BOOK REVIEWS

LON L. FULLER. By Robert Summers. Stanford University Press, Stanford, California, 1984. pp. xiii, 174. $19.95.

Reviewed by William Powers, Jr. *

I. INTRODUCTION

Understanding Lon Fuller is a key to understanding the evolution of twentieth-century American legal philosophy. His work was a response to the dominant jurisprudence of the early twentieth century—an amalgam of positivism and legal realism.[1] Fuller denied the positivists' claim that law and morals can and should be sharply distinguished, and he denied the realists' claim that fiat rather than law explains a judge's decision in a difficult case. He did not, however, embrace the formalistic jurisprudence of the late nineteenth century that legal realism itself attacked.

Fuller's own ideas spawned the second principal jurisprudential movement of the century, secular natural law, of which Ronald Dworkin is the most prominent current spokesman.[2] Although secular natural law never entirely supplanted legal realism, its claim that law's purposes rather than a judge's own values can and should be used to resolve ambiguous cases became a central aspect of "thinking like a lawyer." This theory remains influential today.

Secular natural law has itself come under attack by critical legal scholars who, despite their diversity, share a basic skepticism for neutral principals and the rule of law, which Fuller embraced. Understanding

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1. Like other intellectual "movements," the amalgam of legal realism and positivism that dominated the early twentieth century was far from homogeneous. For example, Pound's sociological jurisprudence and its commitment to progressivism and abiding moral truth differed radically from Llewellyn's moral skepticism. Both, however, joined in attacking the idea that judicial decisions are a mere mechanical application of written law. *See generally* G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 121-32 (1978).

2. Dworkin's work diverges from Fuller's in important aspects, but it does draw heavily on Fuller's basic point that law's purposes rather than a judge's own values can and should resolve ambiguous cases. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 4 (1977).

Fuller and his adherents is necessary for understanding critical legal scholarship.[3]

Fuller's work is also an excellent entry point into twentieth-century American legal philosophy because it is accessible to lawyers who have not been trained in technical jurisprudence. Fuller was a lawyer interested in legal philosophy rather than simply a philosopher interested in law. The problems he addressed and the solutions he proposed are interesting to lawyers as well as to legal philosophers, even—or especially—when analyzed at a high level of abstraction. His writing is lucid and straightforward, unlike the work of Hans Kelsen, for example, whose style was often opaque and removed from the life of everyday lawyers.[4] Fuller's clarity, like Holmes', helps lawyers connect their experience with theory. Fuller's analysis of statutory interpretation in *The Case of the Speluncean Explorers*,[5] for example, is an astonishing combination of lucidity and sophistication.

Another strength of Fuller's work as an introduction to twentieth-century American legal philosophy is his focus on "philosophy of law" rather than ethical philosophy concerning issues related to law, such as affirmative action, abortion, and paternalism. Unlike Dworkin, for example, whose work often directly addresses ethical philosophy, Fuller addressed his jurisprudential work almost entirely to the nature of law and legal reasoning.

If Fuller's work serves as a good introduction to twentieth-century American jurisprudence, Robert Summers' book, *Lon L. Fuller*[6], is in turn an excellent introduction to Fuller's work. His writing is clear, and his organization is topical—collecting common themes from Fuller's numerous works rather than presenting seriatim analyses of the works themselves. This makes the book useful even for a reader already familiar with Fuller, especially since Fuller did not himself write a general summary of his legal philosophy.

Summers avoids two temptations that would have undermined the effectiveness of his book. First, he avoids presenting *the* legal philosophy of Lon Fuller, as though all of Fuller's work could be distilled to a simple theme. Although he highlights common themes in Fuller's work, the portrait is of a man whose legal philosophy was rich and detailed. In

3. Critical legal scholarship also generally attacks liberal political theory, usually as embodied in John Rawls' *A Theory of Justice* (1971). Consequently, understanding critical legal scholarship also requires an understanding of Rawls. For an excellent explication and critique of Rawls from this perspective, see generally M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

4. *See, e.g.*, H. KELSEN, PURE THEORY OF LAW (M. Knight trans. 1967).

5. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

6. R. SUMMERS, LON L. FULLER (1984).

demonstrating Fuller's richness and diversity, however, Summers effectively highlights the common threads that give Fuller's work its integrity. This occasionally causes some repetition as common themes resurface, but the repetition is always tolerable and often useful.

Second, Summers avoids the temptation of writing a book about his own views on the issues Fuller addressed. He should be applauded for his fidelity to Fuller, which is itself a tribute to Fuller's views on interpretation. Summers' objective was "a sympathetic general introduction [of Fuller's work], not . . . a definitive assessment."[7] The book is almost entirely descriptive—Summers' own views explicitly surface only occasionally—but the description is neither literal nor mechanical. Summers' organization rearranges Fuller's work, and he often identifies issues that Fuller did not explicitly resolve. In both cases, however, Summers reflects the spirit of Fuller's underlying purposes. The medium itself honors Fuller's message.

Academics often deride work that is "merely descriptive," overlooking the fact that law and legal theory are often so complicated that thoughtful explication is useful. Jurisprudence would be taken more seriously by lawyers and law teachers whose primary concern is elsewhere if it were occasionally presented in works that do not themselves critically address narrow issues on the frontier of theory. The series in which Summers' book appears—*Jurists: Profiles in Legal Theory*—helps alleviate this problem by explaining the views of six important legal theorists.[8] The genre is useful, both because it is descriptive and because it focuses on the integrated theories of individuals over a range of topics. This approach helps a reader understand the influence that an integrated legal theory can have on diverse, specific issues. It is especially useful in the case of Fuller, whose work addresses specific issues in contract law and in legal education and embodies the connection rather than the separation of theory and practice.

I do not mean by these comments that Fuller's work or Summers' treatment of it are without flaw, and I shall later address specific problems of each. My point is that *understanding* Fuller's work is crucial for understanding twentieth-century legal philosophy, and that Summers' explication of Fuller's work is an excellent introduction to it.

Usually, a review presents the book's argument and then evaluates both the argument itself and the author's presentation. In the case of Summers' book, the ideas are Fuller's rather than Summers', except for

7. *Id.* at 1.

8. The other works are, A. KRONMAN, MAX WEBER (1983); N. MACCORMICK, H.L.A. HART (1981); F. MICHELMAN, F.A. HAYEK (forthcoming); W. MORRISON, JOHN AUSTIN (1982); C. PALLEY, LORD DENNING (forthcoming).

Summers' own ideas about organizing and interpreting Fuller's work. I shall organize my own comments by first describing Summers' presentation of Fuller, which I hope will give a reader unfamiliar with Fuller's work a basic understanding that encourages further study. I shall then offer some general comments on Fuller's theories and their role in modern legal thought.

II. SUMMERS' TREATMENT OF FULLER

The book is organized around five major themes in Fuller's work. After a short biographical chapter, Summers devotes four chapters to Fuller's attack on positivism and its insistence that law and morals can and should be sharply distinguished. The next three chapters discuss Fuller's interest in legal process and his belief that means (process) cannot—or at least should not—be sharply differentiated from ends (results). Summers then devotes single chapters to Fuller's views about legal method, contract law, and legal education. Summers' own short assessment of Fuller's work concludes the book.

Summers recognizes that for Fuller these topics were hardly separate and distinct. Fuller's belief that law and morals cannot—or at least should not—be sharply distinguished both influenced and was influenced by his views concerning legal method and interpretation. His work on the legal process supported his claim that law and morals are not clearly distinct, and his work in both areas influenced his work in contract law and his views about legal education. This overlap gives the reader a sense of deja vu as common themes reappear, but it also provides insight into the way an integrated legal philosophy can pervade and organize one man's thinking on a variety of subjects.

A. *Positivism, Natural Law, and the Separation of Law and Morals.*

Fuller's dominant theme was an attack on positivism and its claim that law and morals can and should be sharply differentiated. To make good on this claim, positivism must develop a definition of law that does not refer to morality. Numerous positivists have tried. Austin,[9] following Hobbes,[10] defined law as a command of the sovereigu backed by a sanction. Kelsen defined law as a valid norm in a valid system of norms, the validity of the system depending on a *grundnorm* that is itself presupposed.[11] H.L.A. Hart, to whom Fuller responded most directly, defined law as a combination of primary rules, which govern citizens' conduct,

9. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 139 (London 1832).
10. *See* T. HOBBES, LEVIATHAN 87-90 (1914) (1st ed. London 1651).
11. *See* H. KELSEN, *supra* note 4, at 30-54.

and secondary rules, which govern the creation of primary rules and their validity.[12] The validity of secondary rules is, in turn, determined by higher secondary rules, capped by a basic empirical rule of recognition that validates the legal system as a whole. Unlike Kelsen's *grundnorm*, which is presupposed, Hart's rule of recognition is an objective fact for a particular society. For Hart, these nonmoral definitions permit law to be identified and applied without reference to the moral quality of its content, enabling lawyers, like scientists, to deal with verifiable facts rather than elusive moral claims.[13]

Fuller used four basic arguments to attack this position. First, he believed that law is intrinsically purposive and therefore value-laden and moral. Since we can ascertain a law's meaning only if we know its purposes, we must refer to these value-laden purposes when we interpret a law. In his famous *Reply* to H.L.A. Hart, for example, Fuller argued that a statute banning vehicles from a park can be applied to an Army truck used as a war memorial only if we understand the statute's purposes.[14] For Fuller, a judge does not go beyond law by looking to these purposes, but rather refers to an intrinsic aspect of law itself. Fuller believed that since these purposes are value-laden and moral, law has an intrinsically moral component.[15]

Second, Fuller argued that a *system* of legal rules also has its own intrinsic purpose—"subjecting human conduct to the governance of rules"[16]—that outstrips the specific purposes of its individual precepts. To fulfill this purpose, law must be sufficiently general, public, prospective, clear and intelligible, free from contradiction, constrained through time, possible to obey, and administered according to its nominal re-

12. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624-29 (1958).

13. Hart did not believe that lawyers should not be concerned with law's moral content or the moral issues presented by the requirements of immoral laws. Indeed, he believed that a sharp distinction between law and morals would sharpen a lawyer's moral sensitivity, because it would require an independent moral evaluation of an issue that is independent of a legal analysis. Nevertheless, he believed that a lawyer could *identify* legal norms without reference to morality. *See generally* Hart, *supra* note 12.

14. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662-63 (1958).

15. An obvious objection to this argument is that a law's purposes can be immoral—such as laws enforcing segregation—or *amoral*—such as laws regulating radio frequencies. Fuller does not claim that all laws are moral in the sense that they are *good*, only that they have purposes that affect morality. Truly amoral laws, however, present a more difficult issue. Fuller might respond, as a utilitarian would, that all purposes are moral, in the sense that they affect aggregate happiness. Even if truly amoral purposes exist, Fuller might simply respond that many (most?) laws have moral (not necessarily good) purposes and therefore that law, in the aggregate, is intrinsically connected to morality.

16. L. FULLER, THE MORALITY OF LAW 106 (1964).

quirements. Law without sufficient congruity with these attributes is not merely bad law but ceases to be law at all. Because these "principles of legality" are moral principles, they give law an "internal morality" regardless of its content.[17] Legal *processes* also have their own internal morality. For example, to qualify as a *legal* process, a dispute resolution system must give disputing parties a roughly equal opportunity to present facts and arguments. Because this feature itself has intrinsic moral worth regardless of the specific result, legal process is intrinsically moral.

Third, Fuller believed that no simple, general criterion exists that distinguishes law from nonlaw. Criteria for distinguishing legal and nonlegal arguments and material in the American system are too complex for a general standard to capture, and these criteria are often moral.

Fourth, Fuller argued that governance through law, meaning general rules that satisfy the principles of legality, is more likely than other forms of governance to establish a good order. Governments that publicly announce their rules are more likely to promote public good than governments that act secretly. Even the Nazis, Fuller argued, were somewhat constrained when they governed openly.

Fuller's two most important arguments for an intrinsic connection between law and morals relied on his claims about the purposive—and therefore moral—nature of legal norms and the "internal morality" of law and legal process. Although Summers' organization tends to conflate these points, his specific treatment gives a good account of these arguments and their importance to Fuller's work.

Summers might be criticized here for not evaluating the merits of Fuller's arguments compared to the positivists he opposed. For example, every human invention has a purpose, but does this give it an intrinsically moral component? If it does, surely a positivist would not be embarrassed by a claim that law is as connected to morality as are all other artifacts. Positivism may have occasionally overstated its case for the separation of law and morals, and Fuller's demonstration of these weak connections should cause positivists to soften their claims. But it does not undermine the basic claim of positivism that law and morals can be widely divergent. If Summers errs in this regard, however, he errs in the right direction. An overall strength of his presentation is that he explicates Fuller's theories rather than his own. On balance, his forebearance is a strength, not a weakness of the book.

Summers concludes his treatment of Fuller's opposition to positivism with a chapter on Fuller's status as a secular natural lawyer.

17. Fuller did not deny that specific laws or regimes can be immoral; he merely claimed that "legality" contributed its own inner morality to social ordering. *See id.* at 107, 152-86.

Although Fuller was not a theological natural lawyer who believed that law or morals were authored by God, he had many attributes of the natural law tradition, including his belief that law and morals cannot—or at least should not—be sharply distinguished. Important among these attributes was his belief in the role of objective reason in legal reasoning. While he denied that objective reason reveals an ideal system of law applicable to all societies, he did believe that "[n]atural law arguments can . . . be based . . . on objective social facts" and that "the objectivity of reason is grounded to some extent in appeals to 'matters of fact.' "[18] While law has some degree of fiat, it also has constraints that objective reason can discover. Consequently, a judge is to some extent a decision finder rather than merely a decisionmaker, a concept that is central to the natural law tradition.

B. *Legal Process and the Continuity of Means and Ends.*

After four chapters describing Fuller's oppposition to positivism, Summers devotes three chapters to Fuller's extensive writings on the legal process. Fuller argued against a sharp distinction between means and ends in legal theory. It is a mistake, he believed, to focus only on social ends, assuming that means can be found to pursue them. Means that are available to the legal process—which for Fuller included civil adjudication, democratic lawmaking, managerial process, and contractual lawmaking—are not infinitely plastic and malleable. They both constrain the ends that can be pursued through law and have an internal logic and morality of their own: "[A]n internal end of adjudication is fair participation by affected parties. . . . An internal end of democratic lawmaking is the realization of democratic self-rule through elected representatives. . . . An internal end of contracting is the vindication of personal free choice and fair reciprocation."[19]

These internal ends render legal processes more than mere means; they are ends in their own right. They often conflict with other social ends and therefore constrain the ends that law can pursue. For example, specific results of contractual ordering may be unfair, but we might tolerate them to vindicate the values of private contractual ordering itself. Similarly, private adjudication and democratic lawmaking may reach specific, unfair results, but we choose to use them to vindicate their internal values of a fair hearing and democratic self-rule.[20]

18. R. SUMMERS, *supra* note 6, at 67.

19. *Id.* at 102-03.

20. Of course, we might have the reverse preference for achieving substantive results even at the expense of process values. Fuller's point does not require valuing process heavily or even positively, although Fuller himself did put great value on it.

Fuller also emphasized the natural limits of each legal process and of legal process generally. Civil adjudication may be a useful and desirable method of resolving certain disputes among individuals, but it cannot effectively resolve polycentric disputes. Fuller often warned against placing too much strain on legal processes by asking them to perform tasks they are ill-suited to perform.

For Fuller, legal processes had an inherent structure that could be discovered by reason; they were not infinitely malleable products of social will. For example, civil adjudication inherently provides parties to a dispute a fair opportunity to present facts and arguments. Otherwise, the process would not merely be bad civil adjudication, it would not be civil adjudication at all. This "internal morality" of civil adjudication provided Fuller with an inherent connection between law and morals in his debate with legal positivists, but it also provided important lessons for understanding legal processes and their limits.

Summers' treatment of Fuller's work on legal processes is perhaps his most valuable contribution. While his explanation of Fuller's attack on legal positivism is useful, Fuller himself summarized these views in his *Reply* to H.L.A. Hart.[21] Fuller did not, however, similarly summarize his work on legal process, which makes Summers' collation of this aspect of Fuller's work especially valuable.

C. *Legal Method.*

Summers next devotes a short chapter to Fuller's views on legal method. In an otherwise excellent book, this is the one disappointing chapter, especially because it concerns the portion of Fuller's explicitly jurisprudential work that most directly affects lawyers generally.

Fuller's views about interpreting statutes and applying precedent were an integral part of his attack on positivism. They relied heavily on his argument that judges must refer to a law's intrinsically moral purpose in order to ascertain its meaning and to apply it to specific facts. Conversely, his defense of judges looking to moral purposes to decide cases depended on his claim that these purposes are part of the legal system, not external to it. For H.L.A. Hart, a judge's reference to moral purposes to decide a difficult case is an exercise of the judge's discretion involving extralegal criteria. For Fuller, it is an application of criteria external to the judge but internal to the legal system. Consequently, reference to moral purpose is required by, rather than inconsistent with, the rule of law.

21. Fuller, *supra* note 14, at 669-72.

The relationship between Fuller's views on legal method and his attack on positivism is not lost on Summers. In his discussion of Fuller's attack on positivism, Summers highlights Fuller's belief that interpretation and legal method were crucial. The three chapters on legal process that separate the discussion of Fuller's antipositivism and the discussion of legal method tend, however, to undermine this connection. Of course, Fuller's antipositivism relies also on his work concerning legal process, but the importance of interpretation and legal method in current jurisprudence makes me wish Summers had given them greater emphasis in his discussion of Fuller's general attack on positivism.

A second drawback of the chapter on legal method is its surprising failure to deal with Fuller's seminal examination of legal method in *The Case of the Speluncean Explorers*.[22] I generally applaud Summers' decision to avoid lengthy exegeses of Fuller's important works, and I suppose many readers will have their own favorite piece that should have been given more attention. Fuller's style in *The Case of the Speluncean Explorers*, however, is elegant but indirect. Its message concerning legal method is often lost on readers looking for insights into the role of punishment in criminal law. A discussion of its challenge to legal method generally, which I shall address in the next section, would have been a useful addition to Summers' treatment of Fuller's views on interpretation and legal method.

D. *Contracts.*

Summers next addresses Fuller's views on contract law. Generations of law students have learned contracts using a version of Fuller's casebook, and his *The Reliance Interest in Contract Damages*[23] is still influential. Even for readers not directly interested in contracts, this chapter is intriguing because it underscores the connection between Fuller's general theory of law and concrete legal issues.

Although Fuller often attacked legal realism, he shared its antagonism to the formalistic jurisprudence of the late nineteenth and early twentieth centuries. For Fuller, Samuel Williston embodied formalism in contract jurisprudence, especially in his insistence on a sharp dichotomy between a valid contract, with full consequences including expectancy damages, and no contract at all. Fuller eschewed this sharp dichotomy. Different situations might call for different remedies, including expectancy damages, reliance damages, and restitution. By focusing

22. Fuller, *supra* note 5.

23. Fuller & Perdue, *The Reliance Interest in Contract Damages* (Pts.1 & 2), 46 YALE L.J. 52, 373 (1936-37).

on remedies, with which he began his casebook, Fuller stressed a continuum of bargaining situations calling for different consequences, which is not captured by a sharp contract/no-contract dichotomy.

A book about Lon Fuller must, of course, include a discussion of his work on contracts. Even if Summers' only interest were Fuller's jurisprudence, however, the discussion of Fuller's contract theories would be valuable. Legal philosophy should illuminate and clarify a lawyer's experience and the concrete problems lawyers face. Fuller embodied an integrated legal philosophy with implications for specific problems of practice. His views about contract law, and Summers' short chapter about them, help bridge theory and experience.

E. *Legal Education.*

Summers' penultimate chapter, preceding a short conclusion in which Summers briefly evaluates Fuller and his work, deals with Fuller's views on legal education. As is his work on contracts, Fuller's views on legal education are valuable in their own right and as a demonstration of the effect legal philosophy can have on practice. This is especially true for the chapter on legal education because the topic is directly relevant to a wider audience.

Because law is intrinsically purposive and cannot be interpreted or applied with reference to language alone, Fuller naturally opposed teaching mere black-letter law. Indeed, his view of law suggests that black-letter law is at best an heuristic device, and a poor one at that. Fuller believed that legal education should examine underlying purposes because they are intrinsic constituents of law itself. Moreover, Fuller's attention to legal process led him to support courses that examine these processes—including civil adjudication, management, private contractual ordering, and democratic lawmaking—and to teach lawyering skills to their participants. His specific views remain astonishingly timely.

Disagreements about legal education often reflect underlying disagreements about the nature of law, legal reasoning, and legal practice. It is not accidental that legal theorists—including Holmes,[24] Llewellyn,[25] Fuller,[26] and Kennedy[27]—have been keenly interested in educational reform. An individual need not be fluent in technical jurisprudence to participate effectively in the debate about legal education, but an

24. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

25. *See* K. LLEWELLYN, THE BRAMBLE BUSH (1960).

26. *See, e.g.*, Fuller, *What Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 189 (1948).

27. *See* Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

understanding of basic differences in legal theory that often lurk beneath differences about legal education may illuminate and clarify the debate. Fuller's work underscores the importance of the connection between legal philosophy and educational reform.

III. Secular Natural Law and Fuller's Role in Twentieth-Century Jurisprudence

Summers' book does not purport generally to assess Fuller's work or its overall impact on contemporary jurisprudence. The book's strength is its faithful explication and organization of Fuller's work itself, leaving a general assessment to others or to another day. In this section I will attempt, albeit briefly, to place Fuller's work in context and suggest why an understanding of Fuller is a key to understanding the evolution of twentieth-century jurisprudence generally.

Fuller's dominant theme is his antipositivism, yet his most distilled attack on positivism—his famous *Reply* to H.L.A. Hart[28]—leaves a reader wondering why the debate was so heated. Fuller and Hart seem like ships passing in the night, with Hart bent on attacking a version of natural law that Fuller did not endorse, and Fuller adamant about issues that seem unimportant to Hart. The key to understanding their differences lies in the history of legal positivism.

Legal positivism was a reaction to Blackstone's claim that *valid* human law and morals coincide:

> This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[29]

For the positivists, legal theory would advance only if law were studied as a discipline distinct from morals. They did not deny that specific laws have purposes which are often moral, or that the rule of law may itself further important moral goals. While both their rhetoric and their quest for a nonmoral definition of law may have suggested an absolute distinction between law and morals, such an absolute distinction was unnecessary for their basic claim that law is a human creation that is more than a mere branch of morals.

Fuller never claimed that specific laws or even regimes cannot be evil and at the same time be "legal." He merely claimed that law intrinsically has *some* attributes that are moral: underlying moral purposes

28. Fuller, *supra* note 14.

29. 2 W. Blackstone, Commentaries *41.

and intrinsic structural attributes—law's inner morality—that inherently affect morality. Similar claims can, however, be made about other disciplines. For example, buildings are designed to accomplish human (moral?) goals, such as providing shelter. A combination of brick and mortar is not a "house" unless it accomplishes minimal purposes. Moreover, buildings have intrinsic qualities that affect moral issues, such as providing enclosure and occupying space.[30] The autonomy of architecture as a discipline is not threatened by these connections with morality. Legal positivism need not be threatened by a demonstration that law is as intrinsically connected to morals as architecture.

Why then all the fuss? Why did Fuller not see himself merely as a member of the positivist tradition who was trying to soften some of its more extreme claims? One answer, I believe, can be found in the issue of legal method and the concept of the rule of law in a democratic society.

While Holmes' positivism divorced law from morals, his realism unmasked the facade of nineteenth-century legal formalism that legal rules and deductive logic necessarily dictate results in specific cases. The amalgam of realism and positivism in his famous dissent in *Lochner v. New York*[31] provided a battle cry for an attack on a legal order whose time had passed, just as Brandeis' attack on natural law in *Erie R.R. v. Tompkins*[32] tolled its death knell. Apologists for the old order could no longer take refuge in their claim that they merely found law rather than created it.

Realism was, among other things, an extreme form of positivism: it claimed that not only is it fallacious to view law as a mere product of an underlying moral order, but it is equally mistaken to view judges' decisions as merely an embodiment of law, if by law we mean a preexisting structure of norms that generate determinate results.

Stripped of his clothing, the emperor fell. But at what cost? We are reminded of Thomas More's admonition that laws are like trees in the forest: sometimes they obstruct us, but if we cut them down to get at the devil, where then will we stand when the winds blow? After the attack of legal realism on legal formalism, the rule of law lay in ruins. It was this crisis brought on by realism that Fuller sought to resolve.

Realism's attack on legal formalism was too devastating to permit resurrection of the old order, and Fuller was as antagonistic as the legal realists to formalistic jurisprudence. Fuller constructed a new paradigm that accepted the realists' belief that mere words do not decide cases, but

30. Again, these purposes may be evil, such as imprisoning innocent people, but Fuller's claim was not that law was intrinsically good, only that it is intrinsically connected with morality.

31. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

32. 304 U.S. 64, 78-79 (1938).

nevertheless denied that judicial fiat rather than law necessarily does. By interpreting law through its purposes, judges recognize the ambiguity of language but nevertheless apply a standard external to their own values. Crucially for Fuller, these purposes are part of law, not external to it; judges look within law rather than beyond it when they apply these purposes. Fuller's objection to a definition of law that excludes these moral purposes was a necessary element of his model of interpretation.

Natural law is an apt label for this aspect of Fuller's work, since he put law as a source of decision external to a judge's values, if not external to collective human will. A judge acting appropriately neither applies words mechanically nor refers to his own values; he looks to law's purposes which are external to his own preferences, but not external to law itself.[33] In this way the rule of law might be salvaged after the crisis of realism.

Fuller's work has been continued by others, most notably Ronald Dworkin,[34] for whom values embodied in law and social institutions are themselves a source of law to guide judges in hard cases. Even when statutes and precedents seemingly fail to produce a clear result, a correct result *in fact* is dictated by the "gravitational" effect of values embodied in surrounding statutes, precedents, practices, and beliefs. Because this "gravitational" force changes over time with social beliefs and institutions, judges might engage in law reform without abandoning fidelity to "law" properly understood.

A general attack on the very idea of the rule of law has again emerged. Much of it attacks the specific approach to interpretation suggested by Dworkin,[35] but some of it attacks the very idea of the rule of law. Some of the new nihilism draws on theories about understanding language generally and applies them to the problem of meaning in law.[36] Still others, primarily critical legal scholars, challenge the underlying ethical and political assumptions necessary to make Fuller's and Dworkin's notions of the rule of law work.[37] According to this view, reference

33. *See* Bennet, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 491-95 (1984). Fuller's claim assumes, of course, that a law's purposes are "facts" that judges can ascertain. The claim is dubious in hard cases in which a law serves multiple purposes or represents a compromise among competing purposes. Fuller recognized this problem. *See* Fuller, *supra* note 5, at 634-35 (Fuller notes that the peculiar facts of *The Speluncean Explorers*, in which several men trapped in a cave ate one of their own in order to survive, did not easily lend themselves to a description as "murder" rather than survival).

34. *See* R. DWORKIN, *supra* note 2.

35. *See, e.g.*, Levinson, *Taking Law Seriously: Reflections on "Thinking Like a Lawyer,"* 30 STAN. L. REV. 1071 (1978) (reviewing R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977)).

36. *See generally* Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

37. *See, e.g.*, Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

to a gravitational field of underlying purposes will not save the rule of law because coherent, unifying purposes do not underlie law. In specific cases, statutes and precedents reflect a compromise between competing values and interest groups; they do not embody common social purposes. At a more general level, liberal political and legal theory is itself too fractured and riddled with inconsistencies to resolve lower order conflicts.[38] According to this view, the smooth, continuous effects of a gravitational field, even a complicated one, is simply the wrong metaphor.

My purpose here is not to examine the current debate concerning our ability to ascertain meaning in law, but merely to place Fuller's work in the context of that debate. Current critics of the concept of the rule of law have offered a rejoinder to Fuller's answer to legal realism. Although critical legal scholarship is often noteworthy for its political agenda rather than its jurisprudential implications, its nihilistic version addresses an issue in the mainstream of twentieth-century American jurisprudence: the status of the rule of law after the crisis of legal realism. A lawyer can hardly understand the current debate without taking seriously Fuller's own reply to the nihilism of the legal realists.

One wonders, of course, what Fuller's own reaction to the current debate would have been. One feature implicit in his legal philosophy may yet be helpful. Since Descartes, a search for a firm foundation of knowledge has been a central problem for most intellectual disciplines. Failure to find irrefutable foundations has lead to nihilism, in which the "truths" of many disciplines, most notably ethics, have been reduced to mere statements about personal preference or belief. But this failure to find irrefutable premises and methods to support knowledge has pervaded all disciplines, including science and the mathematics. Wittgenstein, for example, demonstrated that we cannot irrefutably determine the meaning of the concept "plus" in the phrase "two plus two equals four."[39] Nevertheless, the lesson of this failure of certainty, even for our most certain knowledge, should not be despair. Indeed, it is encouraging news for legal meaning and the rule of law. Surely we do not expect more from meaning in law than we do from the statement "two plus two equals four."

Most disciplines have responded to a failure to find a firm foundation with some version of conventionalism. Rather than condemn beliefs that lack a firm foundation, conventionalism tentatively accepts the beliefs and examines the conventions by which we hold them. The validity of the convention itself is due to its utility, clarifying power, wide accept-

38. *See generally* M. SANDEL, *supra* note 3.

39. For an excellent discussion of Wittgenstein's work on this point, see S. KRIPKE, WITTGENSTEIN: ON RULES AND PRIVATE LANGUAGE (1982).

ance, or some other convention about the conventions we accept. Wittgenstein adopted such an approach for our understanding of the meaning of the word "plus." Community conventions about the way it is used and understood, not logic and objective facts about the mind of a speaker who uses the term, give us its meaning.

A task of jurisprudence and of lawyers generally is to understand our conventions about legal meaning. A problem arises, however, from the fact that conventions about legal meaning are more malleable than conventions in most other disciplines. As we debate the propriety of one convention or another—from the plain meaning rule to original intent to Dworkin's gravitational field—we influence as well as describe it. A convention that is incoherent due to surface inconsistencies may be unacceptable—due to a more general convention about coherence—but like styles of architecture, legal systems have a wide range of acceptable styles of interpretation. Different conventions about legal interpretation may have different effects on judges and lawyers. Judges who are told to apply a statute's plain meaning may act differently than judges who are told to arrive at their conception of fair results.[40] The different impact of these different messages is an empirical question, not merely an analytical one.

Fuller recognized the normative role of legal theory. In his famous examination of legal method in *The Case of the Speluncean Explorers*,[41] he presented three competing conventions of interpretation—one approximating the plain meaning rule, one approximating a command to do justice, and one approximating his own style of ascertaining meaning from purpose. None is given a clear victory; each has its own plausibility and its own problems. One of the judges, unable to decide among methods, is unable to decide the case. Therein lies an important question: how can we decide among competing conventions of legal interpretation?

For Fuller, the answer was often normative: which theory of law and interpretation will have the best impact on judges, lawyers, and citizens? His objection to both legal formalism and positivism was in part due to his fear that these legal theories would lead judges to adopt a wooden method of interpretation. He often argued for his purpose-laden form of natural law because it would cause judges to take law's moral purposes more seriously.[42]

For Fuller, jurisprudence, like law itself, was somewhat normative. Just as we might debate the propriety of a specific law in terms of its

40. Even if the plain meaning rule is incoherent, it may have an empirically verifiable effect on judges' decisions.

41. Fuller, *supra* note 5.

42. *See, e.g.*, L. FULLER, THE LAW IN QUEST OF ITSELF, 90-91 (1940).

contribution to a better society, we might debate jurisprudential theories based on their normative impact as well. "Better" in this context might be in terms of clarifying power, justice, or some other metaconvention, which might itself be the subject of debate. Surely Fuller would not have argued that jurisprudence is infinitely malleable to our purposes; he did not believe law was infinitely malleable. But within a wide range, the choice of competing legal theories is a normative issue rather than an issue of truth.

IV. CONCLUSION

It is impossible here to analyze the contemporary debate concerning legal method and the problem of meaning in legal interpretation. My purpose is merely to suggest that attention to Fuller's work is necessary to understand that debate and that we might still learn from it. Fuller is a focal point of twentieth-century jurisprudence because he emphasized its pervasive issue, the question of interpretation. The secular natural law tradition he spawned responded to the nihilism of realism and has in turn been attacked by the emerging nihilism of some contemporary scholars.

If an understanding of Fuller is a good entry into the basic issues of twentieth-century American legal philosophy, Summers' book is an excellent introduction to Fuller. This, in turn, makes the book a good entry into the basic issues of twentieth-century American legal philosophy. That is no small achievement, and one hopes that Professor Summers' work will gain the wide readership that it deserves.