

Lon Fuller (1902-1978)



**“Positivism and Fidelity to Law – A Reply
to Professor Hart” (1958)**

***The Morality of Law* (1964)**

Outline

1. Fuller's Starting Point
2. The Internal Morality of Law
3. Application to Nazism
4. Fuller's Proceduralism
5. Contrast with Radbruch
6. Hart's Criticism

Fuller's Starting Point

- Law is not a one-way projection of power.
- Law is “the enterprise of subjecting human conduct to the governance of rules.”
 - Such a conception of law implicates a moral framework in which government and citizens have distinctive duties.
 - **Citizens must** obey legal rules that government enacts.
 - To impose duties, **government must** conform to certain moral requirements.

The Internal Morality of Law

If human conduct is to be subjected to the governance of rules, those rules must be:

- (1) general (not *ad hoc*)
- (2) public
- (3) prospective
- (4) understandable
- (5) compatible (not contradictory)
- (6) possible to obey
- (7) constant in time (not constantly changing)
- (8) congruent with official action

Application to Nazism (p. 66o)

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality — when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.

Fuller's Proceduralism

“The term ‘procedural’ is...broadly appropriate [to describe the internal morality of law] as indicating that we are concerned, **not with the substantive aims of legal rules**, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.”

(The Morality of Law, 97)

Fuller and Radbruch

“Professor Hart and others have been understandably distressed by references to a ‘**higher law**’ in some of the decisions concerning informers and in Radbruch's postwar writings...I suggest that if German jurisprudence had concerned itself more with the inner morality of law, it would not have been necessary to invoke any notion of this sort in declaring void the more outrageous Nazi statutes.”
(pp. 559-560)

How are the theories of Fuller and Radbruch similar?

How are their theories different?

Hart's Criticism

"[Fuller] perpetrates a **confusion between two notions** that it is vital to hold apart: the notions of **purposive activity and morality**. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ('Avoid poisons however lethal if they cause the victim to vomit,' or 'Avoid poisons however lethal if their shape, color, or size is likely to attract notice.') But to call these principles of the poisoner's art 'the morality of poisoning' would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned."

Fuller's Reply to Hart

Fuller's affinity argument

- It is, of course, possible for a ruler to fully conform to the internal morality of law while pursuing an evil end.
- But "I believe that order, coherence, and clarity have an affinity with goodness and moral behavior."

Does Hart have a good reply?

What should Fuller have said?