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# LEGAL REALISM AND THE SOCIAL CONTRACT: FULLER'S PUBLIC JURISPRUDENCE OF FORM, PRIVATE JURISPRUDENCE OF SUBSTANCE

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One seldom encounters a law review article today of the type so common ten years ago, in which the writer starts with an inquiry into the "nature" of some legal concept and ends by deducing all sorts of important consequences from the supposed inner nature of the concept,—without more than a passing reference to the practical effects of his conclusions, and then with an air of condescension, as if to compliment the facts for showing good judgment in conforming to his theories.<sup>1</sup>

A total failure in any one of these eight directions does not simply 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.<sup>2</sup>

## INTRODUCTION

This Article is a contribution to the theoretical and historical literature about Lon Fuller, a figure who is of interest both for his own sake and because of his "iconic" role<sup>3</sup> in the history of legal

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† Professor of Law, American University. This essay was written while I was a Visiting Professor of Law at Harvard Law School. The Harvard Law School Research Fund provided generous support. Gail Brashers-Krug, Chris Crean, and William Amberg researched expertly.

1 Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 443 (1934).

2 LON L. FULLER, *THE MORALITY OF LAW* 39 (2d ed. 1969).

3 I take the phrase from my colleague Mark Hager who originally used it to refer to the implicit messages of legal concepts, or the metaphors of social thought, rather than of legal thinkers.

Despite the demise of formalism, however, legal concepts continue to exert their force as they have always done, as metaphors, symbols, images, and visions of social existence. This is what I call the "iconic" dimension of argument, the way in which a particular image stands for a whole cluster of interrelated ideas. As example of iconic images in social thought we might list: Leviathan, the Invisible Hand, the Polis, the Atomized Individual, and the Single-Office-and-Factory.

Mark Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 576 (1989). Legal thinkers and judges sometimes also have this quality. Regardless of the justice of the depiction, Cardozo's name evokes a particular

thought over the last fifty years. At the same time, the Article aspires to make a broader argument about the relevance of legal realism to the social contract tradition in political theory. My argument begins with the discovery of an apparent conflict between the "public"<sup>4</sup> and the "private" jurisprudence of contract in Fuller's work. Describing contracts in private law, Fuller gave an account that owed a great deal to legal realism, particularly in the way that it attacked formalistic criteria for enforceability. Where the classicists stressed form and consideration as theoretical a priori, Fuller subjected those ideas to functional scrutiny, decried the undervaluation of the reliance principle, and found reasons for enforceability in relative and contingent community norms. Fuller accepts that Section 90 of the *Second Restatement of Contracts* may require the judge to step in post hoc and create enforceable bargains where necessary "to prevent injustice";<sup>5</sup> he portrays the formal requirements of contract as being in dialectical, productive tension with their functional goals; and he denies that the rules of contract law are somehow immanent within the very definition of a contract.

In his more general jurisprudential writing, however, when Fuller describes the "morality that makes law possible," he has in mind a set of formal criteria that *define*, or perhaps it would be better to say *are deduced* from, the very meaning of law. In this vision, for example, the abuse of retroactive legislation does not merely result in bad law, but in rules that are not law at all. From his comments about reciprocity between state and citizen, it seems that Fuller thought he could deduce his eight formal and necessary principles of legality from the social contract. Yet the vision he gives of the *social* contract seems to conflict with his vision of a *private* contract. In the latter case Fuller writes more like a realist, in the former,

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style of legal reasoning in which sweeping (progressive) change is produced without fanfare by a virtuoso manipulation of traditional legal materials. Langdell's name conjures up opinions about science, pedagogy, and legal thought—some of which he may never have held. In this pantheon, Lon Fuller's name brings to mind a number of propositions—though to a smaller audience. One is the notion that it is possible to absorb the techniques of legal realism, subject them to critical scrutiny and even make (famous) use of some of them without being practically immobilized or reduced to nihilism and despair. Another, and more important one for my purposes, is that there is still a connection between the esoteric knowledge of the theorist of private law—the writer on contracts, torts, or property—and the esoteric knowledge of the social theorist, the practitioner of jurisprudence writ large. I am second to none in my admiration for Fuller, but I believe this Article demonstrates that if these two propositions are true, they are true in a way entirely different from the received wisdom.

<sup>4</sup> By which I mean the general jurisprudence of the *res publica*, and the contractual arguments within it, not merely Fuller's writings on "public law" or on contracts with public entities.

<sup>5</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

more like a formalist. Fuller, the early contracts theorist, apparently undermines the claims made by Fuller, the later jurisprude.

This Article explores the roots of that conflict. My aim is to clarify our picture of Fuller, but also to come to some more general understanding of the relationship of political theory and doctrinal analysis. I argue that legal and social theorists have been slow to see the parallels between the problems of contractualism and the problems of contract law, between the contract for chickens and the social contract, between the problems of Willistonian will theory and the problems of original intent. In the Conclusion I offer some tentative suggestions about the relationship of legal realism to the theory and rhetoric of the social contract.

## I

### A CONFLICT?

Lon Fuller was one of the greatest American legal thinkers, and in not one but two fields.<sup>6</sup> Students today still read a contracts casebook that bears Fuller's name and includes (a sadly diminishing amount of) his scholarship on contracts.<sup>7</sup> Chief among that body of work is his famous article, *The Reliance Interest in Contract Damages*,<sup>8</sup> although his review of *Williston on Contracts*<sup>9</sup> and his *Columbia Law Review* essay, *Consideration and Form*<sup>10</sup> are perhaps even more worthy of notice. In those works, Fuller provided a vital part of the theoretical apparatus necessary to go beyond the classical Willistonian idea of contract. He argued that contract should not be considered as an "in or out" category, that in fact there was an "ascending scale of enforceability."<sup>11</sup> He criticized the psychological language of assent and implied conditions in which the First Restatement framed its

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6 The literature on Fuller is rich, and I have benefitted from many sources. A number of works deserve particular mention. Patrick Atiyah, Book Review, 1983 DUKE L.J. 669 (1983) (reviewing KENNETH I. WINSTON, *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* (1981)), is the clearest and most penetrating analysis of the tension between Fuller's explanation of the principle of autonomy and his work on reliance. Todd Rakoff, *Fuller and Perdue's The Reliance Interest as a Work of Legal Scholarship*, 1991 WIS. L. REV. 203, convinced me of the keen "tactical" sense in Fuller's contracts scholarship. ROBERT S. SUMMERS, *LON L. FULLER* (1984), provided a wealth of useful background material. Finally, the recollections of a number of colleagues at Harvard Law School gave Fuller's words a "personal" feel they might otherwise have lacked.

7 LON L. FULLER & MELVIN A. EISENBERG, *BASIC CONTRACT LAW* (4th ed. 1981).

8 LON L. FULLER & WILLIAM R. PERDUE, JR., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936).

9 LON L. FULLER, *Williston on Contracts*, 18 N.C. L. REV. 1 (1939).

10 LON L. FULLER, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

11 Letter from Lon L. Fuller to Karl Llewellyn (Dec. 8, 1938), in SUMMERS, *supra* note 6, at 133.

substantive positions on enforceable and unenforceable bargains.<sup>12</sup> He was openly skeptical of the possibility of classifying contracts through some general list of formal desiderata.<sup>13</sup> Above all, he was an able critic of the idea that contracts should *only* be seen as arising out of individual autonomy expressed through form and exchange.<sup>14</sup> To supplement this idea of contract, he focused instead on justified reliance and thus explicitly introduced reference to notions of community norms and shared understanding.<sup>15</sup> By making enforceability dependent on the particular social understandings in which behaviour is embedded, Fuller posed the single most effective challenge of his time to the notion that there was some set of trans-social, formal criteria that could allow us to distinguish contract from non-contract.

Fuller's second—and to jurisprudential eyes, greater—contribution lay in the realm of general legal theory. Students still read the *Case of the Speluncean Explorers*,<sup>16</sup> as well as Fuller's debates with H.L.A. Hart over *Positivism and Fidelity to Law*.<sup>17</sup> In this incarnation, Fuller presents himself as the proponent of purposive interpretation. The argument imputed to him here is that even the easiest case is answered by a subconscious exploration of the purposes of a rule, and that more complex cases should, and generally are, resolved by a more conscious exploration of purpose and intent. With simple examples and unusually accessible linguistic arguments, Fuller criticized the notion that there are core meanings to words and that those core meanings generally allow judges to decide cases without recourse to consideration of purpose or policy. This part of his work was a vital inspiration to the early critical legal studies work on interpretation,<sup>18</sup> just as his article *Consideration and Form*<sup>19</sup> contained many of the ideas later worked out in the early critical literature on rules and standards in private law.<sup>20</sup>

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<sup>12</sup> Fuller, *supra* note 10, at 821-22.

<sup>13</sup> *Id.* at 822.

<sup>14</sup> *Id.* at 811, 821-22.

<sup>15</sup> *Id.* at 810-13.

<sup>16</sup> LON L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 2-27 (temp. ed. 1949).

<sup>17</sup> Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

<sup>18</sup> ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* (1975) is probably the best example. For a discussion of Fuller's arguments and their role in the development of critical legal studies, see James Boyle, *The Politics of Reason: Critical Legal Studies and Local Social Thought*, 133 U. PA. L. REV. 685, 711-12 (1985).

<sup>19</sup> Fuller, *supra* note 10.

<sup>20</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Mark Kelman's book contains the most sophisticated recent discussion of the politics of the rules/standards debate. MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 13-63 (1987).

Above all, however, today's students learn that Fuller made a third distinct contribution to legal theory. They learn that he was the proponent of a unique legal philosophy—a natural law of process rather than of substance. In his 1964 book *The Morality of Law*,<sup>21</sup> Fuller puts forward a series of formal criteria for law to meet.<sup>22</sup> The difference between this argument and other attempts to give content to the ideal of the rule of law is that Fuller argues that law *must* meet (or at least come a substantial way towards meeting) these criteria, if it is to be considered law at all. Perhaps the clearest exposition of these requirements is in the chapter in which Fuller discusses the behavior of a bumbling hypothetical legislator called Rex, who violates each of Fuller's principles of legality, one after another:

Rex's bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect since, it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.<sup>23</sup>

So far, this might seem like an unexceptional list of the formal or procedural goals associated with the ideal of the rule of law. Any such impression is corrected when Fuller continues:

A total failure in any one of these eight directions does not simply 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.<sup>24</sup>

Here, as at numerous other points throughout the book, Fuller makes clear that he sees his criteria of legality as more than a list of desiderata culled from the particular historical experience of a few

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21 FULLER, *supra* note 2.

22 *Id.* at 38-39.

23 *Id.*

24 *Id.* at 39.

states with a certain understanding of the rule of law. Instead, he claims that these criteria are part of the very *definition* of law.<sup>25</sup>

Finally, he argues that the obligation to obey law depends on the same criteria:

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted.<sup>26</sup>

Is this point commentary or corollary? The answer, I think, is the latter. Fuller is saying that law is (and must be) defined as a concept by the same criteria that cause it to give rise to obligation. The attraction of this project is that it appears to offer a third pole in the debate between positivism and natural law.<sup>27</sup> The natural lawyer argues that there are universal norms of morality to which legal systems must conform if they are to be truly “law.”<sup>28</sup> The positivist argues that this confuses fact with value, that the question of what the law is should not be confused with the question of what the law should be: “Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.”<sup>29</sup>

Fuller’s response to this stereotyped debate was similar to Hart and Sacks’s response to the corrosive power of legal realism.<sup>30</sup> Like them, he realized the difficulty of putting forward a set of universal *substantive* normative criteria for law to meet. Searching for an uncontroversial basis upon which to build a theory, but convinced that

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<sup>25</sup> A number of scholars have sought to reinterpret Fuller’s eight principles as simply functional conditions of efficacy for the rule of law, a position that would be much more consistent with Fuller’s work on private contracts. In a letter to Wolfgang Friedmann of Columbia, quoted by Professor Summers, Fuller dismissed this interpretation of his work. “In treating my principles of legality as mere conditions of efficacy you are in harmony with Hart, Dworkin, Cohen, Hughes and Summers. Nevertheless, in my humble opinion you are all wrong.” SUMMERS, *supra* note 6, at 37.

<sup>26</sup> FULLER, *supra* note 2, at 39.

<sup>27</sup> For a discussion of the “invented” quality of this debate, see James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power and Essentialism*, 135 U. PA. L. REV. 383 (1987).

<sup>28</sup> See, e.g., A.P. D’ENTRÈVES, *NATURAL LAW* (1970).

<sup>29</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (1954); see also HANS KELSEN, *THE PURE THEORY OF LAW* (1967).

<sup>30</sup> HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 3-6 (tent. ed. 1958); Gary Peller, “Neutral Principles” in the 1950’s, 21 MICH. J.L. REF. 561 (1988).

any general normative principle could be attacked as partial, controversial or uselessly vague, Fuller turned instead to a jurisprudence of *process*.<sup>31</sup> Hart and Sacks's Legal Process materials<sup>32</sup> were famous in part because they made exactly the same turn. In Fuller's case, however, the postulated procedural values (publication, proactive application, clarity, possibility, and so on) were supposed to be universal, to apply beyond the boundaries and political traditions of the United States. Where did they come from?

In both his debates over the interpretation of a single word of a statute and his debates about the concept of law itself, Fuller's theoretical touchstone is the notion of purpose. The root definition he gives of law is "the enterprise of subjecting human conduct to the governance of rules."<sup>33</sup> With this enterprise in mind, Fuller believes that he can deduce the eight tenets of procedural natural law described above:

As the sociologist Simmel has observed, there is a kind of reciprocity between government and the citizen with respect to the observance of rules. Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.<sup>34</sup>

Thus the definition of law, the obligation to obey the law and the internal procedural morality of law are deduced from a "kind of reciprocity" between government and citizen. This is not an explicit social contract theory of the kind offered by Locke. Nevertheless, Fuller is clearly adopting the structure and rhetoric of the social contract in his analysis of the bonds between government and citizen. Breach of the bond of reciprocity ends the obligation of the citizen to obey the commands of the state. It is from this implicit contract—immanent in the very *idea* of law—that the eight criteria of legality are to be deduced. Yet Fuller's own work on contracts makes his eight criteria surprising, to say the least. Fuller is one of the greatest American exponents of the idea that there are no trans-social, formal criteria of validity for private contracts. He argued that it was impossible to deduce contractual ground rules from the mere notion of binding agreement and exchange—impossible, ab-

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<sup>31</sup> For other examples of the turn to process in an attempt to evade the realist critique, see Richard Parker, *The Past of Constitutional Theory—And its Future*, 42 OHIO ST. L.J. 223 (1981); James Boyle, *The Politics of Reason: Critical Legal Theory and Social Thought*, 133 U. PA. L. REV. 685 (1985).

<sup>32</sup> HART & SACKS, *supra* note 30, at 9.

<sup>33</sup> FULLER, *supra* note 2, at 106.

<sup>34</sup> *Id.* at 39-40 (footnote omitted).

sent some particular social context. How then could he believe that such criteria and such ground rules could be deduced from and for the social contract itself? Why did he not apply the insights of his own private law contract theory to his grand edifice of procedural natural law?

#### A. Mistake

Three hypotheses present themselves. The first is that of random error. Fuller simply did not see the apparent inconsistency. I will call this the "mistake" theory and reject it more or less out of hand. Fuller was brilliant and highly self-critical. What is more, unlike many theorists who write entirely about law in the abstract or about law in some concrete context, Fuller's work consistently and commendably links the various levels of abstraction. To put it another way, Fuller is probably the *least likely* legal theorist of his generation to fail to see the connections between some understanding of private law and some more general account of the concept of law itself. Such a charge could much more easily be levelled against someone like Hans Kelsen. Indeed, that is one of the reasons why Fuller's work continues to be of interest, while Kelsen's increasingly seems to be an historical oddity—an answer to a question based on an epistemological confusion, directed towards a debate upon whose outcome nothing depended. Admittedly, I cannot disprove the "mistake" theory, but it seems to me to be a deeply unsatisfying explanation.

#### B. Public and Private

The second hypothesis refines the mistake theory by adding to it the notion of ideological confusion, pressure or denial—in this case, denial of the homologies between public and private. For brevity, I will call this the "denial" theory.

During Fuller's lifetime, the distinction between public and private was one of the most politically charged issues in American law.<sup>35</sup> To summarize a very complex issue very quickly, one could say that the conceptual tools of legal realism undermined faith in the public/private distinction, a faith that seemed a vital part of liberal political theory. On the theoretical level, Morris Cohen's *Prop-*

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<sup>35</sup> See Morton Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

erty and Sovereignty,<sup>36</sup> and Jaffe's<sup>37</sup> and Hale's<sup>38</sup> articles on the law of contract all seemed to show that rules of private law could be seen as regulatory, that contract law could be seen as the delegation of public power to private actors and that even the most "private" activities could be described so as to invoke the public interest.<sup>39</sup> On the level of practical politics, most of the administrative agencies of the New Deal could not neatly be classified in terms of the classical liberal dichotomy of public and private. What, for example, was the Tennessee Valley Authority? At the high point of this movement, in the case of *Shelley v. Kraemer*,<sup>40</sup> the Supreme Court actually accepted the argument that the mere enforcement of private contracts by the state courts counted as state action<sup>41</sup>—a ruling that implicitly subjected every private law relationship to constitutional scrutiny.

This background offers some strong ideological and epistemological reasons why Fuller might not see the connection between his public and his private jurisprudence. Whatever theoretical language we use to express the thought, we know that societies and individuals can have beliefs or mental frameworks so fundamental that they completely obscure connections or implications that seem inescapable to outsiders. Even today people talk confidently of "deregulation" as though the rules of private law were *not* regulation, or chart their moral course around the words "public" and "private" as though those terms described an unchanging geography of social division. Did cognitive dissonance or an ideological veil keep Fuller from seeing the connections and contradictions I have described here? Did he think that *Consideration and Form* dealt with a qualitatively different set of moral and epistemological issues than *The Morality of Law*?

My reaction to this second hypothesis is not quite as dismissive as my reaction to the mistake theory. Nevertheless, I would say that

<sup>36</sup> Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

<sup>37</sup> Louis Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

<sup>38</sup> Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

<sup>39</sup> The status of this critique now is more open to question.

In the decades since, the Realist challenge to the "privateness" of contract has been assimilated and defused, a process aided by the incomplete nature of the Realist assault. Thus our principal vision of contract law is still one of a neutral facilitator of private volition. We understand that contract law is concerned at the periphery with the imposition of social duties, that quasi-contract governs situations where obligation attaches even in the absence of agreement, that doctrines of duress and fraud deprive the contracting reprobate of benefits unfairly extorted.

Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1014 (1985).

<sup>40</sup> 334 U.S. 1 (1948).

<sup>41</sup> *Id.* at 20.

while the denial explanation would be downright convincing if applied to some of Fuller's contemporaries, it seems much more unlikely when applied to him—at least in this form. One test for this theory would be to examine how Fuller discussed contract, property, and tort. Did he see them as neutral, private institutions, subject to none of the questions of goal and value raised by the institutional framework of state government? The answer is a clear no. Fuller almost always presented private law doctrines with reference to their "social functions." A passage discussing consideration is characteristic:

It has sometimes been proposed that the doctrine of consideration be "abolished." Such a step would, I believe, be unwise, and in a broad sense even impossible. . . . What needs abolition is not the doctrine of consideration but a conception of legal method which assumes that the doctrine can be understood and applied without reference to the ends it serves.<sup>42</sup>

A second and more particular test would be whether Fuller saw private contract, itself, as the natural form of promise and exchange or as a morally contingent type of private legislation? Again, the answer is clear:

If A and B sign articles of partnership we have little difficulty in seeing the analogy between their act and that of a legislature. But if A contracts to buy a ton of coal from B for eight dollars, it seems absurd to conceive of this act as species of private law making. This is only because we have come to view the distribution of goods through private contract as a part of the order of nature, and we forget that it is only one of several possible ways of accomplishing the same general objective. Coal does not have to be bought and sold; it can be distributed by the decrees of a dictator, or of an elected rationing board. When we allow it to be bought and sold by private agreement, we are, within certain limits, allowing individuals to set their own legal relations with regard to coal.<sup>43</sup>

These do not sound like the words of someone who thinks of private law in a totally different way than public law. At least as stated, the denial theory is unconvincing. Later I will suggest that elements of it could be retained in a more complete and believable account.

The third available hypothesis deserves extended consideration. It links Fuller's apparent change of views to the history of legal realism.

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<sup>42</sup> Fuller, *supra* note 10, at 824.

<sup>43</sup> *Id.* at 809.

### C. Fuller and Realism in Newgarth

In the 1930s and 1940s a number of prominent realists turned away from realism because they believed that it had undermined belief in the rule of law—the last thing that one would want to do when preparing for or fighting a war with fascism. Purcell gives an excellent account in *The Crisis of Democratic Theory* of the contortions through which realists attempted to make their work consistent with the pieties of the rule of law.<sup>44</sup> In the aftermath of the Second World War, the process continued. Jerome Frank, the author of *Law and the Modern Mind*,<sup>45</sup> had explained fixation on precedent by invoking Freudian theory and the subconscious desire for an intellectual father who would take painful choice out of our hands. Frank's judicial psychology seems to be premised on a pervasive ethical relativism; that, after all, is what gives the question of judicial method its bite. Yet by 1948 he was saying: "I do not understand how any decent man today can refuse to adopt, as the basis of modern civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas."<sup>46</sup>

Fuller himself exhibited a lifelong relationship of attraction to and repulsion from realist doctrines.<sup>47</sup> This profound ambivalence

<sup>44</sup> EDWARD A. PURCELL JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

<sup>45</sup> JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

<sup>46</sup> PURCELL, *supra* note 44, at 173 (citation omitted).

<sup>47</sup> Fuller's 1934 article on American legal realism in the *University of Pennsylvania Law Review* is sometimes taken to be a resolute rejection of that philosophy. See Lon Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934). I think this would be stretching the point. In fact, Fuller gives an admiring account of the benefits of legal realism in moving legal scholars away from conceptualism. The quote that begins this article is a good example. Not content merely to praise, Fuller adopts as his own ideas that have a strongly realist tinge. "The intellectual torture which our courts inflict on legal doctrine will be obviated when we have brought ourselves to the point where we are willing to accept as sufficient justification for a decision the 'non-technical' considerations which really motivated it." *Id.* at 435.

Fuller does criticize the realists in general and Llewellyn in particular for a number of mistakes. But the overall tenor of his analysis is that of a friendly and supportive critic. Thus he agrees with the realists' insistence on functional analysis of legal rules, agrees with their critique of conceptualism and their claim that judges are significantly unconstrained by legal doctrine *tout seul* but argues that general acceptance of these ideas will actually lead to *greater* certainty and predictability in the legal system:

If you put an animal in too small an enclosure you may rely on it that he will make a violent effort to escape. There is no way of predicting whether he will succeed in this effort, or where he will go if he breaks out. If you put him in a larger enclosure you may be reasonably sure that he will be content to stay inside the enclosure. And if you study your animal's habits closely you will be able to follow his movements within the enclosure and discover regularities in them. What we need, as I see it, is a larger grazing area for judges. *The realists are bringing this about, and they ought to realize that in doing so they are making the judge a more tractable and predictable animal.*

is nowhere as clearly indicated as in his famous set of hypothetical cases set in Newgarth, of which the *Case of the Speluncean Explorers* is the best known.<sup>48</sup> Fuller uses the judges of these imaginary cases to personify various legal philosophies. There is a bumbling, pompous formalist chief justice called Truepenny, a relentless positivist called Keen, and an agonized, indecisive justice who Fuller, in what appears to be an interesting piece of stereotyping, calls Justice Tatting. But the most fully realized characters, those whose opinions read as though they come from profound, if antithetical convictions, are Justices Foster and Handy.

Justice Handy is an arch-realist—a realist so exaggerated that at times one suspects he is being deliberately parodied so as to remove any residual attraction that Fuller might have felt towards realist ideas. Yet Fuller is too meticulous a thinker to deal entirely in stereotype and there are moments when he seems to take pleasure in having Handy attack the pieties uttered by the judge who seems closest to his own purposive vision of law—Justice Foster. Handy sees the law as a matter of practical politics, he constantly flaunts the conventions of the judicial role and delights in puncturing the constructs with which his earnest colleague Foster attempts to defend a middle ground between raw politics on the one hand and formalism on the other. Fuller himself offers the following interesting authorial caution about Handy:

If there is an element of caricature in all of the judicial opinions in this volume, in the case of Mr. Justice Handy the matter goes beyond a mere exaggeration of recognizable traits. It would be difficult to find a counterpart for him on any of our courts. Some may feel that a happier day will dawn in Newgarth when he has been impeached and deprived of his office. But if he is indeed the Evil One disguised in a black robe, we need to become acquainted with his wiles so that we may recognize them and take steps to protect ourselves against the temptations he throws in our way.<sup>49</sup>

I do not think I am stretching the interpretation in saying that the actual opinions contained in the book evidence a very personal feeling of *temptation* as well as the more proper feeling of *disapproval* shown by this quotation. Throughout the opinions, Fuller has Handy tease the more serious Foster repeatedly—tempting him with a realist world of practical politics. After one of the many rebukes hurled Handy's way by the Chief Justice for bringing into the record facts that are not properly before the court, Handy defends himself

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*Id.* at 437 (emphasis added).

<sup>48</sup> FULLER, *supra* note 16.

<sup>49</sup> *Id.* at 1.

sardonically by noting that he has “the only mind on the court impure enough to be influenced by the legally irrelevant.”<sup>50</sup> Then he offers some second thoughts about Foster’s susceptibility:

On reflection I am not so sure of my brother Foster, and perhaps for his sake I ought to desist. It may startle my hearers for me to say so, but in many ways I feel myself closer to Foster than to anyone else on this court. If he could only rip off that metaphysical jacket he has put on himself, and gain a little more freedom of action, I think we might get along very well indeed.<sup>51</sup>

The main axes along which Foster and Handy do battle, and along which Fuller’s ambivalence about realism asserts itself are the tensions between fact and norm on the one hand and form and substance on the other. All of Fuller’s hypothetical cases show that one cannot conceive of the law as purely form or purely substance, purely “is” or purely “ought.” In both of these pairs, one pole simultaneously requires and denies the other. Thus, in the *Case of the Speluncean Explorers*, Handy argues that “government is a human affair” and laments the legal tendency to analyze a situation until “all the life and juice have gone out of it and we have left a handful of dust.”<sup>52</sup> In place of this tendency towards form and formal analysis, Handy argues for close attention to substance, to popular will and practical politics. But even an arch-realist like Handy acknowledges that there are

a few fundamental rules of the game that must be accepted if the game is to go on at all. I would include among these the rules relating to the conduct of elections, the appointment of public officials, and the term during which an office is held. Here some restraint on discretion and dispensation, some adherence to form, some scruple for what does and does not fall within the rule, is, I concede, essential.<sup>53</sup>

With Fuller’s characteristic love of nested insights, Handy then shows how problematic a task it is to pick these “foundational” rules. Having gulled the unwary reader by referring to apparently uncontentious procedural rules of election law, Handy adds: “[p]erhaps the area of basic principle should be expanded to include certain other rules, such as those designed to preserve the free civilmoign system.”<sup>54</sup> We must have both form and substance, and Handy wants to restrict our ideas of formal justice to those “few fundamental rules of the game that must be accepted if the game is

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<sup>50</sup> *Id.* at 81.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 20-21.

<sup>53</sup> *Id.* at 21.

<sup>54</sup> *Id.*

to go on at all."<sup>55</sup> But which rules exactly are those? Generations of students have wondered aloud just what exactly "the free civilmoign system" is, only to discover that one of their classmates said confidently "it must be property rights" while another thought it to be human rights and the third, the institutional framework of the market.

One might conclude from this that, long before Jacques Derrida and "dangerous supplementarity,"<sup>56</sup> Lon Fuller was capable of showing us the inherent instability of any attempt to reconcile two concepts that both deny and depend on each other. In this case, the concepts were formal and substantive justice.<sup>57</sup> Fuller was adept at demonstrating that the realists would have to put some limit on the idea that judges act as practical politicians,<sup>58</sup> and yet would be unable to justify those limits in any uncontentious way without resorting to the same kind of formalism and essentialism the realists had criticized. Yet he did not exempt his own *alter ego* from the same criticism.<sup>59</sup>

To put a complicated intellectual biography very tersely indeed, I would say that Fuller was never free from ambivalence towards realist ideas, but that he became more and more hesitant about them as he grew older. Although all of the legal philosophies Fuller described conflicted with each other, realism posed a particularly acute challenge to basic assumptions about the legal system. The later Fuller seemed to assert both that a judge's legal philosophy played a role even in easy cases, and that conflicts *between* different

<sup>55</sup> *Id.* at 24.

<sup>56</sup> *See, e.g.*, JACQUES DERRIDA, *OF GRAMMATOLOGY* (1976); *cf.* Dalton, *supra* note 39.

<sup>57</sup> Thirty years later, Roberto Unger was to use an almost identical analysis of the antinomy between formal and substantive justice in order to ground his critique of liberal legalism:

A system of laws or rules (legal justice) can neither dispense with a consideration of values in the process of adjudication, nor be made consistent with such a consideration. Moreover, judgments about how to further general values in particular situations (substantive justice) can neither do without rules, nor be made compatible with them.

UNGER, *supra* note 18, at 91.

<sup>58</sup> From Fuller's point of view, even the invocation of practical politicians, administrators, or engineers as role models implies that some formal limitations are accepted on the role of the judge.

<sup>59</sup> At one point, for example, Foster engages in a purposive interpretation of a statute in a way strikingly reminiscent of the interpretive practice advocated by Lon Fuller in his debates with Hart. Keen then subjects him to merciless critique:

My brother thinks he knows exactly what was sought when men made murder a crime and that was something he calls 'deterrence.' My brother Tatting has already shown how much is passed over in that interpretation. But I think the trouble goes deeper. I doubt very much whether our statute making murder a crime really has a 'purpose' in any ordinary sense of the term.

FULLER, *supra* note 16, at 18.

visions of the law would be mediated by the conventions of professional life:

To be sure, different judges entertain . . . different philosophies of law and these philosophies may affect their treatment of even the most technical seeming questions. In actual life, however, these differences are usually softened by a spirit of democratic tolerance, controlled by adherence to a common professional tradition, and bridged in some degree by a felt but unexpressed conviction that the whole of truth can never be contained in a single point of view.<sup>60</sup>

But it is hard to accept this attractive picture of professional reconciliation in a spirit of democratic tolerance when the conflicts between paradigms or philosophies are absolutely basic. Is the apparent conflict I have described in this Article such a conflict? To answer this question, we must first get a sense of how the social contract would look if Fuller's private law jurisprudence were applied to it. More generally, I will explore the extent to which formal criteria have been understood as necessary to further the principle of autonomy, in both public and private contracts.

## II

### THE SOCIAL CONTRACT AS PRIVATE CONTRACT: THE RELATIONSHIP OF FORM TO AUTONOMY

Though Fuller's most famous contribution to contracts literature is *The Reliance Interest in Contract Damages*,<sup>61</sup> several other pieces express his own ideas about the relationship of form to substance in the law of contract. Most notable among these is the 1941 article *Consideration and Form*.<sup>62</sup> In a series of numbered paragraphs, a style reminiscent of Wittgenstein to modern eyes, Fuller lays out his basic ideas about contract liability with extraordinary clarity and precision. His focus is on the subtle, reflexive connections between the substantive values of contract law and its formal requirements. Like most contract theorists, Fuller stresses the importance of the promotion of private autonomy: "Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy. . . . The principle of private autonomy may be translated into terms of the will theory by saying that this principle merely means that the will of the parties sets their legal relations."<sup>63</sup>

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<sup>60</sup> *Id.* at 1.

<sup>61</sup> Fuller & Perdue, Jr., *supra* note 8.

<sup>62</sup> Fuller, *supra* note 10.

<sup>63</sup> *Id.* at 806-07.

Thus our understanding of the goal<sup>64</sup> of contract law has been seen in American legal thought to dictate our theory of how contracts should be interpreted and enforced. But this linkage of contract with the will theory brings a suite of problems in its wake:

When the principle is stated in this way certain consequences may seem to follow from it: (1) that the law must concern itself solely with the actual inner intention of the promisor; (2) that the minds of the parties must "meet" at one instant of time before a contract can result; (3) that the law has no power to fill gaps in an agreement and is helpless to deal with contingencies unforeseen by the parties; and even (4) that the promisor must be free to change his mind at any time, since it is his will which sets the rule. Since these consequences of the will theory are regarded as unacceptable, the theory is assumed to be refuted by the fact that it entails them.<sup>65</sup>

One of Fuller's purposes in writing *Consideration and Form* was to argue that the principle of autonomy could be maintained without recourse to the definitional fragility of will theory.<sup>66</sup> With regard to the first point noted above, for example, he argued that the "objective" interpretation of contracts was not only *compatible* with the principle of private autonomy, but that it could actually be seen as a *corollary* of that principle, a commonly understood structure in which autonomous private parties could pursue their own ends more efficaciously.<sup>67</sup> Fuller dealt with some of the other problems with the will theory by arguing that private autonomy had a legitimately restricted ambit.<sup>68</sup> He also tried, unsuccessfully in my view, to minimize the anomalous nature of the reliance interest, both in damages and as an independent ground of contract liability.<sup>69</sup> Finally, Fuller pointed out that the supposed reasons for insisting on "consideration and form" as a basis for contracts would differ markedly depending on the social context, the power disparity between the

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<sup>64</sup> Like Fuller, I use this term to mean either the social aim that contract fosters, or the principle that it embodies. For the moment, the differences between more or less utilitarian accounts are not central to my analysis here.

<sup>65</sup> Fuller, *supra* note 10, at 807.

<sup>66</sup> See Atiyah, *supra* note 6, at 676.

<sup>67</sup> Fuller, *supra* note 10, at 808. Fuller stresses the benefits of such an interpretive method to the security of transactions and the consequent enhancement of the "liberty" of all. *Id.* This is also, of course, a familiar argument for certain understandings of the social contract as well. Other writers have sought to connect the vision of private autonomy to the conception of contract as promise and thus to find *interpretive* guidance in the same social conventions that are postulated to give promises their *moral force*. See generally CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

<sup>68</sup> Fuller, *supra* note 10, at 809-10.

<sup>69</sup> *Id.* at 811-12. I am indebted to Professor Atiyah's article for pointing out the flaws in Fuller's attempt to reconcile reliance with autonomy.

parties, the nature of the transaction, and the type of interests involved.<sup>70</sup>

*Consideration and Form* thus attempts to separate form from autonomy. Fuller criticizes the notion that contract law is a formal structure deduced from a principle of autonomy and applied in idealized contractual relationships abstracted from their social settings. The article does not give up the principle of private autonomy, but rather argues that we should attend to the principle rather than to the formal construct with which it had become associated—the will theory of contract. At the same time, Fuller argued that the principle was not all-embracing, that it must sometimes give way to other goals and, in any event, that it can be better pursued through a flexible and context-sensitive law of contract.<sup>71</sup> Thus—like all of Fuller’s work—the article declares the necessity of a dialectical inquiry, focusing both on the purposes of a body of law and on the concrete locations in which it is to be applied.

So Fuller was interested in the notion that autonomy is the primary goal of contract law, and that the formal requirements of contract can be deduced from this goal. In the realm of private contracts, some of his greatest work consisted of an exploration of the difficulties with this idea. How do these difficulties apply to the social contract?

### A. Parallel Problems

At first glance, social contract theories also, seem both rooted in and rhetorically constructed around a vision of private autonomy.<sup>72</sup> Both types of contract offer a narrative structure in which

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<sup>70</sup> *Id.* at 812-13.

<sup>71</sup> Whether he was right about the consistency of his ideas with the goal of private autonomy is quite another question.

<sup>72</sup> The traditional social contract and the classical legal contract are similar in structure and function. With respect to structure, both involve a two-fold relation: the relation that the parties to the contract establish among themselves and the relation between the contractors and the sovereign, which is the interpreter and enforcer of the contract. With respect to function, the similarities are also quite apparent. Indeed, both classical legal contract and traditional social contract are used to dismantle the entrenched institutional framework that binds and subordinates the individual. After having disengaged the individual from the fetters of custom, both the social contract and the legal contract are used as vehicles to reconstruct the sociopolitical universe from the standpoint of the autonomous will of free individuals. By the means of abstraction and reciprocity, these paradigms forge a path of intersubjective relations that is separate and distinct from the will of any of the individual contractors, but which is, nevertheless, determined exclusively by the confluence of their respective individual wills.

Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 880 (1985) (footnote omitted).

the chronology of acceptance of the contractual regime marks the progress away from brute compulsion and necessity and towards freedom and individualism. Maine's summary of classical liberal historiography in the aphorism that we are moving from status to contract<sup>73</sup> is paralleled in social contract theory by the idea that we move from a mythical pre-social state of nature to the realm of civilization, government, and respect for private property. In both, the attraction is the idea that we are entering a realm where social arrangements are not incompatible with freedom, because it is the affected parties who bind themselves to their own prior will—either with laws or with the private legislation of the contract.

### B. Interpretation

Given these similarities, it is not surprising that the same sort of problems Fuller describes for the will theory are commonly understood to beset social contract theory. After all, a meeting of the minds between the contracting parties in *the social contract* seems even more unlikely than in the ticket cases.<sup>74</sup> Even if such a meeting of the minds is conclusively assumed, what is its content? The state is in the anomalous position of being both called into being by, and responsible for interpreting, the social contract. How is it to do so? Suppose that we assume that the purpose of the social contract is to maximize autonomy and that this purpose necessitates some kind of "will theory" of interpretation. What practical consequences does this entail?

In the United States this—or at least a closely cognate question—has been most vigorously argued in the debates over originalism.<sup>75</sup> What is the proper method for interpreting the foundational

<sup>73</sup> See HENRY S. MAINE, *ANCIENT LAW* 165 (1864).

<sup>74</sup> Were you to preach, in most parts of the world, that political connexions are founded altogether on voluntary consent or a mutual promise, the magistrate would soon imprison you, as seditious, for loosening the ties of obedience, if your friends did not before shut you up as delirious for advancing such absurdities. . . .

. . . .  
Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people.

DAVID HUME, *THEORY OF POLITICS* 198-99 (Frederick Watkins ed., 1951).

<sup>75</sup> I say closely cognate, because the framers of the constitution are understood, like Lycurgus, to have laid down the fundamental laws of the society. Admittedly, there are problems in understanding the Constitutional Convention as a locus for the social contract. Who precisely are the parties to such a contract? How are future generations to be bound? How real was the consent? My point is that the same problems beset any theory of the social contract, and that both constitutional scholarship and popular speechways give evidence of the notion that the framing of the constitution is understood as the decision of the people to bind themselves.

moment of the nation? The most popular proponents of originalism began, as did the classicists, by proposing something very much like a simple version of will theory with its accompanying focus on *intent*. Thus, for example, in 1986 Robert Bork declared his aim "to demonstrate that original intent is the only legitimate basis for constitutional decisionmaking."<sup>76</sup> According to this argument, the Framers are the authors of the constitutional compact to which the people agreed. By binding ourselves to their intentions about the structure and language they laid down, we remain free.

This idea of interpretation, of course, runs into all the problems of the subjective theory of intent under will theory. (It is striking, however, to find that the parallel is almost never mentioned.) In 1988 Henry Monaghan remonstrated with those among his fellow originalists who had adopted "intentionalism" for providing "an easy mark for most critics of originalism."<sup>77</sup> Again, as with private contracts, the tendency has been to move away from the simple intentionalist vision towards a more general, socially based vision of interpretation.<sup>78</sup> Thus, by 1991, Bork was arguing that "[n]ot even a moderately sophisticated originalist" believes the Constitution should be interpreted according to "the subjective intent of the Framers."<sup>79</sup> Instead, Bork offered the idea of "original *understanding*," thus moving the interpretive focus onto the community in much the same way as the objective theory of contractual interpretation had done.<sup>80</sup> Bork argues that this notion of interpretation is entirely consistent with the notion of individual autonomy under a democracy.<sup>81</sup> His arguments are almost identical to those Fuller offers in *Consideration and Form*. Indeed, both use the same example (interpretation according to the private intentions of legislators) to attack the excesses of intentionalism and the same justification (freedom within a commonly understood structure, collectively assented to) for the compatibility of "objective" interpretation with private autonomy.

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<sup>76</sup> Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

<sup>77</sup> Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988) (footnote omitted).

<sup>78</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 180-88 (1977).

<sup>79</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1991). For the full details of this and other transformations in Mr. Bork's legal philosophy, see James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 281-90 (1991).

<sup>80</sup> BORK, *supra* note 79, at 139-60 (emphasis added).

<sup>81</sup> *Id.* at 170-71, 176-81.

### C. Form

In private law, Fuller offered a resolutely contextual account of the relationship of form to substance: "The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises. . . ." <sup>82</sup> Fuller goes on to give the example of formalities designed to make the parties think about what they are doing. As usual, he takes a purposive view of such general requirements, saying that the need for them depends on whether "the factual situation, innocent of any legal remolding, tends to bring about the desired circumspective frame of mind." <sup>83</sup> Thus, we have our criterion for the utility of form: is the purpose that a formal requirement serves already accomplished by the context? How would this criterion apply to the social contract, to the edifice of procedural natural law that Fuller finds immanent within the reciprocity between government and citizen?

The immediate answer seems to be that such a view of the relationship of form to context would undermine both the epistemological basis for, and the uncompromising statement of, Fuller's eight criteria of legality. Instead of arguing that the concept of law itself contains the prohibition against retroactivity, we would have to flesh out the purposes that such a prohibition is designed to serve and then examine the particular society, the particular form of government, and the particular context in which retroactivity was being considered. For example, imagine a society in which abuses of private power were at least as much to be feared as abuses of state power. In this society, let us postulate that there are enormous corporations, disproportionately well-represented in the legislature and the legal system, who are capable of seeding the tax laws with loopholes of which they can then take advantage. The tax burden would consequently fall on the individual citizen who was unable, individually or as a member of a group, to wield equivalent influence. In addition, imagine also that because of information costs, it is disproportionately harder for individual citizens to discover the import of particular technical rules. In this imaginary society, the consequences of specific legislative deals might only become apparent in hindsight.

In such a society, we might imagine that retroactive taxation of "windfall profits" would seem like a lesser evil, perhaps even the lesser of two evils. At the very least, it would not seem so clearly a

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<sup>82</sup> Fuller, *supra* note 10, at 803.

<sup>83</sup> *Id.* at 804.

violation of one of the criteria of legality. Substantive differences in power would have undermined or at least gravely weakened the reasons for the formal prohibition—in exactly the way that Fuller describes in *Consideration and Form*.<sup>84</sup> Admittedly, Fuller does say that one would have to take a holistic assessment of his eight criteria, and apparently agrees that one deviation from legality would not be enough to undermine a legal system. For the most part, however, Fuller does not discuss the social conditions that would render his eight criteria of validity superfluous. Yet this is the kind of contextual and purposive discussion of formal requirements that he had advocated so persuasively in his writing on private contracts.<sup>85</sup>

In Fuller's jurisprudential theory, by contrast, the very concept of law itself is loaded with a series of conclusory (but contentious) assumptions that make this situational examination superfluous, if not pointless.<sup>86</sup> It is as if *Consideration and Form* argued that a contract without adequate consideration could never be valid because, by definition, it would not be a contract.

This brings me back to the question, "Why the difference?" As the introduction to this section suggests, the difference in Fuller's

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<sup>84</sup> I am not suggesting that it is *necessary* to embrace retroactive legislation as universally deniable. My argument is that, if we followed Fuller's hints from *Consideration and Form*, we would have to lay out clearly the reasons for prohibiting retroactive legislation and to decide whether the premises on which the prohibition relied were convincing in this particular set of circumstances, or whether they achieved their force through definitional sleight of hand. For example, one argument against retroactivity focuses on the unfairness of applying to a natural or legal person a rule which was not in existence at the time when the relevant conduct took place. At the same time, we are willing to apply rules to those who have no knowledge of them, on the grounds that ignorance of the law is no excuse. Does the distinction here depend on an assumption that knowledge of the rules is 'equally available' to citizens, provided publication does take place? Is this presumption a factual one, or does it depend on the acceptance of some other principle of formal equality as a subsidiary premise of the jurisprudential scheme? If so, is Fuller arguing that the very ideal of the rule of law demands that we adopt classical liberal assumptions about formal equality, so that no society which challenged these assumptions—whether through affirmative action or an expansive doctrine of unconscionability in private contracts—would count as a law-governed society?

<sup>85</sup> Consider also the following example:

[s]o far as the channeling function of a formality is concerned it has no place where men's activities are already divided into definite, clear-cut business categories. Where life has already organized itself effectively, there is no need for the law to intervene. It is for this reason that important transactions on the stock and produce markets can safely be carried out in the most "informal" manner.

Fuller, *supra* note 10, at 806. Note the insistence on first enunciating the goal served by a particular form and then examining whether that goal is achieved in a particular context.

<sup>86</sup> The story of King Rex, which Fuller uses to make his points, is instructive for it becomes clear that while it is jurisprudentially irrelevant whether or not the society has any shred of democratic governance, the *form* of the norms issued to the populace is all important. This is an ethically thin conception of the rule of law, to say the least.

attitude towards form in private contracts and in the social contract may turn on contrasting attitudes towards autonomy. In private law, Fuller could hardly have been accused of being unsympathetic to concerns about autonomy. He called it "the most pervasive and indispensable" principle among the basic conceptions of contract law.<sup>87</sup> But Fuller also argued that "will theory is only a figurative way of expressing the principle of private autonomy,"<sup>88</sup> pointed out that there were important limits on the application of the principle, and warned us against confusing the principle with the metonymic formal construct with which it had become associated. When that metonymic formal construct is "the rule of law" or "the social contract" rather than will theory, Fuller's resolve seems to weaken.<sup>89</sup>

Notice, for example, that in *The Morality of Law* Fuller describes law as "the enterprise of subjecting human conduct to the governance of rules"<sup>90</sup> and that all of his eight criteria are centrally concerned with a vision of law as an affair of rules rather than, say, of standards or goals. Why? Part of the reason lies in the *type* of reciprocity that he envisions between government and citizen. This vision of reciprocity protects a narrow vision of freedom of action, of autonomy. As Fuller put it, "[g]overnment says to the citizen in effect, 'These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.'" <sup>91</sup> In part, this argument appeals to the

<sup>87</sup> Fuller, *supra* note 10, at 806.

<sup>88</sup> *Id.* at 807.

<sup>89</sup> Some of my readers have taken me to task for failing to clarify the link between the social contract and the rule of law in Fuller's ideas. Surely these two historically and conceptually separate notions should not be conflated in the way that they are here? My answer is that, for both personal and historical reasons, it was vitally important for Fuller to come up with some defense of the rule of law that was not obviously subject to relativistic criticism. The Second World War, after all, was widely perceived to have been fought to maintain the notions of the rule of law, of democracy, and of the right of national self-determination. The difficulty came in proposing some vision of the rule of law that did not seem to impose the vision of a particular country and a particular political tradition on the legal systems of all the nations of the world. Failure to propose such a vision would "save" the rule of law only at the cost of flouting the notion of self-determination. As I argue later, Fuller's answer to this conundrum was to code the notion of the rule of law into the very *concept* of law and to base this teleological definitionalism on an implicit, but attenuated social contract, a contract granting procedural rather than substantive rights. His hope (mistaken in my view) was that the thin notion of reciprocity would be inclusive enough to include all political traditions and that procedure would seem uncontentious where substance was not. Thus there *is* a relationship of entailment between Fuller's thin social contract and his procedural vision of the rule of law, a relationship stronger than the historical affinity and conceptual congruence between the general tradition of social contract theories and the general notion of the rule of law. Hence, it is not an accident when I suggest that Fuller's jurisprudence of private law threatens *both* his vision of the social contract and that of the rule of law.

<sup>90</sup> FULLER, *supra* note 2, at 96 (emphasis added).

<sup>91</sup> *Id.* at 39-40.

notion of justified reliance. But as the other stages in the progress of Rex's débâcle unfold, it becomes clear that an even more important value to be protected is the realm of freedom that is left to the individual inside the boundaries laid down by the clear commands of a rulemaking state. Justice Foster's opinion in *The Speluncean Explorers* sounds the same themes, and links them explicitly to the social contract between the naturally free citizen and the limited state.<sup>92</sup>

It is important to remember that Fuller is telling us that we can deduce normative conclusions *from the nature of the legal system*, a position very different from his claim about the very idea of private contracts. Yet the norms he deduces from the concept of law are norms of formality and procedure. Fuller seems to be incorporating the concerns of classical liberalism into his idea of law. One cannot be sure, but it seems that Fuller is assuming that the trans-social goal of law is the restraint of a potentially oppressive state and the guidance of a citizenry seeking assurances of complete autonomy within the sphere of non-proscribed conduct. The cords used to bind the state are also the guide ropes for the citizenry and this legal cordage should be, indeed *must be*, woven from rules.<sup>93</sup> Thus, Fuller believes that his formal and procedural requirements can be deduced from the concept of a legal system whereas other goals—democratic decisionmaking, protection of human rights, the enhancement of social welfare, or the promotion of economic efficiency—are merely contentious external normative desiderata, each competing for our affections.

Why should we assume that the citizen is better guided, or the state better restrained, by rules and formality? There is a strong legal realist counterargument to this position which runs something like this: In a society where there are barriers of class, price, time, or expertise to the acquisition of information, standards may be a better guide to behavior than rules. The argument depends on a number of contentious assumptions, in particular that standards will be based on relative community norms such as "good faith in the trade" and that the individual who needs to predict state action under the standard is also a member of the community. Under those two assumptions, the individual in a regime of ostensibly vague standards may find it easier to "know the law" than the individual who lives in a world of ostensibly clear rules, rules that, in practice, are unknown and counterintuitive in their complexity.

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<sup>92</sup> FULLER, *supra* note 16, at 7.

<sup>93</sup> Fuller lists as the first of the eight ways to fail to make law "a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis." FULLER, *supra* note 2, at 39.

There are other variations on this argument. Earlier, I quoted Fuller himself accepting the argument that excessive regard for formality led to the courts "torturing" legal doctrine and that "the 'non-technical' considerations which really motivated" decisions should be accepted and recognized.<sup>94</sup> Failure to do so, Fuller suggested, would lead to unpredictability of exactly the kind that *The Morality of Law* abhors, as the judges strive to escape from the narrow enclosure in which they are penned. Thus, the realists, with their skepticism about rules and their attention to policy, were actually "making the judge a more tractable and predictable animal."<sup>95</sup> Yet when it comes to the larger jurisprudential stage of *The Morality of Law*, the idea that rule-skepticism might increase the predictability of the legal system, and hence the "knowable domain of freedom" of the individual, seems entirely absent. Instead, we have returned to a type of classical liberalism in which autonomy is conclusively presumed to be the most important value and rules are conclusively presumed to be the mechanism by which autonomy is to be assured.

Part of the reason may be that the stakes of the discussion have changed. It is important and, to some, shocking to challenge the ambit, formal realizability and conceptual essentialism of the principle of private autonomy in contract law. Nevertheless, the political stakes do not seem to be as high as they are in the discussion of the rule of law. Many flavors of liberal state theory take it as definitionally true that abuses of public power are more to be feared than abuses of private power, that rules constrain governments more than standards and—perhaps most significantly of all—that autonomy is more legitimately the concern of the state than equality. If Fuller was to be as skeptical of these definitional pieties as he was of those of will theory, the result would be more sweeping in its imaginative transformation of the state than Section 90 of the *Second Restatement* or *Hoffman v. Red Owl Stores*.<sup>96</sup> In private law, Fuller can loose the surly bonds of liberal political theory. But writing as a jurist he finds those bonds inescapable.

#### D. Consent

In a famous passage, Hume criticized the notion of consent behind social contract theories—arguing that it was so attenuated as to mean nothing at all: "We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the

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<sup>94</sup> Fuller, *supra* note 1, at 435.

<sup>95</sup> *Id.* at 437.

<sup>96</sup> 133 N.W.2d 267 (Wis. 1965).

ocean, and perish, the moment he leaves her."<sup>97</sup> To use the words of a modern political theorist, "consent theory's big gun turns out to be of woefully small caliber."<sup>98</sup>

In private law, a similar question has been debated over the issue of the enforceability of "standard form contracts," although, once again, the parallel is rarely ever mentioned. In a famous article on the subject, Professor Slawson argues that if standard form contracts are to be enforceable, their enforceability cannot rest on consent.<sup>99</sup> In most cases, such consent is entirely absent, except as a legal fiction. Instead, such contracts should only be enforceable if their substantive terms meet criteria of justice and fairness. This also seems to be the clear implication of Fuller's contract law jurisprudence. In fact, it is fair to say that private law theory in general has paid fruitful, if intermittent, attention to the issue of whether consent is best seen as a psychological fact (meeting of the minds), as a substantive theory of the justice of outcomes, a capacious conceptual box designed to hold the values of the moment, or as some other, more complicated, amalgam of social practice and moral obligation.<sup>100</sup>

When it comes to the rule of law, Fuller's notion of consent seems a thin one, to say the least. In *The Morality of Law*, he picks as an illustrative case study the rules made by a monarch. While Rex fails in many ways to make law, the failure of democracy is not one of them. A failure to "achieve rules" means that no law is ever made, as does the failure to issue rules that are internally consistent, comprehensible, and capable of being followed. Retroactive rules, rules that change with undue frequency, and rules which are not congruent with official behavior also fail to achieve the status of law. In each of these cases, Fuller's argument stems from the "reciprocity between government and the citizen."<sup>101</sup> Yet the power of citizens to make, to accept or reject the rules—whether directly or through representatives—is no part of this reciprocity. Thus we

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<sup>97</sup> HUME, *supra* note 74, at 203.

<sup>98</sup> A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 68 (1979).

<sup>99</sup> W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

<sup>100</sup> For example, Charles Fried finds the roots of the binding quality of promises in a morality of autonomy, a social convention that gives intersubjective meaning to the act of promising, and an existential account of the possibilities of self-realization that such a system offers. See CHARLES FRIED, *CONTRACT AS PROMISE* (1982). It is also interesting to note that Fried's book includes a generous tribute to Fuller. The fact that Fuller's ideas influenced Roberto Unger's account of interpretation, Duncan Kennedy's analysis of rules and standards, and Charles Fried's analysis of contract as promise, gives some idea of the range of their appeal. My sense is that it would be possible to show the evolution of the tensions I describe here through the works of contemporary theorists who have been influenced by Fuller's work. That task, however, must wait for another occasion.

<sup>101</sup> FULLER, *supra* note 2, at 39.

have the apparently anomalous result that a theory built on the language of the social contract still manages to rank legal form higher than democracy.

To understand how Fuller gets to this point it is necessary to step back from this particular argument for a moment and examine his method of generating "the morality that makes law possible."<sup>102</sup> Remember, Fuller claims that the eight criteria are more than mere desiderata for efficiency or equity. They can be deduced from the very definition of law, norms that can be deduced from facts, a procedure that most philosophers since Hume have understood to be impossible.<sup>103</sup>

Fuller argues that his criteria come from the very definition of law, because the very definition of law includes certain uncontentious purposes and achievement of those purposes constitutes the good. In *After Virtue*, Alasdair MacIntyre gives a good example of this kind of argument in his attempt to show that values can be deduced from facts, provided only that the factual construct is one that has an accepted *telos* or purpose.<sup>104</sup> His two examples are "a watch" and "a farmer." He claims that the mere definition of these two terms provides us with normative arguments about them:

[T]hese arguments are valid because of the special character of the concepts of a watch and of a farmer. Such concepts are functional concepts; that is to say, we define both 'watch' and 'farmer' in terms of the purpose or function which a watch or a farmer are characteristically expected to serve. *It follows that the concept of a watch cannot be defined independently of the concept of a good watch nor the concept of a farmer independently of that of a good farmer; and that the criterion of something's being a watch and the criterion of something's being a good watch—and so also for 'farmer' and all other functional concepts—are not independent of each other.* Now clearly both sets of criteria—as is evidenced by the examples given in the last paragraph—are factual. Hence any argument which moves from premises which assert that the appropriate criteria are satisfied to a conclusion which asserts that 'This is a good such-and-such', where 'such-and-such' picks out an item specified by a functional concept, will be a valid argument which moves from factual premises to an evaluative conclusion. Thus we may safely assert that, if some amended version of the 'No "ought" conclusion from "is" premises' principle is to hold good, it must exclude arguments involving functional concepts from its scope.<sup>105</sup>

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<sup>102</sup> *Id.* at 33-94.

<sup>103</sup> DAVID HUME, A TREATISE OF HUMAN NATURE (London 1740); James Boyle, *Modernist Social Theory: Roberto Unger's Passion*, 98 HARV. L. REV. 1066, 1071-77 (1985) (book review).

<sup>104</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE* 54-55, 122-245 (1981).

<sup>105</sup> *Id.* at 55-56 (emphasis added).

MacIntyre gives as an example the argument that from the mere fact that a watch is too heavy to carry or grossly inaccurate we could *deduce* the normative conclusion that it was a bad watch.<sup>106</sup> Fuller ups the definitional stakes. Based on a largely implicit set of assumptions about the functions of law and the *telos* of the legal relationship between state and citizen, he deduces his criteria and makes them definitive. To use MacIntyre's example, it is as if we said that a watch which is slow or heavy is not a watch at all. The problem with this procedure, however, is that even these supposedly uncontentious "functional concepts" dissolve back into contingent facts and contentious purposes. Fashion watches, Dali's watches, and clunky Soviet army watches, environmentalist farmers, agribusiness tycoons, and crofters; all give evidence of the fact that the norms of superior watch and farmer-ness are not built into the concepts themselves. What is true of watches and farmers is even more true of law.

The only way that arguments like this can survive is to pick implicit values that are either vague enough or reassuringly familiar enough to survive prolonged scrutiny. Thus, when Fuller tries to make his stand between positivism and natural law, he relies on the familiar notion of the state as law giver. There are many norms one could see embodied in the tradition of the rule of law, or deduced from the social contract. One could imagine that heteronomy, or solidarity, or equality, or democratic self-governance is the value coded into law's *telos*, the value on which the reciprocity between citizen and state depends. But these arguments are a little more complex, a little more obviously subject to challenge. The need to produce an apparently uncontentious set of functional norms draws Fuller away from the complexity he had demonstrated so well in private law. Rather than a reciprocal relationship of form and substance, a polyphonic chorus of values, and a sophisticated understanding of the ways in which standards can constrain tighter than rules, we return to a world in which law *must* be an affair of rules, rules which produce order for the society and (bounded) autonomy for the citizen. We can deduce these formal requisites from the nature of law as a reciprocal relationship between government and citizen. We have come full circle. Lon Fuller has returned to the will theory of contract.

How might things have been different? I noted at the beginning of this Section that consent—supposedly the *raison d'être* of social contract theories—is in fact one of their weakest points. In private law, the obvious difficulty of explaining mass contracts to

which there are no real alternatives has driven many theorists to argue that enforceability can only depend on the substantive justice of the provisions of the contract.<sup>107</sup> This is perhaps the most revealing parallel between private law and state theory. Had Fuller followed this insight when he came to *The Morality of Law* he would have been driven to acknowledge that—by his own premises—his formal criteria, his concentration on rule-form and procedural requirement, could never supply the basis for the obligation to obey the law.<sup>108</sup> He might have been driven to the conclusion that there was *no* general basis for the obligation to obey the law. This, after all, would have been the logical outcome of his contracts scholarship. Alternatively, Fuller might have been driven to offer a theory of substantive justice, instead of claiming a third position in the debate between natural law and positivism. Fuller would have joined the natural law side—at least in the sense that one can say little of interest about legal philosophy without entering into normative debate. What's more, Fuller would have made the normative turn without an unquestioning adherence to the definitional pieties of liberal legalism. If we go by his contract jurisprudence, we have to imagine him rejecting the idea that private power is qualitatively different from public power, that state oppression is always more to be feared than private inequality, that autonomy is the supreme goal of the legal system, and that contract—whether social or private—is merely the enforcement of pre-existing consent.

#### CONCLUSION

It is hard to imagine exactly what kind of theory would have emerged if Fuller had taken the turn I suggest here. I imagine an odd combination of Rawls and Hale—a liberalism with a large measure of skeptical legal realism. If that picture seems strange, it can only be because we have kept the two halves of our contractarian traditions separate, despite their logical, normative and epistemological similarities. In private law, a watered-down legal realism has become our orthodoxy. Yet when we turn to jurisprudence or political theory, the skepticism about form, about definitional reasoning, and about the limits of private power seems distinctly muted. A large portion of contemporary political philosophy is enamoured of contractarian rhetoric. Grand contractarian schemes attempt to de-

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<sup>107</sup> It also seems to be the line that contemporary contractarian philosophers find most convincing. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1988).

<sup>108</sup> For an interesting contemporary argument coming to the same conclusion, see Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 *NOTRE DAME L. REV.* 553 (1992).

duce the structure of a just society from hypothetical choices made behind a veil of ignorance,<sup>109</sup> or to anchor the nightwatchman state in autonomy and contract.<sup>110</sup> Yet one will search political theory in vain for references to the rich private law literature examining the difficulties in *applying* the principle of private autonomy without some contentious theory of the person, or some controversial invocation of substantive values.

In constitutional law, originalists debate whether the constitution should be interpreted according to the theory of original intent or original understanding: yet one looks in vain for a comparison to the analogous debate in contract law. Are contracts only formed when there is an actual meeting of the minds, or may a court legitimately look to the "objective" meaning of the parties' statements? Is will theory really the corollary of a belief in private autonomy or is it merely a partial and figurative representation of that principle? The conceptual apartheid maintained between the public and the private half of the contractarian tradition is sometimes breached, of course, but the episodic quality of these breaches makes the narrow orthodoxy of political theory and constitutional scholarship all the more visible.

I close with one final suggestion. Looking back on the largely unresolved tension between the two sides of Fuller's work, I have been moved to the suggestion that Fuller's work has been so influential because of, rather than in spite of, the conflict. Whether conservative, liberal, or radical, some of the most vigorous and interesting legal scholarship in the 1980s breached the apartheid I have just described, but in the opposite direction—starting in the details of doctrinal analysis or the problems revealed by legal realism and then moving outwards to liberal social theory. Writers as different as Charles Fried, Roberto Unger, Duncan Kennedy, and Bruce Ackerman have produced scholarship that can be read this way. Kennedy produces a Fuller-like analysis of form and substance and then asks whether there is an aesthetic connection between arguments for "standards" and altruistic political positions that challenge the framework of classical liberalism.<sup>111</sup> Unger takes Fuller's ideas about the interpretation of legal rules and asks if they do not undermine liberal political theory.<sup>112</sup> Fried's work on contracts seeks to reconstruct a particular view of contractual obligation, and to protect both it and the principle of private autonomy which it expresses, from a utilitarian, realist, social welfare type of analy-

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109 See RAWLS, *supra* note 107.

110 See NOZICK, *supra* note 107.

111 See Kennedy, *supra* note 20.

112 See UNGER, *supra* note 16.

sis.<sup>113</sup> Ackerman's work on liberal state theory<sup>114</sup> shows many of the same influences. The list could be extended and quibbled over, of course. Obviously there were other factors at work, and the extent of direct conscious influence is not as great as this idealist litany might suggest.<sup>115</sup> Nevertheless, the conclusion I am left with is that Fuller's work provided a jumping-off place for so many scholars precisely *because of* its unresolved tensions. In the end, Fuller's role in legal scholarship may have been to bring the two sides of these contractarian traditions to a high, but ultimately inconsistent, level of sophistication and then to leave them there, nagging the next generation.

It remains to be seen whether the legal realist analysis of market, freedom, rules, and form will ultimately wreak some greater transformation in the tradition of liberal political theory than that represented by the conceptual itches of a few law professors. In this, as in many other things, the work of Lon Fuller presents us with a momentary ability to imagine how things could have been otherwise.

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<sup>113</sup> See FRIED, *supra* note 67.

<sup>114</sup> See BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

<sup>115</sup> Apart from the general problems of idealist legal history, the degree of inspiration offered by Fuller, rather than by the realist movement generally, is in considerable doubt. This issue is complicated by Fuller's own contradictory feelings about realism and by the accidents of law school tradition and pedagogic influence. If citation and syllabi are anything to go by, Fuller seems to have had more of a direct influence on the first three thinkers in my list.