Please note the following is a section

from Chapter 1 of the book

It does not follow, therefore, that because Fuller turned his mind so directly to the position of the legal subject and her contribution to the possibility of law that he was necessarily uninterested in the source of lawgiving and the considerations of efficacy that shape the pursuit of governance through law. Fuller looked to the position of the lawgiver and to considerations of efficacy repeatedly, and his tale of King Rex in *The Morality of Law* offers an obvious example. But what is crucial not to lose sight of is how closely Fuller's jurisprudential ambitions were associated with his criticism of the tendency of the legal philosophies of his era, above all legal positivism, to set their theoretical sights exclusively on the office of the lawgiver. For Fuller, the problem with the source-oriented impulse of the dominant school of jurisprudence was not that it was wholly misguided, but simply that it led to an understanding of law that it is fundamentally incomplete: it fails to keep both sides in the picture. Thus, to borrow terminology from Ronald Dworkin, to which I return in chapter seven, Fuller's jurisprudence in fact orients around two 'centres of gravity': morality *and* efficacy.[26] It is not, as the response by Hart that was so decisive to Fuller's dismissal from the inner circle of twentieth century legal philosophy would have it, a matter of one or the other.[27]

II What is Being 'Reclaimed'?

The broad overview of the ambitions of this book just offered will have provided a general sense of what it is I seek to reclaim by revisiting Fuller's jurisprudence through a more direct focus on his interest in the moral and other implications that attach to law's distinctive form. But it is helpful to take the space in this foundational chapter to map the levels of that reclamatory project more closely, because arriving at a position where we can read Fuller on his own terms requires many smaller reclamations in order to be achieved.

To begin, at the widest level, it is necessary to reclaim an idea of 'jurisprudence'—of intuitive wisdom about law—within a field that over the course of Fuller's lifetime came to define the scope of its proper concerns in increasingly narrow terms. During and since Fuller's time, for instance, the project of jurisprudence has often been proclaimed to be one concerned only with truth claims about law universally true, descriptive in its orientation and kept at a safe distance from normative, or political, claims. This is, of course, not true for projects such as those offered by John Finnis[28] or Ronald Dworkin,[29] or indeed for elements of the work of Joseph Raz,[30] and it is increasingly also not true in the work of younger

[26] Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1, 26.

[27] See chapter four, II 'Hart's review'.

[28] See further my introductory comments in chapter six.

[29] See chapter seven.

[30] See chapter six.

contemporary legal philosophers who now seek to build bridges across what, in Fuller's time, were very sharp divides.[31] Still, my choice to use the term 'jurisprudence' rather than 'legal philosophy' in the title of this book is deliberate: though not intended to suggest that a project such as Fuller's lay outside of the field of legal philosophy, properly understood, it *is* intended to bring the simple wisdom and creative possibilities of the idea of 'jurisprudence' back into focus.

At the next level, this book stands as an attempt to reclaim the Hart-Fuller debate, in the very specific sense of reading that famous exchange from Fuller's perspective. Here, it is not just a matter of clarifying what Fuller actually sought to convey in his claims about law's internal morality, and distancing those claims from interpretations that have served to distort our understanding of his contribution to debates about the connections between law and morality. It is also, indeed more importantly, a matter of demonstrating how many of the questions that Fuller put to Hart in the context of that debate were in fact never adequately answered either by Hart or by positivists since. The attention given to Fuller's position that was generated by the 50th anniversary of the Hart-Fuller debate in 2008 has, however, done much to draw attention to these omissions, and to invite awareness of how Fuller's responses to Hart were shaped by a distinctive agenda; one that some scholars have helpfully framed in terms of a challenge to Hart to explain how positivists understand the connections between law and 'legality', or 'the rule of law'.[32] Reading the Hart-Fuller debate from Fuller's perspective is thus to accept the possibility that his responses to Hart express a rather different set of challenges to the dominant mode of legal philosophy than those which are ordinarily attributed to it.

One such challenge that becomes apparent when we revisit the Hart-Fuller debate with twenty-first century eyes is the robust methodological critique that Fuller raised against Hart's positivism; a challenge that, in content and orientation, mirrors much of what became a much more famous exchange between Hart and Dworkin. In the terminology of how these issues are often now discussed, Fuller's was an unapologetically internal approach to doing legal philosophy, even if he did not explicitly possess or argue for a methodological approach along these lines.[33] In many ways akin to John Rawls's method of 'reflective equilibrium',[34] Fuller's way of doing jurisprudence is to move back and forth between insights gained from a lawyer's wisdom of law in practice, and more abstract theoretical propositions, as indeed we see in his notion that law has an 'internal morality'. As such, it is a methodology that in some moments seeks a descriptive account of what law is that is compatible with the kind of methodology pursued by positivists, while in others turns to combine this with precisely what positivists attempt to avoid or simply reject: namely, a turn towards practice and—with practice in

[31] See further my discussion of Scott Shapiro's recent book, *Legality*, in chapter eight.

[32] See especially David Dyzenhaus, 'Grudge Informer Case' (n 12) and Jeremy Waldron, 'Positivism and Legality' (n 12).

[33] See Frederick Schauer, 'Fuller's Internal Point of View' (1994) 13 *Law and Philosophy* 285.

[34] John Rawls, *A Theory of Justice*, revised edn (Cambridge, Harvard University Press, 1999) 40–46.

view—towards prescription. Fuller's own understanding of this method is captured especially nicely in a letter to a colleague about his essay 'The Forms and Limits of Adjudication', which I would suggest equally illuminates the method we see in his exchanges with Hart:

> Many seem to assume that my definition of adjudication is something with which I started. In fact, this definition resulted from a process almost identical with that illustrated in my horse thief cases. I don't know just what that process is, but I know the clarity of premise comes at the end. This happened over about ten years of brooding over adjudication. So it does not correspond to my own thought processes to say that I derive rules from my definition; my definition seemed to me to give coherence and added meaning to rules already vaguely perceived.[35]

The methodological mix at play here is consistent with the conviction, to which Fuller held unswervingly, that we lose too much in the enterprise of jurisprudence if we adhere uncompromisingly to fixed dichotomies. This, Fuller believed, was the case whether those divisions speak to the strict separation of law and morality, or to the opposition of means and ends, or is and ought, or description and prescription or, indeed, theory and practice.[36] An important part of reading the Hart-Fuller debate from Fuller's perspective, then, is recognising how crucial a rejection of received polarities was to his basic jurisprudential aims. Only then can we see how the contest recorded in the Hart-Fuller exchanges is in fact much less an instance of a traditional debate between positivism and natural law, with the two held out as starkly opposed positions, than it is a more nuanced attempt, on Fuller's part, to challenge Hart to explain whether and in what ways positivists see law is answerable to conditions that go beyond the narrow factual criteria that satisfy a positivist test of legal validity.

It was very clear to Fuller that to pose such a challenge, to bring these conditions into focus, was to move the inquiry of jurisprudence into an atypical space. But this is precisely the space from which Fuller's jurisprudential project arises, and its concerns are not straightforwardly about whether we can ever insulate the concerns of legal philosophy from the concerns of political philosophy, in the sense of whether we can fruitfully insulate the study of law from the reasons why we might come to need, or want, law in the first place. This kind of story is very much present in Fuller's writings, from *The Law in Quest of Itself* onwards. Equally present is an interest in the effect of law on morality, expressed repeatedly in Fuller's writings in terms of how the existence of the stable baselines that are provided by a legal order make a crucial contribution to the very possibility of moral conduct, and so forth.

But the principal and recurrent space from which Fuller's main jurisprudential claims arise is, for him, a distinctly *legal* space. This is especially well captured in a working note where Fuller suggests that what he means by 'morality' when he

[35] Letter from Fuller to Professor Boris I Bittker, 4 April 1960, The Papers of Lon L Fuller, Harvard Law School Library, Box 14, Folder 1 ('The Forms and Limits of Adjudication').

[36] See further chapter two.

criticises Hart and others for what they seem to miss in their way of debating the connections between law and morality is the 'conditions antecedent to law':

> A legal system cannot lift itself into being legal by fiat. Its security and efficacy must rest on opinions formed outside of it which create an attitude of deference towards its human author (say, a royal law-giver), or a constitutional procedure prescribing the rules for enacting valid law. To say that this acceptance is 'moral' means merely that it is antecedent to law.[37]

To reclaim the Hart-Fuller debate and to read it from Fuller's perspective, then, is to begin seeing how he repeatedly asked his critics to explain where consideration of these conditions could be found in their accounts of law. If they were absent, why were they absent? If they were present, why were their implications not teased out more fully as part of the project of doing legal philosophy? Taken together, Fuller's jurisprudential writings reflect a sustained attempt to draw his critics into a conversation about these forms, relationships, commitments and modes of participation within debates about the connections between law and morality, but also, crucially, as subjects of theoretical concern in their own right. Indeed, one of the reasons I rely extensively in this book on archival materials (especially letters and working papers) is not only because they make these priorities clear, but because they bear witness to his frustration at his apparent inability to instantiate meaningful conversation with his peers about them.[38]

Fuller's challenge to positivists to explain where the conditions that make law possible reside within their legal philosophy was equally a challenge to what he perceived to be positivism's highly permissive conception of law, in the sense that it appears to place no meaningful limits on a lawgiver's power. Here, Fuller's concern lay squarely with the two themes that lie at the centre of this book: his interest in the status of the legal subject and her experience of law as opposed to other modes of ordering and, closely related to this, his complaint that positivism offers a fragile basis from which to distinguish law from those other modes of ordering. This, as I will show over the course of chapters three, four and five, is the agenda that unites Fuller's discussion of Nazi law in his 1958 reply to Hart, the tale of King Rex and his exegesis of the eight principles of legality in *The Morality of Law*, as well as his invocation of the distinction between law and managerial direction in his final 'Reply to Critics'.

By the time that Fuller is defending his position in that reply, however, his debate with Hart and others about the claimed moral status of his eight principles of the internal morality of law had taken a very narrow—and for Fuller, very bewildering—turn. It had, in effect, become a debate about whether observance of the internal morality of law made law 'moral' or just simply 'effective'. As Hart famously put it, Fuller gave us no meaningful reason to distinguish his 'internal morality of law'

[37] Untitled and undated document, paginated in hand as p 25, The Papers of Lon L Fuller, Harvard Law School Library, Box 12, Folder 4 ('Encyclopaedia Britannica').

[38] See further chapter five.

from an 'internal morality of poisoning':[39] aided by the principles of efficacy reflected in the so-called internal morality of law, morality enters law only when this instrument is used for moral good. But beyond this, the argument ran, there is no meaningful sense in which those principles ought to be regarded as moral.[40]

This famous retort has had a decisive impact on how the scholarly memory of Fuller's jurisprudence has been shaped. Few, especially among positivists, have challenged it, though here Raz's engagement with Fuller is notable for the much less central place the matter of efficacy occupies, reflecting Raz's appreciation of how, from Fuller's perspective, the Hart-Fuller impasse was never really about this question.[41] But the power of the 'morality versus efficacy' prism through which standard readings of Fuller have largely been filtered cannot be overstated; indeed, this is the reason why diagnosing the foundations as well as the consequences of this standard response to Fuller occupies much of the exegesis that I offer in chapters two to five.

The debate about efficacy, moreover, is arguably also responsible for what some might regard as the lost or at least underdeveloped promise of Fuller's contribution to more traditional debates about law's connection to substantive morality, or other questions relating to law's wider moral project. With a legal positivist as his partner in conversation, Fuller evidently discerned that such a debate was not going to happen, even if he always tried to keep the door to it open in his insistence that the question of what law *does* must be brought into debates about what law *is*. But the point to note is that, mindful of the debate that he was in, and which at Hart's hand became increasingly narrow in its scope, Fuller ultimately posed his questions about law's wider moral project in a manner compatible with the agenda for conversation that had been set by Hart. Whether or not this led to us learning less of Fuller's thinking about law and morality than we might have, had the conversation been convened differently, what it does show is the extent to which Fuller entered his exchange with Hart with a spirit of engagement that, for the most part, he continued to maintain despite the withering criticism that met his efforts.

The point we need to take from this context, and which is important to the task of reclaiming Fuller, is that there is a need to distinguish between the promise, or invitation, that his jurisprudence presents, especially on the question of law's connection to substantive morality, and the primary concerns and content of the claims that he did in fact develop. Though closely related in ways that I will tease out over the chapters to follow, these are, in fact, different projects. As should by now be clear, in this book my energies are directed above all to the latter: to the animating concerns and content of the claims that Fuller did in fact develop, and how these were shaped, positively and negatively, by the context of the debates in which they were articulated.

[39] Hart, 'Lon L Fuller' (n 1).
[40] See chapter four, II 'Hart's review'.
[41] See further chapter six.

It is clear, then, that to engage with Fuller's jurisprudence in any meaningful way, let alone to attempt to reclaim it along under-explored lines, is to accept the towering presence of the agenda for legal philosophy announced by HLA Hart in 1958. That said, it is important not to read anything said in the foregoing paragraphs as suggesting that the Hart-Fuller exchanges were a thorn in Fuller's jurisprudential side, full-stop. The remarkable endurance of that debate is a testament to how the two modes of legal philosophy that found expression within it continue to be drawn into an engagement with each other. It thus remains not only an important prism through which to understand Fuller's jurisprudence, but also the practice of legal philosophy itself.

But within the very specific project of reclaiming Fuller, a caveat does need to be added to this last point. The contest that ostensibly defines the Hart-Fuller debate—whether there is, or should be, a relationship between legal validity and the morality, or otherwise, of the content of law—was a contest that long pre-existed Fuller's intuitions about the questions to which the study of jurisprudence should attend. It is important to acknowledge this explicitly, because the often-sensed awkwardness of Fuller's relationship with the parameters of that debate was in many ways a consequence of how it was not necessarily the ideal forum within which to develop his intuitions about what, for him, was so independently interesting and important, for both theory and practice, about the form of law.

This is why, in the final analysis, the project of reclaiming Fuller must be a project dedicated not merely to clarifying crucial issues of vocabulary, but to reconvening whole conversations. Clearly, words matter. The way that Fuller was and largely continues to be received within the field is a testament to this, with its persistent queries about what exactly he meant by 'morality' or some other term (though, despite this rarely being acknowledged by his critics, Fuller regularly asked the same questions in return, such as in his challenge to Hart in 1958 to explain what precisely it is that positivists seek to exclude when they exclude 'morality' from their accounts of law,[42] or his appeal in the 'Reply' for his critics to explain how exactly they envisage the measure of 'efficacy' being applied to 'the creation and administration of a thing as complex as a whole legal system'[43]).

But though Fuller was clearly mindful of the decisive significance of the words we use to the possibility of fruitful dialogue across philosophical divides, his working notes make clear that the problem was a much bigger one than simply finding the right words: the only way out of the impasse, or simply through it, was to try to change the conversations themselves. Revealing the struggles of a thinker who was trying to find the best way to redeem a debate and initiate a meaningful conversation about his ideas, these notes capture a remarkable diversity of attempts on Fuller's part to frame the impasse between him and his critics through

[42] 'Positivism and Fidelity' (n 1) 635. See further chapter three, IB 'Reorienting the agenda: Fuller's replies'.

[43] 'Reply to Critics' (n 1) 202.

different conversational prisms. Did the impasse, for example, turn upon differences of opinion about whether there is such a thing as 'legal morality'? Or on disputes about 'the structure of purpose'? Or about 'the structure of reciprocity'?[44]

This is why I ultimately close the project of reclaiming Fuller's jurisprudence in my concluding chapter by gesturing to the kinds of conversations that we might now have about the claims, promise or simply the novelty of Fuller's jurisprudence. Indeed, building upon the exposition of Fuller's central claims that I offer in chapters two to five, I hope to show in chapters six and seven that the passage of time has, for the most part, offered little reason to suggest that those conversations ought to be convened in terms greatly different to those through which Fuller himself attempted to convene them. The difference, however, is that he made this attempt at a time when his peers were much less receptive to the invitation than, I will argue, they appear to be now.

III About the Book: Method, Material and Structure

Anyone who has ever attempted to write about Fuller's jurisprudence in the past will likely report that it is a much more difficult undertaking than might be expected. Certainly, others who have entered this territory before me have warned of the traps. Kenneth Winston has counselled that Fuller's eclecticism as a thinker and the wide range of resources that he drew upon pose the danger, in any attempt at reconstruction, of 'making him appear as a more systematic thinker than he actually was'.[45] Peter Teachout has further suggested that any such attempt at systematisation is liable to derail altogether, producing 'the Cinderella syndrome in reverse, where the golden coach gets turned into a pumpkin'.[46]

All of this places the Fuller scholar in the awkward position of not wanting to do too much in a study of his thought, while at the same time maintaining the impulse to not do too little. To confine Fuller to the Hart-Fuller exchanges is definitely too little, but, at the other end of the spectrum, there is minimal value to be achieved in an attempt to draw all of his intellectual interests into one picture. The challenge, therefore, is to not distract attention from the rich array of his intellectual interests and their points of interconnection, while at the same time not allowing this wider view to swallow the coherent jurisprudential vision that inhabits the same space.

[44] Still more of these notes are simply headed with the question, 'what is at stake?', and all can be found in The Papers of Lon L Fuller, Harvard Law School Library, Box 12, Folder 1 (notes for 'Reply to Critics'). See further chapter five.

[45] Kenneth Winston, 'Three Models for the Study of Law', in Willem J Witteveen and Wibren van der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam, Amsterdam University Press, 1999) 69.

[46] Peter Read Teachout, 'The Soul of the Fugue: An Essay on Reading Fuller' (1986) 70 *Minnesota Law Review* 1073, 1088.