Wibren van der Burg*

THE WORK OF LON FULLER: A PROMISING DIRECTION FOR JURISPRUDENCE IN THE TWENTY-FIRST CENTURY†

This is a review article of Rundle, Forms Liberate *and Brunnée & Toope,* Legitimacy and Legality in International Law. *It puts both books in perspective, in the context of a modest Fuller revival since 1994. Rundle successfully reclaims Fuller from the distorted picture that arose in the wake of the Hart–Fuller debate and argues for taking the form of law seriously. Brunnée and Toope provide a convincing account of the emergence of international law by elaborating a Fullerian framework.*

Keywords: Lon L Fuller, Rundle, Brunnée and Toope, interactional law, international law, form of law

I *Reclaiming Fuller*

For most contemporary students of jurisprudence, Lon Fuller (1902–78) is hardly more than a footnote in the history of their discipline. He is known mainly for his role in the Hart–Fuller debate, which most commentators believe that he lost. His discussion of the eight principles of legality in *The Morality of Law* may be original, but his claim that they have major moral implications seems to be unwarranted. Moreover, Joseph Raz has included the most important insights from Fuller's analysis of the rule of law in his famous, philosophically more sophisticated article 'The Rule of Law and its Virtue.'[1] Thus, there appears to be little left that a contemporary scholar can learn from Fuller's work.

Something like the above seems roughly to be the prevailing opinion with regard to Lon Fuller. However, in an impressive book, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller*, Kristen Rundle sets out to correct this belief. She aims to reclaim Fuller from the distorted picture

* Professor of Jurisprudence, Erasmus School of Law, Erasmus University Rotterdam

† A review of Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart, 2012); Jutta Brunnée & Stephen John Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010). Subsequent references appear parenthetically in the text. My thanks go to Ken Winston and Donna Devine for helpful comments on a draft version.

1 Joseph Raz, 'The Rule of Law and its Virtue,' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 210.

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that arose in the wake of the Hart–Fuller debate. Her strategy is threefold. First, she looks at the debate from the perspective of Fuller and analyses how his substantive views and especially his questions have been twisted by being laid on the Procrustean bed of Hart's narrow conceptual agenda. Second, she embeds – like Ken Winston before her – Fuller's research questions in his broad and unfinished project of *eunomics*, a theory of the principles of 'good order and workable social arrangements.' Third, using materials from the Fuller archives, she reconstructs his central ideas as he presented them most clearly, when he was not engaged in polemical discussions with his opponents but in friendly conversations with kindred spirits such as Philip Selznick, or in unpublished working notes.

The Hart–Fuller debate started with Hart's famous Oliver Wendell Holmes lecture at Harvard: 'Positivism and the Separation of Law and Morals.'[2] Fuller was a professor at Harvard and one of the sponsors of Hart's visit. During the lecture, Fuller became highly agitated, and he demanded the right to reply. This lengthy response – even longer than Hart's discourse itself – was published in the same issue of the *Harvard Law Review* as the lecture. Hart's lecture and, subsequently, his book *The Concept of Law* and his review of Fuller's book *The Morality of Law* effectively framed the debate in his own terms; namely, those of philosophical conceptual analysis. However, in this restricted frame, the issues that mattered most to Fuller could not be adequately discussed. Fuller tried to bring those broader questions to the table, but Hart consistently ignored these attempts, thus forcing Fuller to engage Hart in Hart's own terms. Only in the 'Reply to Critics,' added in 1969 to the *Morality of Law*, did Fuller try to reclaim his own agenda, but by then Hart's framing of his work as merely discussing conditions of efficacy had become generally accepted. Consequently, Fuller was strongly disadvantaged in the debate. Moreover, he was also handicapped by the fact that he was not a philosopher, let alone one trained in analytical philosophy – and he was undeniably sloppy in his language as well as being extremely polemical at times.

Rundle rightly argues that we should go beyond the narrow way the debate was framed by Hart as an analytical philosopher, because the

2 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 593. The next stages in the exchange were Fuller's reply in the same issue: Lon L Fuller 'Positivism and Fidelity to Law. A Reply to Professor Hart' (1958) 71 Harv L Rev 630; the publication of Hart's book, HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); Fuller's book, Lon L Fuller *The Morality of Law* (New Haven, CT: Yale University Press, 1964); and Hart's review, HLA Hart, Book Review of *The Morality of Law* by Lon L Fuller, (1965) 78 Harv L Rev 1281. It concluded with Lon L Fuller, 'Reply to Critics' in Lon L Fuller, *Morality of Law*, revised ed (New Haven, CT: Yale University Press, 1969) [Fuller, *Morality*] 187.

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broader questions that were so important to Fuller are still on the agenda of contemporary jurisprudence. Therefore, we need to understand what Fuller was really after; namely, his broader *eunomics* project. Fuller distinguished various modes of ordering, such as adjudication, mediation, contract, legislation, custom, and managerial direction. Each of these modes – that Fuller sometimes also refers to as 'forms' or 'principles' – has its own internal morality. They are not mere instruments, neutral means to political ends, but have their own integrity. The *eunomics* project should 'uncover the organising principles, features of design and participatory commitments which constitute different models of social ordering, and which make them appropriate for use in a given context' (37). Fuller announced this research agenda in the early 1950s, but he never published or even finished most of the essays that were part of it, let alone completed the full project. From 1958, the debate with Hart provided a diversion as well as a stimulating opportunity. It was a diversion because it meant that the original *eunomics* project was largely dropped for the next several years. However, it also seemed to provide an opportunity to challenge the leading positivist of his time to address those questions that, in Fuller's mind, should be central to the jurisprudential debate. The tragedy was that Hart simply never took up those questions, as his research agenda was different from Fuller's.

Rundle shows that what Fuller sought was not a denial of Hart's thesis that there is no universal conceptual connection between law and morality, but the insight that this thesis was an incomplete story about law – and not a very interesting one. The positivist core of truth with regard to the conceptual distinction should not be taken to imply that law as a social practice is morally neutral. In Fuller's view, jurisprudence should not focus on issues of definition but on the question as to what it is that makes fidelity to law possible. This question can only be answered if we analyse the relationship between lawgiver and subject as well as the moral quality of law. Fuller's central idea was that law must be built on a relationship of reciprocity between lawgiver and citizens. Only in the light of this underlying collaborative relationship can we understand how the forms of law embody an internal morality. Positivist critics of Fuller have usually followed Hart in his review of *The Morality of Law* in reducing this internal morality to eight criteria of efficacy, but Rundle convincingly demonstrates that there is much more to it. The underlying relationship of reciprocity, she points out, is reflected in these eight principles but is not exhausted by them (92). Whereas positivists tend to regard the principles as mere criteria of craftsmanship, for Fuller they reflect both craftsmanship and trusteeship.

For Fuller, law is not merely a pliable instrument. If a sovereign embarks on the process of legislating, he has to do this through general

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rules. That is what is distinctive in law, the governance of human conduct by general rules. Moreover, in order to govern through law, a sovereign must treat the legal subject with respect as a responsible human agent who has the capacities to interact with general rules. Rundle refers to a relatively unknown article from 1968[3] in which Fuller describes a type of lawgiver different from the benevolent Rex that figures prominently in *The Morality of Law*: namely, an utterly selfish tyrant. According to Fuller, this tyrant would soon discover that, in order to govern efficiently, he needs not only to govern by general rules and, consequently, to respect the principles of legality but also to award his subjects at least some freedom, especially the freedom to pursue their own happiness in their own way. Once the tyrant embarks on the project of lawgiving for purely instrumental purposes, he is drawn into a process in which the associated values of legality and freedom become increasingly more important.

According to Rundle, Fuller's most important and still highly relevant message is that we should take the form of law seriously. There is a connection between the form of law and how law approaches human agency. This core idea is expressed succinctly in the book title, a short phrase that Rundle found in a small note in the Fuller archives: 'forms liberate.' Law presupposes as well as respects and fosters a view of human agency, of man as a 'responsible agent, capable of following rules, and answerable for his defaults' (21).[4] That a view of human agency, more precisely that of freedom, was at the core of Fuller's endeavours was first suggested by Kenneth I Winston, who collected and edited a number of Fuller's unpublished papers in *The Principles of Social Order*.[5] According to Rundle, this is the central idea in Fuller's work: 'For Fuller, there can be no meaningful concept of law that does not include a meaningful limitation of the lawgiver's power in favour of the agency of the legal subject' (2). In the positivist framing of the Hart–Fuller debate, this focus on human agency is usually ignored; however, if we put the debate in a broader perspective, we may understand much better Fuller's contributions – not as unconvincing replies to Hart's narrow conceptual agenda but as interesting questions in their own right.

For Fuller, the relationship between law and morality should be analysed not in terms of conceptual necessities but in terms of intrinsic presuppositions and empirical tendencies. There are two separate but

3 'Freedom as a Problem of Allocating Choice' (1968) 112 Proceedings of the American Philosophical Society 101.

4 Quoting Fuller, *Morality*, supra note 2 at 162–3.

5 Kenneth I Winston, 'Introduction to the Revised Edition' in Lon L Fuller, *The Principles of Social Order. Selected Essays of Lon L Fuller*, revised ed by Kenneth I Winston (Oxford: Hart, 2001) 1 at 2.

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interrelated senses in which we may understand this intrinsic moral character of law (21). First, it includes a distinct ethos – one of trusteeship – that the lawgiver has to live up to in order to earn the fidelity of citizens. Second, it is based on the specific view of human agency discussed above. Both ideas are internal to what legislating means; they are not an external morality, as if the lawgiver's actions must be measured critically against some social contract model of reciprocity or against a Kantian ideal relating to the human person.

Fuller belonged to the natural law tradition only in a highly qualified sense, as he was critical of the classical natural law idea that certain precepts are above positive law. Although, in the debate on Nazi law, he was clearly more sympathetic to Radbruch's position than Hart was, he explicitly did not subscribe to some version of the substantive natural law idea that evil law is not really law at all. Instead, he analysed Nazi law in terms of the pathology of the Nazi system, as a procedure that flagrantly violated requirements of the internal morality of law: for example, by frequently resorting to unclear, retroactive, and secret statutes; by arbitrary and illogical interpretation; and by ignoring the texts of statutes when applying them. What he took from the natural law tradition was the idea that there were certain internal moral demands that had to be respected in order for a mode of ordering to be fully law – not as an external morality above the law but as an internal one. It is not a substantive morality that is at stake here, but an internal morality that makes law possible – that is, in Fuller's perspective, a morality that makes human agency possible. A legal system that does not live up to those standards of legality makes it more difficult for its citizens to be guided by legal norms and – for that reason – it lacks legal quality. One of the questions that he pressed on positivists, but in vain, was whether their theories provided for a meaningful idea of legal pathologies. Fuller's claim was that a general debasement of law might make the exercise of human agency in the context of the legal framework so problematic that such a legal order might no longer be capable of establishing and maintaining a general attitude of fidelity among citizens (75).

If we want to situate Fuller intellectually, it is not primarily in the natural law tradition that he belongs but in the typical American traditions of pragmatism, the legal process school, and sociological jurisprudence. As a pragmatist, Fuller was interested not in conceptual necessities or rigid dichotomies, but in understanding how law works in specific contexts and for specific purposes.[6] Rundle corrects a common misinterpretation

6 Kenneth I Winston, 'Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law' (1988) 8 Oxford J Legal Stud 329.

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when she remarks that Fuller never claimed any universal or necessary conceptual connections between law and morality; that would have been inconsistent with his contextualism and with his acceptance of a broad form of legal pluralism (4). He was, along with the legal process school, interested in the forms of law; namely, what is implied if a lawgiver uses specific legal processes or forms. These forms are not morally neutral, but neither do they result in a direct conceptual connection between law and substantive morality. Rundle formulates it nicely when she argues that 'the form of law may temper its substance' (96); or put in a more negative way, 'when pursued through law, oppressive aims tend to be accompanied by a deterioration in the standards of the internal morality of law' (96). This is not a conceptual necessity but an empirical tendency. Paradoxically, while Hart claims that his book *The Concept of Law* may be called an exercise in descriptive sociology, it is, in fact, almost devoid of empirical insights and is primarily an exercise in linguistic philosophy, whereas Fuller's work indeed relies on empirical insights. We gain a much better understanding of Fuller when we regard his work as an interdisciplinary project of jurisprudence in a wider sense, based on philosophy and sociology as well as on the practical insights and wisdom derived from legal practice.

Rundle takes an interesting turn in the last part of her book, where she discusses how Fuller's insights might be used for contemporary debates in jurisprudence. In a sophisticated analysis, she lays bare certain ambiguities in Joseph Raz's theory of law. She concludes that positivism may need a more discriminating concept of law than Hart or Raz has to offer, and that this concept may need to rely on Fuller's concern for the form of law and the agency of the legal subject (160). Rundle then moves on to discuss Ronald Dworkin, Fuller's successor as Hart's main challenger in Anglo-Saxon jurisprudence. From a historical perspective, it is curious how much Dworkin's initial critique of *The Morality of Law* (in two articles published in 1965) resembles Hart's. Like Hart, Dworkin reduces the internal morality of law to mere criteria of efficacy. Rundle carefully dissects Dworkin's criticisms and shows that they miss the mark because they do not recognize the importance of the form of law in Fuller's theory and because Dworkin too easily dismisses the idea that the lawgiver's role must be understood in terms of a specific ethos. This absence of attention to the form of law can be found not only in Dworkin's early work but also in his later material and up to the present, and it is here that Rundle suggests that an interesting conversation might occur between Fuller's work and Dworkin's.

Of course, there are many commonalities between Fuller and Dworkin – ones that Dworkin strangely enough has never bothered to discuss. For example, his emphasis on underlying principles and values in

adjudication, the central role of coherence or fit in the work of the judge, the choice of the participant's perspective rather than that of an external observer, and even the famous chain-novel metaphor may all be found in Fuller's work as well. These similarities, however, do not interest Rundle most. She focuses on Dworkin's recent work, in which he argues that competing conceptions of legality lie at the heart of competing philosophical theories of law. According to Dworkin, the centre of gravity in interpreting legality is for natural law theory accuracy (in terms of substantive justice and wisdom), for positivism efficiency, and for his own theory political integrity.

How would Fuller fit into this mapping of the philosophical debate? He would clearly agree that legality is the point of legal practice, its underlying value. However, he would not accept a choice of either accuracy or efficiency – both would be taken into account. In this respect, his position might be regarded as a fourth option alongside the three that Dworkin distinguishes. According to Rundle, there is a more important fundamental difference between Fuller and Dworkin. For Fuller, legality and its accompanying value of respect for human agency are inherent in the form of law; they are inherently connected to the distinctively legal. On the other hand, Dworkin remains silent on the form of law and even on what may account for law's distinctiveness. Rundle argues that Fuller's view of legality is not incompatible with Dworkin's, but might provide additional foundations that are missing in Dworkin's jurisprudence. Dworkin's theory might thus be enriched by including Fuller's important insight that the form of law matters – and not merely because the law promotes individual freedom but also because the form of law, and especially the principle of generality, presupposes respect for autonomous persons. In other words, equal respect for human dignity and freedom is not merely the result of a legal order once it is oriented toward legality as political integrity; it is already presupposed in the form of law as such.

This is a short summary of how, according to Rundle, we may draw inspiration from Fuller. Her book originated as a PhD thesis at the University of Toronto, but she has elaborated upon it substantively, especially by relying more extensively on unpublished materials from the Fuller archives. This was a fortunate choice, because in those materials Fuller was often franker and clearer than in the published materials. Thus, the intentions behind his work can be better understood. This leads to a much richer interpretation of what Fuller was really after. He was not yet satisfied with a number of unfinished papers – some of which he had been working on for decades – because they did not answer fully the questions he was seeking to resolve. His wide-ranging *eunomics* project remained unfinished. Given those conditions, it helps to interpret the published as well as the posthumously published work on the basis of

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the intentions behind them, and for this, the archives provide important sources. Indeed, if we examine closely what Fuller was really after, we obtain a much more interesting picture than if we study him from the positivist perspective, through the lens of the Hart–Fuller debate. We can then recognize that Fuller still has much to teach us – perhaps even more than he did fifty years ago.

II *A Fuller revival?*

Rundle is certainly not the first to reclaim Fuller. The most important contribution was made by Kenneth I Winston. Winston – like Robert Summers, in his biography,[7] and now like Rundle in this book – argued forcefully for the idea that we should understand Fuller from the perspective of his concern for human freedom. Apart from editing a collection of partly unpublished articles by Fuller in *The Principles of Social Order*, Winston published widely on how Fuller's work could be better understood and made productive for various topics. In 1994, he edited a special issue of the journal *Law and Philosophy* on the work of Fuller, which may be regarded as the start of the current Fuller revival.[8] This special issue was also interesting because it included the first article in a series in which Jeremy Waldron discussed elements from Fuller's work for his own non-positivist approach. In 1999, Willem Witteveen and I followed with an edited volume that had the programmatic title *Rediscovering Fuller*, which included seventeen articles from scholars who all derived inspiration from Fuller's work for a wide range of themes.[9] In 2008, the fiftieth anniversary of the start of the Hart–Fuller debate led to two symposia in which a number of authors also claimed that there was more to Fuller's side of the debate than the canonical interpretation would have us believe.[10] Of course, apart from the contributors to those

7 Robert S Summers, *Lon L Fuller* (Stanford, CA: Stanford University Press, 1984).

8 Kenneth I Winston, ed, Spec issue on Lon Fuller, (1994) 13 Law & Phil, with contributions by Jeremy Waldron, Frederick Schauer, Stanley L Paulson, Gerald J Postema, and Kenneth I Winston.

9 Willem Witteveen & Wibren van der Burg, eds, *Rediscovering Fuller: Essays on Implicit law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) [Witteveen & van der Burg].

10 Peter Cane, ed, *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart, 2010) [Cane], including 16 articles; in particular, the long opening essay by Nicola Lacey offers many perceptive insights into Fuller's side of the debate: Nicola Lacey, 'Out of the 'Witches' Cauldron? Reinterpreting the Context and Reassessing the Significance of the Hart-Fuller Debate,' Cane, ibid 1. The second collection is 'Symposium: The Hart-Fuller Debate at Fifty,' Spec issue (2008) 83:4 NYUL Rev, with seven contributions.

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special issues and edited volumes, many other authors have published favourably on Fuller's work.[11]

Certainly, a number of authors focus on the substantive implications of the rule of law and use Fuller's analysis to argue that the rule of law is not a weak ideal but has important normative implications.[12] Other publications discuss the familiar theme of the relationship between law and morality. A further core theme is legal professional ethics, on which Fuller published highly influential work as well as a policy report for the American Bar Association, which was largely implemented in its Model Code of Professional Responsibility. David Luban, the leading scholar on legal ethics, even argues that Fuller is the greatest philosopher since Plato to devote serious attention to the ethics of lawyers.[13] Like many other authors on legal ethics, Luban is strongly inspired by Fuller's work, though he is certainly not an uncritical follower.[14] For example, Fuller's distinction between a morality of aspiration and a morality of duty is still reflected in many ethics codes that distinguish between aspirational and mandatory norms. According to Frederick Schauer and Peter J Smith,[15] Fuller's work on legal fictions from the 1930s is still the classic and most comprehensive treatise on the subject.[16] His work on institutional design and *eunomics* has been fruitful in discussions of legislation in the regulatory state.[17] Similarly, on many other themes, ranging from contract law to mediation, and from interactional or implicit law to lawyers as architects of social structures, Fuller's work still generates refreshing questions and tentative suggestions.

11 For a fuller bibliography, Rundle's book under review here, as well as various contributions to Cane, ibid.

12 *Cf.* David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, UK: Cambridge University Press, 2006); Evan Fox-Decent, 'Is the Rule of Law Really Indifferent to Human Rights?' (2008) 27 Law & Phil 533; David J Luban, 'The Rule of Law and Human Dignity: Reexamining Fuller's Canons' (2010) 2 Hague Journal on the Rule of Law 29.

13 David Luban, 'Rediscovering Fuller's Legal Ethics' in Witteveen & Van der Burg, supra note 9 193 at 193.

14 *Cf.* David Luban, *Legal Ethics and Human Dignity* (Cambridge, UK: Cambridge University Press, 2007). *Cf.* also S Viner, 'Fuller's Concept of Law and Its Cosmopolitan Aims' (2007) 26 Law & Phil 1.

15 Frederick Schauer, 'Legal Fictions Revisited' in Maksymilian Del Mar & William Twining, eds, *Legal Fictions in Theory and Practice* (New York: Springer, 2014) [forthcoming] [Schauer]; Peter J Smith, 'New Legal Fictions' 95 Geo LJ 1435 [Smith].

16 See Lon L Fuller, *Legal Fictions* (Stanford, CA: Stanford University Press, 1967). This book is based on papers written in the 1930s. It is described as the 'classic defense of legal fictions' by Schauer, ibid, and as 'the most comprehensive treatment' by Smith, ibid at 1466.

17 See e.g. the contributions by Marc Hertogh, Roderick A Macdonald, Wibren van der Burg, Willem Witteveen, and Pauline Westerman in Witteveen & Van der Burg, supra note 9, as well as various other publications by these authors.

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III *International law*

An interesting application is found in the field of international law, which has always been the Achilles heel of legal positivism. In international relations, there is no central state. Traditional legal institutions such as legislatures and courts, to say nothing of enforcement agencies, are completely missing or have only a marginal existence. Treaties often remain a dead letter in state practice; their authority is sometimes dubious. Moreover, customary law – the other weak spot in most versions of positivism – is an important aspect of international law and cannot be as easily dismissed as a marginal phenomenon, as it is in domestic law. Consequently, accounts of positivism based on authoritative sources, state institutions, or secondary rules are not quite satisfactory in understanding international law. Moreover, the digital character of most versions of legal positivism – implying that a legal norm cannot half exist – cannot do justice to the phenomenon that, in international law, norms gradually emerge and can be said to become more law in the process.

Jutta Brunnée and Stephen Toope have taken up this challenge. In *Legitimacy and Legality in International Law: An Interactional Account*, they suggest a radical theoretical shift. Instead of positivism, they propose an interactional account, which is strongly inspired by the work of Lon Fuller. Law is not characterized, they say, by 'formal enactment by a superior authority, application by courts and centralized enforcement' (6). If we were to focus on these sources of law, we would have a highly distorted view of international law. They argue that law is made 'through the interactions of a variety of actors, including elites, the media, NGOs and "ordinary" citizens' (5). What is essential for law, in their view, is the fact that – at least some – citizens and other actors feel obligated because legal norms can inspire fidelity or a feeling of obligation. Fidelity is not produced by authorities that regard law simply as a command to their subjects. Indeed, subjects may obey if these commands are backed up by threats, but they will not feel obligated. In order to produce fidelity, legal norms must be grounded in shared understandings and be built and maintained – and sometimes destroyed – in a continuing practice of legality; namely, a practice oriented toward Fuller's eight principles of legality.

In order to explain why these eight dimensions of legality can be regarded as the distinctive characteristic of law, we should start with the notion of legal interactionism[18] – that law emerges through the interaction of various actors and that law provides reasons for action. A first

18 Whereas Fuller refers to his theory as 'an interactional view of law' (*Morality*, supra note 2 at 221, 237), various authors have referred to his theory as 'interactionist' (e.g., Brunnée & Toope 24; Willem Witteveen, 'Rediscovering Fuller: An Introduction' in

requirement to make this possible is free communication between the actors so that they can exchange their interpretations of what they are doing and so that shared understandings may emerge. A second requirement is that the actors can act freely, that they are regarded as autonomous beings that may act on reasons. This means that actors have to be able to pursue their own ends while being guided by law. They should be able to organize their interactions through law. This is only possible if law has certain characteristics. Legal norms must be general; a fully casuistic catalogue of prescriptions for every specific case is not possible, and it cannot function as an effective action guide. Law must be promulgated; norms unknown to me cannot guide my actions. Similar arguments hold for Fuller's criteria of non-retroactivity, clarity, non-contradiction, and not asking the impossible; legal norms that do not meet these requirements simply cannot guide human action. Norms that change every day constitute a problem as well, because ordinary citizens simply will not be able – and not be willing – to keep up with the changes; they will simply ignore the law when possible. Fuller's final criterion is congruence between rules and official action. If legal authorities do not uphold the norms, they show disrespect for them, and this will also erode fidelity to the law among other actors. Thus, the eight criteria are requirements that make law possible. Without such requirements, law cannot serve as an effective action guide.

Brunnée and Toope elaborate and adapt this Fullerian framework so that it provides an adequate theory of international law, a field where, obviously, there is no equivalent of an ambitious King Rex wanting to draft a perfect legal code for all his subjects. According to the authors, for the emergence and continued existence of law, we need three requirements.

The first prerequisite is that a community of practice exist in which some shared understandings and moral commitments emerge. These understandings need not be substantive; they can be very minimal and largely procedural. 'It is possible to imagine law rooted in thin shared moral commitments, such as autonomy and communication' (32). I would add that these two commitments are, indeed, the minimal basis for legal practices because the eight criteria of legality presuppose and reinforce the idea of autonomous actors and the possibility of communication between them on the meaning of the norms.[19] For example, for basic rules of contract law, it may suffice to have common notions of free

Witteveen & Van der Burg, supra note 9, 21 at 33.) Brunnée & Toope 47, 138 refer to their own position as 'interactionalism.' I prefer the simpler term interactionism.

19 Both autonomy and communication are gradual criteria; we do not need full autonomy (whatever that may be) or completely undisturbed communication to make law

consent or autonomy and of transaction. For international law, the shared understandings are often very thin, indeed, but they may become more substantial in the process of continued interaction and discussion. The starting point may be no more than the common acknowledgement that we need norms or procedures to coordinate when and how force is allowed or the shared understanding that we should, for example, find means to avoid global warming beyond dangerous levels.

The second requirement is that on the basis of these shared understandings there is a practice of legality. This refers to a practice of norm creation and norm application that adheres to the eight criteria of legality. If the creation of norms and their application do not meet these criteria, they are not law. The norms created without these criteria of legality may sometimes be effectively followed as commands backed up by threats, but they miss having full legal character, even if they have the formal characteristics often found in but not defining of law. Or the created norms may simply not be followed by actors other than the norm creators because these actors do not feel included and taken seriously as autonomous actors. In both cases, the norms do not evoke the sense of legal obligation among the norm subjects.

The third requirement is that of a continuing practice of legality. In international relations, law creation is not simply the result of an act of will on the part of certain authorities – it is a continuous project and a challenge. In particular, Fuller's eighth criterion, the congruence between norm and official action, is important in continually reconstructing law. If legal norms are no longer taken seriously by the participants in a practice, these norms become a dead letter and lose their legal character. This is also the partial truth in the common idea that law is associated with enforcement. Enforcement must be rejected as a defining characteristic, but it may be important in ensuring fidelity to the law. If legal norms remain only on the books and are not enforced or practised by the norm subjects, they are no longer law.

This, in a nutshell, is the basic tenet of Brunnée and Toope's argument. Such a view of law obviously fits better with the phenomena of international law than do the simple black and white criteria of most positivist theories. It allows for more diversity than natural law theories do, as it requires only a minimal shared understanding, which is largely procedural. It simply requires the agreement that some form of coordination and common action is necessary on the basis of respect for autonomy and open communication, and that a practice of legality is the best

possible. But it may be that decreased autonomy and partly blocked communication channels lessen the legal quality.

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method to tackle this need. The authors demonstrate the value of this interactional view with elaborate case studies on environmental protection, torture, and the use of force by states, which show that taking an interactionist perspective provides us with new and illuminating insights into international law with regard to those issues.[20] In my view, they have provided a highly convincing account of the emergence of international law.[21] Thus, they illustrate Rundle's argument that we need to reclaim Fuller because his insights are highly productive for the questions that contemporary jurisprudence faces.

IV *Critical evaluation*

Both books are exceedingly good, and they have already received much deserved praise.[22] However, they share a certain bias. It seems to me that Rundle's reconstruction has two major lacunae, both of which are the consequence of still putting too much emphasis on the Hart–Fuller debate – even if it is studied now from a Fullerian perspective. These same lacunae are even more strongly visible in Brunnée and Toope's work because they restrict themselves mostly to *The Morality of Law*.

First, the implicit focus on legislation leads to the neglect of other forms of law, such as contract. There is an unresolved tension in Fuller's work. On the one hand, in the 1958 'Reply to Hart,' as well as in *The Morality of Law*, Fuller focuses on the legislator and, consequently, seems to identify the internal morality of legislation with that of law in general. On the other hand, in various essays in *The Principles of Social Order*, he regards legislation as merely one of the legal processes alongside adjudication, mediation, contract, and even managerial direction.[23] Each of these processes has its own internal morality with distinct characteristics, its own principles of legality. The implication is not that there is merely one internal morality of law but that there is a multiplicity of internal moralities; in other words, a multiplicity of legalities. In phenomena like

20 For a similar application of Fuller's ideas to international law, see Jan Klabbers, 'Constitutionalism and the Making of International Law: Fuller's Procedural Natural Law' (2008) 5 No Foundations 84.

21 In this review article, I only discuss their theory as a contribution to debates in jurisprudence. For critical studies from an international law perspective, see e.g. Symposium on Brunnée & Toope, Legitimacy and Legality in International Law (2011) 3 International Theory 307.

22 Brunnée & Toope received the 2011 Certificate of Merit award from the American Society of International Law for their book; Rundle's book was awarded second prize by the Society of Legal Scholars Peter Birks Book Prize 2012.

23 Kenneth I Winston, 'Introduction' in Lon L Fuller, *The Principles of Social Order. Selected Essays of Lon L Fuller*, revised ed by Kenneth I Winston (Oxford: Hart, 2001) 25 at 29.

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negotiated rule making (combining contract and legislation), international law (combining at least the first four processes), and informal court proceedings (often mixing mediation and adjudication), these processes are combined. This might be perceived as a sign of pathology in Fuller's terms, but it could also be perceived as a successful combination or even as a new legal process *sui generis*.

This unresolved tension is ignored in Rundle's book, as her analysis focuses on the debate with Hart; the result is that legality is analysed mostly in terms of the morality of legislation. Rundle does not discuss the plural character of law or the multiplicity of forms and internal moralities. This really is a missed opportunity because an aspect of Fuller's research agenda that is highly topical and seldom explored or elaborated is the detailed study of each of the various types of law – including new and hybrid types that have emerged in the past century. This study would include a careful analysis of the internal morality associated with each of them rather than merely the internal morality of legislation.[24]

Rundle's neglect of this tension is shared by Brunnée and Toope. Legislation certainly need not be the only model for international law. Fuller's internal morality of legislation is typical of legislation in a more or less democratic context, in which citizens are treated as autonomous persons. The internal morality of interactional international law, as developed by Brunnée and Toope, is typical of international law at the beginning of the twenty-first century. In a critical reaction to their theory, Christian Reus-Smit suggests that, before the nineteenth century, there was a different set of international legal practices and that these were connected with different criteria of legality. He convincingly argues that we should not 'treat Fuller's criteria of legality as though they were *the* criteria of legality.'[25] There is no reason to assume that practices of legality always have the same characteristics; on the contrary, it is plausible to assume that there is variation with regard to context and to types of law. Most of the principles of legality for legislation are probably relevant for international law as well, but there may be additional principles of legality, or some of the eight principles may be less relevant in international law. For example, in international arbitration or negotiations among NGOs, multinational corporations, and states, the principles of generality or publicity need not always be fully applicable.

24 On Fuller's social science research agenda studying the various legal processes and their specific internal moralities, see Karol Soltan, 'A Social Science That Does Not Exist' in Witteveen & Van der Burg, supra note 9 at 387.

25 Christian Reus-Smit, 'Obligation through Practice' (2011) 3 International Theory 339 at 347 [emphasis in the original] [Reus-Smit]. He argues that criteria of legality are always historically and contextually contingent.

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Second, Rundle's focus on the conversations with Hart and others and Brunnée and Toope's focus on *The Morality of Law* result in the neglect of those publications in which Fuller tried to transcend philosophical debates and present the field of jurisprudence in a relatively impartial way. Fuller had a polemical side that cannot be denied, but he also attempted to bridge divisions. In two publications, 'The Case of the Speluncean Explorers' and *Anatomy of the Law*, Fuller tried to do justice to the different sides of the jurisprudential debates. These publications can provide an even broader perspective on how Fuller's work can be inspiring as regards contemporary issues.

'The Case of the Speluncean Explorers'[26] is the best known example of this impartial analysis of the debates, and it is still widely used in jurisprudence classes. This case is the reverse of various Nazi cases in the Hart–Fuller debate, such as the 'grudge informer': a woman who reported her husband for anti-Nazi remarks in the hope of getting rid of him. The debate on this theme – and especially the contribution by Radbruch discussed by Hart and Fuller – has become highly topical in the two decades since the fall of the communist regimes in Central and Eastern Europe. This recent discussion focused on the prosecution of East German border guards who, in line with the existing law of the communist German Democratic Republic, shot people trying to flee to the West. In both the Nazi and communist cases, the philosophical question was whether citizens could be prosecuted for immoral acts that were legal or even legally obligatory under the laws of their country. 'The Case of the Speluncean Explorers' is the reverse, as it discusses a morally justified (or at least morally tolerable) act that contravenes the law: the killing of one person in order to save the life of a number of others. Of course, most lawyers would hold that this is a case of *force majeure* and that prosecution is not at issue, but the question is how this can be argued in light of a clear legal norm prohibiting killing. Fuller uses this hypothetical case to present five different philosophical positions in their best light, in the form of five opinions of Supreme Court justices, so that the differences become clear to the reader. He succeeds remarkably well in presenting an unbiased description of each of the positions. This provides proof not only of the more ecumenical side of Fuller but also of how, as James Allan puts it, jurisprudence can be made seriously enjoyable.[27] In 1998, Peter Suber published an interesting book in which he printed Fuller's

26 Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 Harv L Rev 616.

27 James Allan, ed, *The Speluncean Case: Making Jurisprudence Seriously Enjoyable* (Chichester, UK: Barry Rose Law, 1998). This book includes, apart from the original article by Fuller, four articles on the Speluncean case as well as three other mythical hypotheticals including Fuller's own 'The Case of the Contract Signed on Book Day.'

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original article and added nine opinions reflecting new movements in legal theory such as feminism and communitarianism.[28]

Rundle also largely neglects Fuller's last published book, *Anatomy of the Law*. This book was written originally as a contribution to an encyclopaedia – a setting that requires an author to be relatively neutral. Indeed, Fuller tries seriously to do justice to the core of truth in both legal positivism and natural law thinking, to made law and to implicit law. For my own recent work on legal interactionism, this short treatise has been extremely inspiring precisely because of its inclusive approach – although it is also a frustrating text because, in the end, Fuller does not succeed in integrating both traditions in one coherent theory.[29] However, perhaps that is part of Fuller's attraction. We should not expect to find a fully elaborated coherent theory, but he places the right questions on the agenda and offers inspiring suggestions regarding as to where to look.

Brunnée and Toope ignore *Anatomy of the Law* completely and, in my view, to their peril. In *Anatomy of the Law*, Fuller distinguishes at least two sources of law, one with a horizontal and one with a vertical character: implicit or interactional law and made or enacted law, respectively. Brunnée and Toope ultimately regard interactional law as the only source of law and view the obligatory force of enacted law and state consent as reducible to the obligatory force of the underlying interactional law. According to Brunnée and Toope, enacted law represents only a surface phenomenon; positive law is an important method of fixing legal understandings but cannot create a legal order in its own right. However, although interactional law is the main source of law at the current stage of development of international law, it should not be regarded as the only source. In my view, enactment and consent can also be the basis of relatively autonomous legal orders, even if they are embedded in broader practices of interaction and must be largely congruent with those practices in order to be legitimate. Moreover, many developed forms of international law present a mix of interactional, enacted, and consensual elements. In other words, like Rundle, Brunnée and Toope do not take pluralism seriously enough.[30]

These two deficiencies are simply the mirror side of the distinct angles from which both books approach Fuller. Rundle's approach results in a

28 Peter Suber, *The Case of the Speluncean Explorers: Nine New Opinions* (London: Routledge, 1998).

29 Wibren van der Burg, *The Dynamics of Legal Interactionism: A Pluralist Account of Legal Interactionism* (Farnham, UK: Ashgate, 2014).

30 For a similar argument that Brunnée and Toope are not pluralist enough, see Reus-Smit, supra note 25.

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better reading of the miscommunication in the Hart–Fuller debate. Brunnée and Toope's book provides an original and compelling understanding of international law. Even so, there is still much more to rediscover in Fuller for topical issues. Some of these I have already referred to above, but let me conclude by mentioning two themes that contemporary theories of law still need to address: legal pluralism and the highly dynamic character of legal orders. Fuller was a strong legal pluralist and did not focus merely on state law. He accepted that there may be thousands of legal orders, even in the United States alone. In a time of global legal pluralism, a theory of law that embraces pluralism so clearly is an interesting source. Fuller also developed a gradual concept of law that may be extremely illuminating in a time when we have become more strongly aware that legal orders may both develop and decline. Once we accept that law is a gradual and pluralist concept, Fuller's work may be seen to provide a rich source of inspiration. Perhaps his work is even more relevant and productive for the legal research agenda of the twenty-first century than it was in the last century.

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