too radically different to Arendt's

4 See, for one recent example, Barry Macleod-Cullinane, 'Lon L. Fuller and the Enterprise of Law,' a publication of the Libertarian Alliance (Legal Notes No. 22), accessible at <www.libertarian.co.uk> (last accessed on 26 September 2014).

5 On the Fuller-Hayek point specifically, this issue has been explored by Gerald Postema, whose research indicates that there is no cause to suggest that there was ever any relationship between Fuller and Hayek, personally or intellectually, to explain any apparent convergences: see Gerald J. Postema, *A Treatise of Legal Philosophy and General Jurisprudence: Volume 11* (Dordrecht: Springer, 2011), 141. Dan Priel has equally pushed back against the broader 'libertarian' charge in 'Fuller's Political Jurisprudence of Freedom,' *Jerusalem Review of Legal Studies* (2014): 1-28.

6 Indeed, Fuller planned (if only developed to a small degree) projects on both freedom and democracy. As I noted in the lead article, notes for both projects can be found in the archive of Fuller's private papers held at the Harvard Law School Library; Rundle, 'Legal Subjects and Juridical Persons: Developing Public Legal Theory through Fuller and Arendt,' this volume, note 58.

7 Fuller's position on this point is clarified in a letter to a colleague, Thomas Reed Powell, reproduced by Kenneth I. Winston in *The Principles of Social Order: Selected Essays of Lon L Fuller* (Portland: Hart Publishing, 2001). In the letter Fuller responds to Powell's 'repeated intimation that back of my whole philosophy lies an unavowed economic royalism (not to use an uglier word) which makes me indifferent to the plight of hungry people and puts me on the side of the plutocrats and swindlers,' and explains that a 'possible source of this misunderstanding' may lie in Powell not appreciating that Fuller's concerns lie not with questions of economic redistribution *per se*, but with 'the problem of absorbing reform' given that society is 'an organism which can absorb and survive only so much surgery': 335, 336-7. That said, at least on the issues under discussion between them, Fuller's reply to Powell indicates (one could say, in a Hayekian vein) a preference for decided incrementally reform through judicial rather than legislative means. But he insists throughout that this position is motivated by a concern for how reforms are *done*, and not intended to reflect opposition to reform itself.

(uncompromisingly 'public') to allow for *any* common conversation between them. Certainly, if I had sought to make the claim that Fuller and Arendt share a common political vision, this polarizing stance might be well-founded. I am less sure, however, that it is appropriate as a response to the project I actually undertook, and in which my engagement with Arendt was much more circumscribed. It is therefore worth revisiting what my undertaking was, and where I sought to situate Arendt within it. When I set the scene for the engagement I proposed between Fuller and Arendt, I noted a number of broad commonalities of substance and method. But, I also to make clear that my central concern lay with the very specific resonance I see between Fuller's thinking on the conditions for being a 'legal subject,' and Arendt's thinking on the conditions for being a 'juridical person.' My project, therefore, was not to build an 'Arendtian jurisprudence' in the same vein as Fuller's,[8] or otherwise to align all of their legal theoretical concerns. Instead, the much more modest argument I sought to develop was that a fruitful foundation from which to explore wider questions about the required content and methods of a distinctly public normative legal theory – one that commences its analysis from an appraisal of the position of persons within a putative legal frame – might be developed by teasing out those resonances.

What is striking about Wilkinson's analysis, therefore, is not just the extent to which he insists on no contact of any kind between Fuller and Arendt. There is also very limited engagement with those of Fuller's ideas that I primarily sought to emphasize. For instance, Wilkinson makes no reference to my interest in what Fuller suggests to us about the generative potential of the form of a condition of legality, and the consequences of this for personhood. Why, then, would so much of *this* Fuller – let's call him 'Rundle's Fuller' – be missing? My answer can only be speculative, but my guess is that these aspects of Fuller's jurisprudence that I find so interesting and important simply have no place within Wilkinson's frame. If one begins from the assumption that legal institutional designs are purely instrumental to the constitution of the kind of private legal ordering that is sustained by the bourgeois egoistic man, and if one in turn thinks that such defeats the very possibility of the shared beginnings of politics, it follows that there is little to be said about such designs beyond their instrumental utility. Indeed, as Wilkinson himself puts it, because legal institutions of the kind Fuller theorized are not

8 Similarly, at no point did I suggest that all of Fuller's esoteric intellectual interests can be neatly reconciled with concerns about conditions of public rather than private legality, or that his position on various jurisprudential questions salient to private law is directly mirrored in his reflections on the legality of public action and the rule of law. Indeed, an observation that can be made about Fuller – and which is explored by James Boyle in 'Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance,' *Cornell Law Review* 78 (1993): 371-400 – is that there are multiple tensions between his writings in private law (specifically, contract) and the commitments revealed in his jurisprudential writings. One way that I would frame these tensions is by suggesting that Fuller's private law writings reveal what might be called a primarily instrumental approach to contract, while his jurisprudential writings are primarily concerned with the non-instrumental dimensions of legal ordering: the demands of its form, its constitutive authority relationships, the demands of office generated, conceptions of agency and personhood presupposed, and so forth.

underscored by any kind of inquiry into 'power-founding or power-instituting,' they are necessarily 'wholly inert and abstract.'[9] The only available conclusion, therefore, would seem to be that little is to be said about how or in what ways 'forms generate.'

It is likely that Wilkinson is here following Arendt's own sense that there is something deeply incompatible between the necessary capacity for action and potential for beginnings that defines politics, and the apparently action-obstructing, rule-bound world of law and legal institutions. Thus, the logic follows, there must equally be an insurmountable contradiction in the idea that a theorist of the legal, like Fuller, and a theorist of the political, like Arendt, should ever share a page. This is the logic that I see as informing Wilkinson's analysis, and which is further strengthened when he aligns the commitments of Fuller's jurisprudence with those of the 'normativists.' This grouping – being comprised equally of legal positivists and 'natural lawyers' – is one that we would otherwise not normally expect to see. But, Wilkinson tells us, the bundling is indeed appropriate once we see that common to all normativists is that they presuppose authority as given. The 'normativist,' therefore, is unconcerned about how the legal-political order was constituted in the first place. As a member of this group Fuller's jurisprudence is thus to be read as inherently disinterested in the constitutive conditions of the political realm. The only questions of interest to him are those which start, and end, with things legal.

It is not my aim here to resolve the question of just how much of a card-carrying 'normativist' Fuller was, or in what sense, because the arguments of my paper ultimately do not depend on disputes about the correctness of this classification. But, to my mind, to label Fuller as a 'normativist,' at least when this is done in order to import certain implications that this label is meant to carry, is problematic in a number of ways. In saying this, I do not mean to deny that Fuller's 'normativist' credentials are readily apparent: as a theorist of the legal, Fuller thought that something of considerable normative significance, capable of generating at least an aspect of our 'fidelity' to it, could be said about the form of legal ordering. Nor do I wish to suggest that he was a theorist of 'the political' in the sense of interest to Wilkinson: he clearly wasn't. But does this mean that we should think of Fuller, as Wilkinson invites us to, as *indifferent* to how conditions for human action are generated, beyond that which is necessary to participate within legal forms, or indeed, beyond what is necessary to secure conditions for private legal ordering and stable commercial exchange?

To me it seems too large a step to say that, because of his apparent 'normativist' orientation, Fuller's legal theory is essentially (even necessarily) impermeable to political concerns, and specifically to the question of how authority is constituted in the first place. This is not least because to accept this argument outright would be very much at odds with Fuller's own complaints against the tightly-policed

9 Michael Wilkinson, 'Political Jurisprudence of Institutional Normativism: Maintaining the Difference Between Fuller and Arendt,' this volume, 248.

boundaries of legal positivism, where one theorizes as if law can be understood as 'in quest of itself,' insulated from other phenomena, political, moral, and social.[10] My final point of reply to Wilkinson, therefore, goes to the question of how, as a matter of legal theory, that boundary can be rendered more permeable than the kind of separation that, at least on available theoretical resources, Wilkinson seems to accept as inevitable.

It is helpful to begin by emphasizing the differences between an 'authoritarian' account of authority – that which Wilkinson attributes to Fuller, and which I think represents a significant misreading of his jurisprudence – and a 'relational' account. The authoritarian, obviously, cares little for the relational aspects of his role: what matters to him is that what he commands, happens. Those who he addresses can, therefore, be essentially acted upon, as their own needs are of little consequence. Authority in its 'relational' guise, however, being the kind of authority that we refer to as 'legitimate,' is meant to signal something quite different. On these accounts, to possess authority requires bringing the person on the 'bottom,' the subject of authority, on side. Indeed, it is precisely because authority in this sense is gained through acceptance, rather than through being merely effected, that the subject of such authority can no longer be conceived as on the 'bottom' at all. She is, rather, in a kind of partnership with the authority which makes authority itself possible.[11]

It is this latter view of authority that I see as animating Fuller's jurisprudence. Without doubt, and as I readily conceded in the lead article, there is much work to be done in drawing out the connections between this view of authority and a distinctly public vision of the political realm that I think is its backstory.[12] This would, I think, require the development of an account of authority appropriate to the kind of non-instrumental jurisprudence that Fuller offers: that is, an account that *builds into* the conditions for law's authority a vision of the kind of political relationships (respectful of personhood, concerned with the maintenance of a distinctly public realm) that Arendt has in view. Meanwhile, what is clear, to me at least, is that if ever there was a relational account of *legal* authority that necessarily qualifies a strictly instrumentalist view of law, it is that which we find in Fuller's 'fidelity to law' analysis.

It is fitting to segue from this point to a response to **Pauline Westerman's** commentary – 'Lawyers Doing Philosophy' – by noting that in an early draft of my paper, I framed the project I sought to pursue in terms of developing the founda-

10 See Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940). Fuller reiterated this theme throughout his writings.

11 Elaborating a view that I am sympathetic to, David Dyzenhaus suggests that the same can be said for Hobbes's account of authority, which is otherwise generally regarded as offering perhaps the most 'authoritarian' account of law's authority: see 'Hobbes on the Authority of Law,' in *Hobbes and the Law*, ed. David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2012).

12 See my brief discussion of this point in Rundle, 'Legal Subjects and Juridical Persons,' in this volume, 216-217.

tions of a 'bottom-up jurisprudence.' I agree with Westerman that this frame was either overstated, misleading, or otherwise just not quite right. Still, the broader aims I had in view by gesturing to the idea of a 'bottom-up' jurisprudence ought not to be lost in disputes about the ultimately best label for my enterprise. What I had sought to get at through that subject-driven, 'bottom-up' idea is what 'top-down,' official-centric jurisprudence does not: namely, a commitment to theorizing the legal condition, and approaching key questions of legal theory, through considering the position of persons within a legal frame.

On Westerman's reading, what I hoped to do in pursuing this frame is 'to erect a normative foundation for the theory of law.' This is in some ways right, though I would have thought that my aims in the paper were and remain more humble than that. Indeed, it is appropriate here – joining Fuller (in a less polemical moment) in his insistence that different situations or questions will call for different theoretical counsel[13] – to make my commitment to theoretical pluralism clear. Thus, what I sought to do in the paper is to develop not so much a theory *of* law than a *direction of legal theorizing* that emphasizes connections between personhood, legal form, ideas of legal office, and so forth.

It is on these questions of *what* I am doing, as well as *how* I am doing it, that Westerman's commentary is especially salient. Westerman clearly thinks that I get things fundamentally wrong, on both counts. That is, on her view, I do not set out to solve a 'philosopher's problem' in the paper, and even if I did, I bring to my inquiry none of the philosopher's methods. Instead, akin to the lawyer who argues for the rightness of a legal claim or judgment, I take hold of certain interesting theoretical resources and treat them as authoritative; indeed, as proving certain normative claims. In adopting this technique, I am apparently not alone: the effort to impose legal doctrinal methods on philosophical questions is something repeatedly seen when lawyers attempt to cross the disciplinary line and enter the philosopher's territory. As an example of a 'lawyer doing philosophy,' therefore, this is what I do with Fuller and Arendt in the article.

I admit that I have much trouble trying to work out what to make of this picture of my enterprise. Certainly, its last leap – the diagnosis that I impose on normative theorizing the closed systems and search for coherence typical of legal doctrinal analysis – is one that I reject. Applied to the concerns of my paper, that diagnosis suggests that I am to be read as saying that a condition called legal subjectivity or juridical personhood, to which certain requirements attach, is the right or persuasive way of establishing the presence of law simply because Fuller and Arendt said so. Perhaps this interpretation is available, but for my part I do not see how. I understand my task, and methods, rather differently.

13 This position is captured in the closing lines of *Anatomy of the Law*, where Fuller suggests that although the 'two schools' brings to expression a 'fundamental polarity,' 'at particular junctures in human affairs both kinds of counsel can seem pertinent,' and so 'it is likely that both kinds will continue to be offered in the future.' Fuller, *Anatomy of the Law* (New York: Frederick A Praeger, 1968), 119.

In a soon to be published book, Fred Schauer quotes a famous remark by Oliver Wendell Holmes against the ambitions of 'general' theories: 'I care nothing for the systems,' Holmes apparently said, 'only the insights.'[14] To be sure, this rejection of the ambition towards all-encompassing theory might, as Schauer himself agrees, be going too far. But the important point that Schauer wants to press by quoting Holmes is his concern that when it comes to legal theorizing, 'we may historically and especially recently have lost too many insights by too insistent a pursuit of single, unifying theories.' Moreover, even if such a unifying account were even possible, it 'might turn out to be so abstract as to leave too many interesting questions, including philosophical questions, about law, laws, and legal systems unanswered.'[15]

I find these remarks immensely helpful as a way of replying to Westerman, because I understand myself as having attempted something along these lines in the article. I claim no purity of method on behalf of my enterprise and, to this end, it is helpful to recall Fuller's own 'deep conviction that a too self-conscious concern with preserving some kind of "purity" of method is demonstrably incompatible with creative work, and results in the creative work being concealed.'[16] In sympathy with these concerns, what I sought to do was to ask distinctly creative questions about what Fuller's thinking on the legal subject, and Arendt's on the juridical person, might illuminate for a different kind of legal theoretical inquiry.

Thus, at risk of sounding like Hart and Fuller themselves, I fear, or at least suspect, that Westerman and I are simply too far apart, methodologically, to find common ground. This also goes some way towards explaining certain points of substance about which we are also at odds, of which I will conclude by mentioning one. Westerman insists that because 'the law (…) *turns* entities into juridical persons,' this necessarily reveals just how ultimately 'top-down' (rather than 'bottom-up') it must be. I don't agree. That is, unless (as Westerman presumably does) one starts with an essentially uni-directional, classically positivist, conception of law, I do not see how this transformative effect on persons within a legal frame leads necessarily to her 'top-down' diagnosis. Indeed, Westerman's commentary generally avoids the various ideas I put forward about the *interactions* that bring the legal subject/juridical person into being, and which are generative, or transformative, in *both* directions. It is these which support the idea that, even if law 'turns entities into juridical persons,' it does not follow that it is, of its very nature, 'top-down.'

The question of how to set about the kind of inquiry I undertake is also central to **Wouter Veraart's** thoughtful engagement with my paper, 'The Experience of Legal Injustice.' In its immanent critique of my undertaking, Veraart's commen-

14 Frederick Schauer, *The Force of Law* (Cambridge: Harvard University Press, 2015), Chapter 1 (forthcoming).

15 Schauer, *The Force of Law*, Chapter 1.

16 Working note titled 'Concerning "is" and "ought" in Legal Science,' The Papers of Lon L Fuller, Harvard Law School Library, Box 9, Folder 7 (notes for *The Law in Quest of Itself*).

tary raises several insightful points. Though there is much cross-fertilization between them, I will try to respond to three issues in turn. The first is the matter of the experience of legal pathology and the methodological challenges that accompany the effort to theorize that experience. The second relates to Veraart's helpful engagement with Fuller's 'morality of duty – morality of aspiration' continuum and its interface with these questions. The third relates to his concerns about the deficiency of Fuller's offerings on the substantive question of exclusion from legal protections more generally.

On the first point, Veraart is absolutely right to suggest that my core concern in the article is not with 'legal experience' generally, but with the experience of legal pathology – or, in his usage, 'legal failure or legal injustice' – in particular.[17] He is therefore again right to suggest that what attracts me to Arendt's thinking on the juridical person, and motivates my desire to connect it with Fuller's thinking on the legal subject is how her analysis speaks to the phenomenon of the marginal or pathological legal case. Yet, as I explained in the article, any enterprise that seeks to work with this orientation immediately confronts several challenges. First, there is the methodological challenge of how to glean something of theoretical benefit from a person's experience of law, pathological or otherwise, given that to speak of 'legal experience' generates an expectation of socio-legal inquiry more than theoretical analysis. Such would surely be impossibly dependent on necessarily contingent subjective experiences and evaluations, and so, the objection might run, would of its nature jeopardize the pursuit of general theoretical claims that can be objectively argued. These challenges are undoubtedly significant. Nonetheless, as I put it in the article, if we are to pursue a direction of legal theorizing that commences its inquiry into a (putative) legal condition from the position and status of persons within that condition, the 'exercise-ability' of one's legal standing must form part of the account, rather than being considered additional or optional to it.[18]

The problem taken up by Veraart, however, is somewhat different. His questions relate to how far either Arendt or Fuller can ultimately take us given that, for both, the matter of experience 'becomes "central" or acute only in the most dire circumstances; in other words, when the legal subject or juridical person is

17 This is equally the case for the work I have done in the area of law and the Holocaust, where I have experimented with different methodological means of capturing the idea of legal pathology as an experiential phenomenon. See especially Kristen Rundle, 'Law and Daily Life: Questions for Legal Philosophy from 1938,' *Jurisprudence* 3 (2012): 429-44. But generally I have given special emphasis in my work on Fuller to his interest in legal experience, pathological and otherwise. Beyond the hypothetical engagement with this matter reflected in his 'conception of the person' analysis, or indeed the allegory of King Rex, Fuller squarely turns to experience at various crucial points in his argumentation, among the best examples of which is the Nazi law 'conscientious citizen' analysis: see Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart,' *Harvard Law Review* 71 (1958): 630-72, at 646.

18 In the lead article I gesture to certain directions of methodology in legal theory that might be at least congenial to the kind of enterprise I propose, and I especially emphasize the counsel of Nicola Lacey on this point (Rundle, 'Legal Subjects and Juridical Persons,' 234-236).

directly threatened in her capacities or in her survival as a legal subject, or when she is already in the process of institutionally "fading away".'[19] Even if Fuller's outlook might generally be more 'positive' than Arendt's, in terms of the overall promise he attributes to legal institutions and the legal condition generally, Veraart is right to notice that his most common and indeed effective way of communicating this is by giving us an account of what happens when the legal condition *breaks down*.[20] There thus seems a sound basis for Veraart's point that, though both Fuller and Arendt might have valuable things to say on the connections between the boundaries of legality and the experience of legal injustice, they have 'a lot less to say on the state of law's institutional framework in less radical circumstances.'[21]

Also recognizing this problem, in the article I briefly speculated on a point that is worth repeating here: namely, whether it is an inherent limitation or indeed simply a characteristic of normative theorizing that it must ultimately be married to minimum standards; as if, by its nature, it is a kind of 'lowest common denominator' endeavour. But by way of reply to Veraart, I am interested to explore the interface between this challenges and his very helpful engagement with Fuller's 'morality of duty – morality of aspiration' continuum. As Fuller explained it, the morality of duty is something we can readily grasp for how it 'lays down the basic rules without which an ordered society is possible.' Its calling on human effort, and correspondingly, its demands on the ethos of the actor, are therefore minimal. This is precisely why, when disregarding those demands, an actor will be condemned 'for failing to respect the basic requirements of social living.'[22] The morality of aspiration, by contrast, is much harder to grasp. Speaking not to minima but to excellence in human effort, it is much more difficult to specify as well as to achieve. Indeed, as Veraart highlights, this difficulty was readily conceded by Fuller, who even spoke of his model of the inner morality of law in terms of how it was '*condemned* to remain largely a morality of aspiration.'[23]

In my work on Fuller so far I have been driven to prioritize how *he* understood and sought to present his intellectual agenda, rather than how others have interpreted him. As a result, I have not lingered a great deal on the morality of duty – morality of aspiration continuum because of how Fuller himself viewed the success of his foray into this territory. Responding to Hart's rather withering review of *The Morality of Law*, which included criticism of the morality of duty – morality of aspiration arguments, Fuller made clear that he, too, thought that his argument was seriously under-worked.[24] Yet even with this attempt at qualified disa-

19 Wouter Veraart, 'The Experience of Legal Injustice,' this volume, 275.

20 See, by way of illustration, the tenor of Fuller's discussion of Nazi law in 'Positivism and Fidelity to Law,' as well as the famous tale of Rex – and indeed, his analysis of the conception of the person implicit in legality – in Chapters 2 and 4 respectively of *The Morality of Law*.

21 Veraart, 'The Experience of Legal Injustice,' 275.

22 Fuller, *The Morality of Law*, 5-6, quoted in Veraart, 'The Experience of Legal Injustice,' 267.

23 Veraart, 'The Experience of Legal Injustice,' 276, quoting *The Morality of Law*, 165.

24 Fuller describes his analysis as 'full of open ends': see my discussion of this point in *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Oxford: Hart Publishing, 2012), 86.

vowal on Fuller's part in view, Veraart is correct to emphasize the significance of those ideas to my endeavour in the article of asking questions about what kind of demands are placed on the species of legal theoretical inquiry that Fuller embarked upon, and how and to what extent those demands can ever be met. This is because what is very clearly revealed in Fuller's treatment of the idea of the morality of aspiration is that he, too, was acutely aware of the pull of normative theorizing towards standards generated at a crisis point rather than to standards that speak to a picture of health and flourishing.

That said, Fuller did have a strong sense of what he sought to demonstrate through the idea of a morality of aspiration, or at least a strong sense of what, by way of supportive conditions, the realisation of this aspiration requires. As he explained it, even a movement towards the demands of the morality of aspiration needed to be supported by 'firm baselines' for human interaction 'that – in modern society at least – only a sound legal system can supply.'[25] The eight principles which Fuller articulated through his idea of the internal or inner morality of law are thus squarely an attempt to specify the practical demands of ethos upon which the realization of this 'aspiration' is likely to depend. Moreover, as Veraart also highlights, Fuller was clear that the morality of aspiration is a 'human aspiration,' such that any legal endeavour guided by it cannot 'refuse the human quality to human beings without repudiating itself.'[26] It is worth noting that this point is entirely consistent with his analysis of the conception of the person implicit in the internal morality of law.

The point, then, is that although it might indeed be the case that normative legal theory must invariably be married to minima, despite its orientation to the aspirational or ideal, what we can take from Fuller is that this challenge is nonetheless one that we must attempt to work with. It is therefore appropriate to again return to questions of method, because, whether faced with the task of observing conditions of flourishing or pathology, what will be needed in both cases is a method that embraces socio-legal inquiry at the same time as it remains in touch with normative standards against which the experiences there observed can be measured and assessed.

It is helpful to preface my turn to the third point – a response to Veraart's concerns with Fuller's deficiency in addressing the conditions that perpetuate the phenomenon of legal exclusion – by noting another objection raised in his commentary. I refer here to my suggestion that the perspective Arendt takes when reflecting on the juridical person emphasizes the 'positive' transformative effects of the juridical realm on the person who could otherwise expect to be positioned outside of law and thus alienated from juridical protections.[27] Commenting on

25 Veraart, 'The Experience of Legal Injustice,' 268; quoting *The Morality of Law*, 205.
26 Veraart, 'The Experience of Legal Injustice,' 274; quoting *The Morality of Law*, 183.
27 This is the idea conveyed in the notion that the stateless person is better positioned as a criminal than as a 'mere human.' On this point, I thank Veraart for alerting me to the very similar idea captured by Paul Ricoeur's reasoning in 'Who is the Subject of Rights?': see Veraart, 'The Experience of Legal Injustice,' 273-274.

this, Veraart is of course right to point out that although Arendt does emphasize the status-transforming effects of the 'juridical' in this sense, she is in the analysis in which her reflections on the juridical person emerge otherwise a pessimist. When Arendt traces the effects of legal *inclusion* as they are manifest in the juridical person, she does so precisely to highlight the irony of this vis-à-vis the much more constant fate of *exclusion* to which the stateless person was subject. The 'positive' implications of juridical personhood, therefore, are offered as a contrast to the standard, marginalized and acutely vulnerable plight of that person. The point, then, is that Arendt clearly does not offer a celebration of legal institutions generally. Instead, at the heart of her analysis is an account of the highly contingent relationship of such institutions to the fate of persons, illuminated by reference to the position of those who remain 'beyond the pale' of law.

These are important objections, and Veraart's own grappling with them is probing and by all indications well-founded. But there are nonetheless two issues within his position that need to be disaggregated. The first relates to his engagement with the 'circularity' of Fuller's analysis of the connections between personhood and the legal form: that is, how legal rules presuppose responsible agents capable of understanding and following rules on the one hand, at the same time that it is the legal system that 'maintains and safeguards the institutional mediation which makes responsible agency possible.'[28] As Veraart points out, it is precisely at what I have been calling the 'crisis point' – the instance of 'legal failure' or 'legal injustice' – that the ironies of this circularity emerge, as here 'a set of laws specifically designed to deprive its addresses of these capabilities simultaneously *confirms and negates* their position as responsible agents.'[29]

A reply to this point must begin with the reminder that in Fuller's jurisprudence there is a limit to these dynamics: we must draw a line at the point when the agency presupposed by law's form is also that which is negated by its substance.[30] Veraart is much less convinced, however, that we can find something similar to this commitment in Arendt.[31] He has some sympathy with my claim that, apparent general distrust of institutions notwithstanding, Arendt does signal to us that the condition of the 'juridical' is one that is not reducible to a condition of positive 'legality': that is, that the juridical makes normative demands that distinguish it from an idea of legality understood exclusively in positivist terms. But Veraart is concerned that this same distinction sets up a false dichotomy between purely instrumental (and, as relevant, debased) conditions of positive 'legality,' and a healthy, normative condition in which human beings can flourish as juridi-

28 Veraart, 'The Experience of Legal Injustice,' 269, and generally, 269-273.

29 Veraart, 'The Experience of Legal Injustice,' 271. The point is very helpfully elaborated by Veraart by reference to Jurgen Habermas's idea of a 'performative contradiction.' Though using different resources, I have made a similar point in 'Law and Daily Life,' in terms of how the persecutory content of law may well or indeed is likely to 'cancel out' the gains secured through the formal guarantees of legality, 435-6.

30 I reflected on this aspect of Fuller's position in Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust,' *University of Toronto Law Journal* 59 (2009): 65-125.

31 Veraart, 'The Experience of Legal Injustice,' 270.

cal persons. In teasing this intuition out, he pays special attention to my claim that, akin to the conditions for Fuller's 'legal,' for Arendt the realm of the 'juridical' is defined by the presence of an institutional structure within which recognition of the person as a centre of initiative is *sustained*.[32] For Veraart, this doesn't seem right, because on his reading of Arendt the position to be occupied by the juridical person 'is *never* quite stable, neither in a totalitarian state, nor within its interactions with civilized, mundane legal systems.'[33]

These are important points to highlight, and Veraart's articulation of them is compelling. Still, even though the very motivations of Arendt's analysis lead her to express a more pessimistic view of legal institutions generally, I wonder whether there is really so great a difference between her and Fuller, at least on the matter of the inherent instability of juridical personhood. What I mean to signal here is that even if he was engaged in the enterprise of normative legal theorizing, and so was consciously aspirational in his approach, Fuller was equally concerned to keep his theoretical claims in touch with the 'prosaic facts of human life' and the realities of 'everyday legal experience.'[34] Certainly, he was far more optimistic about legal institutions than Arendt, but even so, Fuller regarded law as an inherently vulnerable endeavour: an enterprise 'dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to always fall somewhat short of a full attainment of its goals.'[35]

My final reply to Veraart extends this last point. Throughout his analysis, Veraart suggests that because Fuller's jurisprudence does not address the fundamental problem of 'the fact that those at the border and claiming their "right to have rights" are left empty-handed from a legal perspective,'[36] it is not only necessarily deficient, but also leaves my own project 'underdeveloped.'[37] Though I am inclined to agree with the first point, I am less inclined to subscribe to the conclusion that these problems signal a deficiency in either Fuller's undertaking or my own. Here again, we must recall what the parameters of Fuller's project were: a project concerned with tracing out the implications of the form(s) of law. Accordingly, the reason why we can take little from Fuller on the matter of how people enter a legal order, or are excluded from it, is precisely because these matters are predominantly politically determined. Certainly, the mechanisms of a 'right of passage' might be expressed through legal categories or entitlements. But the fact remains that the scope of the right itself will be determined by the content, or substance, of law, rather than by its formal character or particular institutional

32 Veraart, 'The Experience of Legal Injustice,' 272 (his emphasis).
33 Veraart, 'The Experience of Legal Injustice,' 273.
34 Fuller, 'A Reply to Professors Cohen and Dworkin,' *Villanova Law Review* 10 (1965): 655-66, at 664, and 'Positivism and Fidelity to Law,' 646.
35 Fuller, *The Morality of Law*, 145.
36 Veraart, 'The Experience of Legal Injustice,' 274.
37 Veraart, 'The Experience of Legal Injustice,' 278.

expression. And it is the latter, not the former, that was Fuller's primary site of focus.

Does that mean, as Veraart suggests, that either Fuller (or I) necessarily 'neutralize' these pressing questions of politics and morality by 'pointing to forms of legal "debasement" or to other explicit or implicit failures of the morality of law'?[38] I hardly think so: Fuller saw the limitations of his theoretical contribution, at the same time as he insisted that there was, in practice, a connection between forms of legal debasement and agency-debasing legal content.[39] So, rather than join Veraart in concluding that the apparent inability of Fullerian resources to resolve the question of the exclusionary effects of legal boundaries reveals their deficiency, I would simply say that the question itself belongs to territory that is largely beyond the ambit of those resources. What Veraart's objection implicitly demands is that Fuller's legal theory be something that it ultimately is not: a theory, through an equal concern for form and substance, which effectively expounds a complete social and political philosophy as part of its account of legality. This point is also relevant to my reply to Thomas Mertens, to which I now turn.

Thomas Mertens' commentary – 'Fuller and Arendt: A Happy Marriage?' – begins with a summary of the main strands of the project I undertook in *Forms Liberate*. Though he rightly sees the aims I pursue in the present article as a development of those foundations, Mertens' ultimate view is that they leave 'perhaps an insufficient basis' for the conversation with Arendt that I propose.[40] To support this conclusion, Mertens pursues three sophisticated points of engagement with my article. The first concerns the apparently 'utopian' yet politically underdeveloped ideas that we might associate with 'Fuller's society.' The second involves an assessment of the relevance of Arendt's analysis of the Eichmann trial for the matters at issue in my article. The third is a creative meditation on the possibility of a more fruitful theoretical conversation – that is, more fruitful than the one between Fuller and Arendt that I have proposed – between Gustav Radbruch and Arendt.

According to Mertens, 'Fuller's society' is one in which 'subjects are not acted upon but treated as responsible agents,' and which is 'supposedly held together by laws and regulations that stem from reciprocal relationships between lawgivers and legal subjects – relationships characterized by concepts such as trusteeship, dialogue, respect, and dignity.'[41] Though surely a social vision worth pursuing, it is, Mertens suggests, 'quite utopian' and 'far removed from the everyday, "empirical", life of the law in our societies, in which positive law is the result of, and char-

38 Veraart, 'The Experience of Legal Injustice,' 278.

39 I address Fuller's sense of this practical connection in 'The Impossibility of an Exterminatory Legality,' though emphasizing there, as Fuller himself did repeatedly, that this does not amount to any 'conceptual' claim about the necessary features of law.

40 Thomas Mertens, 'Fuller and Arendt: A Happy Marriage?,' this volume, 279.

41 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 281.

acterized by, political struggles.'[42] More, therefore, is needed. Fuller's idealistic conception of law as enabling and guaranteeing agency thus needs to be 'complemented by the political dimension: how to acknowledge and deal with the fact that law is related to political power, which is what makes its association with "coercion and sanctions" so convincing.'[43]

Mertens' observations provoke the need to clarify some essential points about what Fuller's jurisprudence did and did not seek to do, and indeed my response on this point must in a number of respects be cast in similar terms to that I earlier made to Wilkinson.[44] On the clarification point, it is essential to emphasize that Fuller's jurisprudence was not 'anti-source,' or 'anti-sourced-based theories' generally. Here, as I have emphasized in other aspects of this reply, his thinking on the conditions for legal authority is crucial. Rather than opposing top-down conceptions of law outright, what Fuller urges us to do is to qualify this understanding of law's constitutive shape with an awareness of the reciprocal relations that actually create and sustain a legal structure, and which, when acknowledged, lead us to pose different questions for legal theory than those generated by purely source-based conceptions. It follows, therefore, that there is not, as Mertens seems to suggest, any need to completely disavow 'a view of politics that is (…) centred around sovereignty as the source of law structured as a pyramid' in favour of a view of politics based 'around human agency.'[45] Instead, it is about seeing the agency elements, and as an expression of these, the authority-subject interactions, that inform and shape 'sovereignty as the source of law.'[46]

Mertens suggests that it is the essential vacuousness of Fuller's jurisprudence on things political that leads me to be attracted to Arendt's political philosophy, and specifically to how that political philosophy 'can provide inspiration for how to establish and to uphold such dialogical relationships between lawgivers and legal subjects.'[47] This suggestion, however, is based on the characterization of Fuller's aims that I have just sought to clarify, and so also needs to be pushed back against to some degree. Certainly, Mertens represents me correctly when, largely supporting the case for my overall endeavour, he suggests that there are good reasons for bringing Fuller and Arendt together.[48] But though I agree that Fuller's jurisprudence is politically deficient, I nonetheless think it is an overstatement to suggest that I turned to 'Arendt's political philosophy' to correct that deficiency. That is, although I was attracted to the intrinsically 'public' legal setting of

42 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 281.
43 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 281.
44 And indeed also the point just made in response to Westerman concerning – despite the polemics – Fuller's ultimate commitment to a theoretical pluralism, where the counsel of different theoretical perspectives will each have its place, depending on the question or circumstance.
45 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 281.
46 This is especially well spelled-out by Fuller in Chapter 3 of *The Morality of Law* ('The Concept of Law') where he engages with Hart, and specifically in the section titled 'Law as a Purposeful Enterprise and Law as a Manifested Fact of Social Power' (see esp. at 148-51).
47 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 281.
48 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 281.

Arendt's juridical person analysis, my sphere of analysis was, and is, less ambitious than what Mertens' suggestion implies.

That said, the more specific question that Mertens poses is clearly directly salient to the exploration I undertook. I refer here to his remark, noting my suggestion in *Forms Liberate* that there is 'no rigid opposition' between the rule of law and its honouring of human agency on the one hand, and managerial direction and its tendencies towards subservience on the other, that 'it is not fully clear what the political conditions are under which societies can move away from "managerial direction" towards the "rule of law" (or vice versa).'[49] Again, Mertens represents me essentially correctly in this suggestion that there is a continuum of possibilities, rather than a rigid opposition, between law and managerial direction. Still, we must not lose sight of Fuller's point that the two *are* different. Yet this clarification does not, of itself, answer the broader point Mertens' makes about how it seems that 'the use of legal forms is not enough to defeat tyranny and to establish the rule of law that fully recognizes human agency.'[50]

In reply to this objection, therefore, it is helpful to recall what I said in response to Wilkinson when I agreed that Fuller was not a theorist of 'the political,' and did not set out to be. Nor did he propound a 'substantive' theory which, for example, insists on the inclusion of human rights guarantees as part of the very concept of 'the rule of law.' Fuller's commitments were considerably more ascetic, and indeed – to reconnect with a point just made in reply to Veraart – there is much in his analysis that would seem to accord with Joseph Raz's caution that to advance anything other than a strictly 'formal' conception of the rule of law is to risk expounding a 'complete social philosophy.'[51] And yet, Fuller's position is clearly *not* as ascetic as Raz's, and certainly not reducible to the instrumentalist account of the rule of law for which Raz's analysis is most well-known. Though led by an emphasis on the formal, the novelty of Fuller's analysis of the rule of law lies in his insistence that these commitments of form have important substantive implications, which in turn render misguided the tendency of formal accounts to lead to instrumentalist conclusions.

This point is crucial to my response to Mertens, because though I readily concede that Fuller cannot provide us with everything needed to answer his question about the political conditions that must accompany legal forms in order for their promise for human agency to be fully realized, there is still something of great importance that Fuller's jurisprudence seeks to highlight, and which cannot be met by positivist accounts of legality. Moreover, to press points made in reply to Wilkinson as well as Veraart, I do not see how Fuller's deficiencies on the political theory front mean that there is *nothing* in the 'normativist' resources he offers

49 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 282.

50 Elaborated especially through reference to Fuller's hypothetical tale of the tyrant that I have emphasized at various points in my work on Fuller (e.g., Chapter 5, *Forms Liberate*): see Mertens, 'Fuller and Arendt: A Happy Marriage?,' 282.

51 Joseph Raz, 'The Rule of Law and its Virtue,' Chapter 11 in *The Authority of Law – Essays on Law and Morality* (Oxford: Clarendon Press, 1979).

– no political backstory, no meaningful way in which the commitments of his reasoning might offer us a 'bridge' to questions concerning the interface between things legal and things political – to assist us to contemplate such questions. I doubt that Mertens wishes to go this far in any event; and indeed Fuller himself was more than ready to concede the limitations of his position in terms of ultimate problems addressed.[52] But this is some distance from supporting the conclusion, as Wilkinson appears to invite us to, that Fuller's position so insulates questions of law from questions of politics as to be essentially the same as positivism.

These last observations provide a fitting segue to Mertens' visitation of Arendt's analysis of the Eichmann trial for the purpose of showing how that analysis provides a 'forceful counter-example' to both the claims I make on behalf of Fuller, as well as the viability of an engagement between Fuller and Arendt more generally.[53] Mertens is in fact surprised that I did not confront this analysis in my article, given that her position there appears to directly contradict the view of law with which I am interested. Mertens' point, in short, is that Arendt's analysis of the Eichmann trial reveals essentially no concern for the rule of law at all: the various violations of the rule of law reflected in the proceedings appear to not to qualify, in any meaningful way, her endorsement of both the legitimacy of the trial and the punishment imposed on Eichmann. Moreover, Arendt was more than content to attribute authority to the Jerusalem court, as well as the law under which Eichmann was tried, despite those obvious violations. Mertens' argument, then, is that given that Arendt and Fuller are worlds apart here, this must surely cause a problem for my attempt to engage the two thinkers in an exercise broadly concerned with the development of rule of law theory.

It is fitting to preface my reply to this point by noting that in earlier iterations of the paper, I did consider including a discussion of the possible salience of Arendt's analysis of the Eichmann trial for my interest in developing her concept of the juridical person. The idea I was interested to explore was whether the suggestion could be developed that among the reasons why Eichmann rejected his trial in the Israeli court was because he denied his own status as a juridical person: that being a self-described 'cog' in a bureaucratic machine, he did not manifest the requisite personhood, in terms of being a centre of initiative in his own right, who could rightly be judged in a juridical forum. Though perhaps an idea worth exploring further, this is clearly not the kind of engagement that Mertens faults me for not undertaking. His complaint is instead that I do not confront the obvious chasm between Fuller's normative commitments about the connections between law and

52 I have gained special insight into this point from correspondence between Fuller and one interlocutor in particular, Walter Berns, who was concerned to point out to Fuller the limitations of his debate with Hart, and its subsequent development in *The Morality of Law*, in so far as it ultimately avoided questions of moral and political theory concerning the justice of law's ends: see esp. Letter from Walter F. Berns to Lon L Fuller, 28 October 1964, The Papers of Lon L Fuller, Harvard Law School Library, Box 11, Folder 17 ('The Morality of Law').

53 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 283.

the rule of law, and Arendt's apparent indifference to the same in *Eichmann in Jerusalem*.

My first response to this objection is to highlight how Arendt is very clearly in 'positivist' mode in her analysis of the Eichmann trial. What I mean by this is that, in that analysis, she takes the claims of the officially-declared law to be authoritative on their face. Thus, implicitly or otherwise, she treats the normative demands of the rule of law as wholly contingent ideals to which the positive law ultimately need not be answerable. This is a very different perspective to Fuller's. Bearing this in mind, therefore, I wonder whether Arendt's apparent ease with the rule of law violations of the Eichmann trial actually causes me the trouble that Mertens thinks it ought to. To defend my cause here, two particular features of Mertens' analysis must be brought into view. First, I am far from sure that his reading of Fuller, at least for the purpose of his rule of law analysis of the Eichmann trial, is the right one. Certainly, I join Mertens in seeing that the rule of law violations in the Eichmann trial were real, and that they significantly diminished the Jerusalem court's claim to legitimacy. I also agree with him that Arendt's evident lack of concern for those violations is peculiar. But it otherwise seems curious to me that, having apparently commended my own reading of Fuller for its subtleties,[54] Mertens would in his analysis of the Eichmann trial apply a very 'literal' reading and application of Fuller's jurisprudence. It is almost as if his interest and apparent endorsement of my insistence that Fuller's eight principles of the internal morality of law should *not* be read as a 'checklist' applicable in all elements and in all situations,[55] and presumably also my ready concession that statements such as that '*every* departure' from law's 'inner morality' comprise an assault on man's dignity as a responsible agent are both hyperbolic as well as at odds with other things that Fuller says about his principles,[56] have moved out of the picture.

Second, I must again reiterate that in drawing out the implicit normative commitments of Arendt's analysis of the juridical person and things 'juridical' generally, at no point did I make the claim that Arendt was a 'rule of law theorist' in her own right. Nor did I suggest that the kind of message we can take from her reflections on the juridical person could be found consistently across the very eclectic and largely under-developed sites within her canon where she engaged with questions of law. Equally, though I am otherwise interested in the constitutive dynamics of reciprocity between subject and authority that inform Arendt's reflections on the grounds for civil disobedience, I did not go so far in the article as to suggest that we can see in Arendt, as we clearly can in Fuller, arguments about connections between the conditions of law's authority and the presence of conditions of the rule of law.

54 See Mertens, 'Fuller and Arendt: A Happy Marriage?,' 278-279.

55 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 279. See Rundle, *Forms Liberate*, Chapter 1 and 4.

56 See Rundle, *Forms Liberate,* Chapter 4, and esp. my analysis of Fuller's comments on retroactivity, 91.

The ambitions I sought to pursue in directing Arendt's reflections on juridical personhood towards the kind of rule of law thinking with which I am interested were instead both more modest, as well as different to the kind of analysis that Mertens undertakes in his engagement with the Eichmann trial. They were more modest in the sense that I had and have no intention to attribute more coherence to Arendt's engagement with 'rule of law'-type questions than her writings can support. But my ambitions were also different from what is reflected in Mertens' analysis in so far that what I wanted to take from the engagement between Fuller's thinking on the legal subject and Arendt's on the juridical person was a deeper understanding of how the generative aspects of legal form, and the significance of these generative aspects for personhood, might be theorized as part of the project of rule of law theorizing more generally. Indeed, as I explained in the introduction and conclusion to the article, it is an effort to *reclaim* and *reassert* the central concern of the rule of law tradition with conditions of personhood – in the face of the growing dominance of instrumentalist and 'private-oriented' alternatives – that provided the guiding motivation for the explorations undertaken in the article.

This matter of what might be called the 'fit' of different theories to the phenomena that we, as theorists, seek to illuminate is also what animates Mertens' final point of engagement with my paper: his turn to the legal philosophy of Gustav Radbruch. Following Radbruch's idea that the 'formal' requirements of the rule of law ('legal certainty') can and should in the appropriate instance be trumped by 'substantive' requirements of justice, Mertens suggests that, at least in relation to her analysis of the Eichmann trial, Radbruch would be a much more fitting legal theory 'partner' for Arendt than Fuller. This for the reason, just outlined, that Arendt's position appears to be one that plays down the apparent rule of law violations of the trial in favour of considerations of substantive justice.

Mertens may well be right that if we were looking for a theoretical categorization of Arendt's analysis of the Eichmann trial, we might better find it in Radbruch's jurisprudence than in Fuller's. Or, at the very least, Mertens is right to say that Radbruch's thought reflects a more direct acknowledgment of the complex relationship between law and politics than does Fuller's. As Mertens puts it, '[b]y acknowledging "purposiveness" as part of the "idea of law", Radbruch succeeds in understanding law as resulting from the political struggle between opposing groups with different views on what values and purposes should be promoted by society.'[57] Overall, however, I wonder whether Mertens somewhat overstates the differences between Radbruch and Fuller. For instance, it is surely an unduly narrow rendering of Fuller's jurisprudence to suggest that its contribution lies *only* on the 'legal certainty' limb of Radbruch's philosophy, with no concern for the matters of 'justice' or 'purposiveness.' Fuller's primary contribution might indeed

57 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 286.

concern things formal, but his jurisprudence also embraces 'purposiveness'[58] as well as the connections *between* legal form and substantive justice.[59] This, however, is a small point, because Mertens' sense of the affinities rather than differences between Radbruch and Fuller comes through when he highlights the importance that Radbruch gave to the 'formal' requirement of legal certainty in terms of its key contribution to the possibility of human agency, as well as for how it can itself be seen as an element of justice.[60] As he puts it, 'whereas law itself cannot decide which societal values and purposes should be promoted, it sets constraints on how these purposes should be realized, namely only by respecting the claims of legal certainty.'[61]

In the end, therefore, I wonder whether the differences between Radbruch and Fuller are all that great. Even if it is intrinsic to Radbruch's legal philosophy to embrace law's interface with the political realm more explicitly than Fuller's does, what is clearly common between the two is how neither deny law's instrumentality to political or other ends, just as neither prescribe outright the substantive content of what we put into that 'instrument.' Yet both insist that an instrumental perspective on law is necessarily incomplete. The constitutive legal feature of the connection between form and agency – 'legal certainty' in Radbruch's vocabulary – is seen by both as doing work of its own, of substantive significance.

Returning, then, to the suggestion that Radbruch is likely a more fruitful legal theory partner for Arendt than Fuller, at least with respect to her analysis of the Eichmann trial, it is fitting to conclude by highlighting the innovative impulse that underscores this last aspect of Mertens' engagement with my paper. Legal theorists have in recent years shown an increasing interest in the different, if under-developed, sites of legal theorizing in Arendt's writings, whether these arise in connection with her thinking on rights and rightlessness, or on politics more generally.[62] Mertens' engagement can be seen to join this trend at the same time as it does something quite different. That is, by asking whether there is an illuminating connection to be made between how Arendt appears to approach 'rule of law' questions, and the commitments of Radbruch's legal philosophy, Mertens positions Arendt as an important question-poser who invites us to reflect upon how different resources of legal theory might respond to those questions, and why. If my own foray into teasing out the legal theory messages implicit in another site of Arendt's canon – her reflections on juridical person-

58 See earlier note re how in *The Morality of Law* Fuller engages with Hart on the idea of law as a 'purposeful enterprise.' Other explicitly 'purpose'-oriented writings, such as Lon L. Fuller, 'Human Purpose and Natural Law,' *Journal of Philosophy* 53 (1956): 697-705, can also be noted.

59 A point that Fuller makes clearly, and yet also readily conceded, within the frame of the Hart-Fuller debate, was something that could not be argued for at the level of ascertaining the 'necessary' features of law.

60 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 286.

61 Mertens, 'Fuller and Arendt: A Happy Marriage?,' 287.

62 The collection edited by Christopher McCorkindale and Marco Goldoni, *Hannah Arendt and the Law* (Oxford: Hart Publishing, 2012), exemplifies this interest.

hood in *The Origins of Totalitarianism* – has helped to motivate this innovative line of inquiry, I can only be glad for it.

To sum up, therefore, one might survey this symposium as a whole and conclude that when it comes to the question of the overall viability of the project that I undertook in the article, the jury is evenly divided. Or, indeed, it might be ambitious of me to even suggest that the two commentators who are broadly sympathetic to my aims – Veraart and Mertens – would place themselves squarely on the side of the case 'for' rather than 'against' that undertaking. In all cases, however, I am indebted to the commentators for their provocations, criticisms and affirmations alike. To my eyes at least, the exploratory and at times controversial moves I sought to pursue through the paper have, through the process of commentary and reply, yielded a range of fresh questions and ideas that are boundary-pushing in their own right.