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# Legal Ethics as a Moral Idea: A Theory of Philosophical Legal Ethics Based on the Work of Lon Fuller

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LEGAL ETHICS AS A MORAL IDEA:  
A THEORY OF PHILOSOPHICAL LEGAL ETHICS BASED ON THE  
WORK OF LON FULLER

EMANUEL TUCSA

A THESIS SUBMITTED TO  
THE FACULTY OF GRADUATE STUDIES  
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
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## **Abstract**

The legal philosophy of Lon Fuller, both in his idea of internal morality and in his theory of legal interpretation, is particularly useful for the purpose of making sense of the relationship between law and morality *vis-à-vis* the legal profession. Legal ethicists have recently developed accounts of legal ethics that are based on jurisprudential theories. These include the exclusive positivist theory of Tim Dare, the inclusive positivist approach of Bradley Wendel, and the substantive contextual judgment view of William Simon. Additionally, David Luban has proposed and evaluated an insightful interpretation of Fuller's legal philosophy.

In this paper, I will argue that the legal philosophy of Lon Fuller provides the best jurisprudential foundation for philosophical legal ethics and the norms of legal ethics. This includes the treatment of topics such as the relationship between law and morality and the duty of fidelity to law.

In addition to arguing these points at a purely conceptual level I make the case that a Fullerian theory of lawyering is indispensable for making sense of a major recent case study in the field of legal ethics, the "torture memos" written for the Bush Administration by the US Justice Department's Office of Legal Counsel (the "OLC").

Using a Fullerian approach to legal ethics, I will argue that the inappropriateness of these memos goes beyond the failure of the OLC lawyers to interpret particular laws in good faith. Rather, taking a view of law and lawyering inspired by Fuller's legal theory, I will argue that, of all of the reasons that one might criticize the OLC lawyers, it is of deepest importance to understand the ways in which the OLC lawyers acted contrary to the ideal of legality in drafting these memos.

I hope to provide insight into the philosophical foundations of legal ethics, as well as into a major recent case study for legal ethics, and to highlight the connection between lawyering and the vindication of the ideal of legality.

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Finally, I want to show my special appreciation to Allan C. Hutchinson. Beyond being my supervisor, he has been a mentor to me. He was a supporter of my project in this thesis from its inception years ago and has challenged me to think ambitiously about it. Allan's guidance has been invaluable.

My most sincere thanks,

*Emanuel Tucsa*

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## Introduction

When discussing legal philosophy with his law students, Professor Allan Hutchinson often begins by giving them an account of why they, as lawyers, should care about the subject of jurisprudence in the first place. He argues that, as professionals who practice law, it is significant for them to ask, “What is this thing called ‘law?’” It is often taken for granted that there is a clear answer, but when engaging in the study of jurisprudence, we see otherwise. Legal ethicists have taken up precisely this question over the past decade in an effort to better understand the ethics of the legal profession.

From the 1940s to the 1960s, Lon Fuller worked on the project of creating a theory of jurisprudence that was modest in its assertions but far-reaching in its scope. Fuller’s procedural naturalism is a less metaphysically-committed theory than other natural law theories, yet it still provides a deep and rich role for morality within the philosophy of law and thus also for the field of philosophical legal ethics. <sup>1</sup> Part I, Section 1), of this paper will be a survey of the major positivist theories of philosophical legal ethics. Subsequently, in Part II, Section 2), I will introduce the legal theory of Lon Fuller, consider positivist objections to Fuller’s idea of the internal morality of law and survey defences of Fuller’s ideas (including elaborations of Fullerian thinking). I will also explore, in particular, N.E. Simmonds’ elaborations of Fuller’s legal philosophy. At the end of Section 2), and throughout Section 3), I will consider the insightful (lawyer-focused) reading that David Luban has of Fuller’s idea of the internal morality of law. In Part III, Section 4) of this paper, I will develop the conceptual and normative features of my

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<sup>1</sup> Fuller made a prominent contribution to the field of legal ethics. Indeed, David Luban has said that “Lon Fuller is the greatest American philosopher to devote serious attention to the ethics of lawyers” in David Luban, “Rediscovering Fuller’s Legal Ethics” (1998) 11 Geo. J. Legal Ethics 801 [Luban, “Rediscovering Fuller”] at 801. Of special note is the influence that Fuller had on the American Bar Association’s *Model Code of Professional Responsibility*, which was promulgated from 1969 until it was replaced by the American Bar Association’s *Model Rules of Professional Conduct* in 1983. This influence is chronicled in *ibid.* at 806-807 and in even greater detail by John M. A. DiPippa, “Lon Fuller, The Model Code, and the Model Rules” (1996) 37 S. Tex. L. Rev. 303 [DiPippa, “Fuller, Model Code”]. One should also be aware of Fuller’s numerous writings dealing with legal ethics as part of his larger interest in lawyers as actors in the institutions that shape social order. Some examples include Lon L. Fuller, “The Philosophy of Codes of Ethics” (1955) 74 Electrical Engineering 916 and Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed. by Kenneth I. Winston (Oxford: Hart Publishing, 2001) [Fuller, *Social Order*], especially the chapters entitled “The Needs of American Legal Philosophy” [Fuller, “American Legal Philosophy”] at 269-283, “The Lawyer as an Architect of Social Structures” [Fuller, “Lawyer as Architect”] at 285-291 and “Philosophy for the Practicing Lawyer” [Fuller, “Philosophy/Lawyer”] at 305-313.

theory of legal ethics. My theory of legal ethics is inspired by Fuller's theory and substantially aligned with Fuller's normative views about law. In addition to simply laying out my theory, I will also undertake some normative and conceptual analysis of my proposal. In the last expository portion of this paper, Part IV, I will apply the Fullerian theory that I have developed to the case study of the Office of Legal Counsel ("OLC") "torture memos". Section 5) is a survey of the facts and law of the case study that will be the applied ethical focus of this paper. In Section 6), I will look at the question of how legal ethicists of various kinds have applied their theories of legal ethics to critically assess the "torture memos" case study. In Section 7), I will apply my Fullerian theory of lawyering to gain insight into the "torture memos" case study. Finally, in the Conclusion of this paper, after recapitulating my arguments in this paper, I will briefly discuss opportunities for future scholarly work related to the ideas presenting here.

As I begin the task of presenting a theory of legal ethics based on the work of Lon Fuller, let me introduce two categories of discursive activity that will be useful for the purpose of understanding the relationships between law and morality in legal philosophy, especially to the extent that the structure of this relationship is relevant for the task of doing philosophical legal ethics. David Dyzenhaus delineates these two categories in his work in legal philosophy as he revisits the classic case study of the Grudge Informer that both Hart and Fuller addressed in their famous debate just over 50 years ago.<sup>2</sup>

This famous case study is set during World War II. A German woman informed German authorities that her husband had made insulting remarks about Hitler while he was on leave from the German army.<sup>3</sup> She wanted to get rid of him since she was having an affair.<sup>4</sup> Under

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<sup>2</sup> David Dyzenhaus, "The Grudge Informer Case Revisited" (2008) 83 N.Y.U. L. Rev. 1000 [Dyzenhaus, "Grudge Informer"] at 1002.

<sup>3</sup> See H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593 [Hart, "Positivism"] at 618-620.

As Dyzenhaus also does in his paper, *ibid.* at 1004, n.7, the source that I cite for this case study is Hart himself, except for a specific fact that was not mentioned by Hart and which is found in the actual judgment. Thus, for almost all facts of Grudge Informer Case that are mentioned in this paper, I refer to the citation of Hart given in the present footnote.

<sup>4</sup> Oberlandesgericht Bamberg [OLG] [Bamberg Provincial High Court and Court of Appeal] July 27, 1949, 5 Suiddeutsche Juristen-Zeitung [SJZ] 207 (207-10), 1950 (Ger.) (judgment in criminal matter applying Strafgesetzbuch [StGB] [Penal Code] § 239 (1871); See also Dyzenhaus' citation of this case in Dyzenhaus, "Grudge Informer", *ibid.* at 1032 (Appendix), n.8.



the “informer statutes”<sup>5</sup>, it was illegal to make these comments. However, the wife did not have a legal duty to inform the authorities. Her husband was found guilty and sentenced to death. It seems that he was sent to the front instead of being executed. After the war, she was put on trial by the post-Nazi German government. Her defence was that she acted in accordance with the informer statutes, which were the laws at the time. The post-World War II courts ultimately found her guilty of illegally depriving a person of freedom, an offence under the German Criminal Code of 1871, which had continually remained in force.

The categories drawn by Dyzenhaus in dealing with this case are (1) legal reasoning at the “fundamental level”, in which “judges confront the question of the ideal of fidelity to law, since they are faced with questions about what legality-the principles of the rule of law-requires”<sup>6</sup> and (2) legal reasoning at the “doctrinal level”, where “judges have to resolve issues of substantive law, such as the issues of criminal law in the Grudge Informer Case”<sup>7</sup>. The distinction sees one level of analysis, the “fundamental level” as a kind of reasoning in which the relevant actors are to deal with basic questions about the nature of law. The “doctrinal level”, on the other hand, is a level at which, given the answers adopted at the “fundamental level”, the relevant legal official asks what the law of the particular legal system is as it pertains to the specific problem at hand.

Dyzenhaus explains these categories in terms of the questions that would have been asked by the post-WWII court in the case of the Grudge Informer:

At the fundamental level, the court faced the question of what to make of judges who are under a duty to interpret positive laws that are morally obnoxious but, in its view, not so obnoxious that one can make a natural law argument that they are invalid. At the doctrinal level, the court had to consider how its sense of an answer to the first question meshed with its sense of how best to interpret the substantive law. Assume that at both levels judges regard themselves as being under a duty to find an answer that coheres with the animating principles of that level-respectively, the fundamental principles of legality and the principles of the substantive body of law. Because the Grudge Informer Case required the court to take a view not only of doctrine but also of the nature of the judicial role, it is a fundamental case.<sup>8</sup>

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<sup>5</sup> The term that Dyzenhaus uses for the Nazi laws that made it illegal to say the kind of things that the husband said in the Grudge Informer Case, Dyzenhaus, “Grudge Informer”, *ibid.* at 1004; Dyzenhaus also calls these rules the “informer laws”, *ibid.* at 1009.

<sup>6</sup> *Ibid.* at 1002.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* at 1010.

None of this is to say that there is a perfectly clean demarcation between fundamental reasoning and doctrinal reasoning. At the simplest level, legal sources such as constitutions often explicitly require respect for the rule of law. In such cases, at the very least, a doctrinal question mandates the consideration of the two levels together in the process of reasoning.<sup>9</sup> Thus, the two levels cannot be kept perfectly on separate sides of an interpretive wall. N.E. Simmonds, whose work I will discuss more broadly later<sup>10</sup>, shows, while discussing arguments for a distinction like the one expounded by Dyzenhaus, that the relationship between fundamental reasoning and doctrinal reasoning can be a contested issue within legal theory. The relationship between these two kinds of analysis may depend on the question of whether one kind of analysis guides the other or informs itself of the answers from the other. Simmonds argues:

If doctrinal legal thought is typically guided by a basic rule of recognition [a central positivist thesis], then the question ‘what is *the* law?’ is quite distinct from, and independent of, the question ‘what is law?’ But if, on the other hand, doctrinal legal thought is reflexively guided by reflection upon the nature of law as such, then the answer to the former question depends upon the answer to the latter question.<sup>11</sup>

Nevertheless, the questions that are asked at the two levels can be different in content, focus, abstraction, and relevance to the legal system as a whole. To state the distinction in terms of understanding levels of analysis about legal ethics, the distinction might be put such that the doctrinal level asks what advice a lawyer should give to a client (i.e. what is the best interpretation of the law), whereas the fundamental level asks what the proper function and role of a lawyer is within law.

Interpretive points such as these are important to understand because questions about whether law meets evaluative and necessary criteria such as the rule of law are ultimately going

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<sup>9</sup> Leave aside, for now, the question of whether these two levels can have an ontic effect on one another, i.e. whether the answer at one level truly can determine the answer at another level. In the example under consideration, all that I am focusing on is the use of the two levels in the process of reasoning.

<sup>10</sup> Below in Section 2.3.2).

<sup>11</sup> N.E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) [Simmonds, *Law/Moral Idea*] at 171 [emphasis in original].

In a sense, one must also do some doctrinal analysis to assess questions at the fundamental level. One must have a sense of what the law is at the doctrinal level in order to be able to determine that it is “morally obnoxious” and thus raises the kind of fundamental level questions that Dyzenhaus proposes in the case of the Grudge Informer, Dyzenhaus, “Grudge Informer”, *supra* note 2 at 1010; quoted at note 8, above.

to be resolved in the interpretative work of actors within the legal system such as judges and lawyers. Thus, it is vital for any theory of philosophical legal ethics, including the one in this paper, to give interpreters of legal sources a framework for understanding how exactly the questions of legal philosophy apply to the specific legal case that they are addressing at the moment. Dyzenhaus' distinction between legal reasoning at the fundamental and doctrinal levels goes a great way toward doing this. For the purpose of the present paper, the distinction is helpful in understanding the ways in which positive law and morality can be said to come into conflict. Having the categories of fundamental level analysis and doctrinal level analysis readily available aids (1) in the task of drawing out principles of lawyering from Fuller's legal theory,<sup>12</sup> and any theory of legal philosophy, for that matter, (2) in applying the principles of Fullerian lawyering that I develop to the task of assessing the legal advice provided in cases studies such as the infamous OLC "torture memos",<sup>13</sup> and, (3) in understanding criticisms made by other authors as they apply their own arguments and theories in legal ethics to case studies such as the "torture memos".<sup>14</sup>

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<sup>12</sup> As I do in developing my theory of Fullerian lawyering, below in Section 4.4) at 101-102.

<sup>13</sup> Below, in Section 7.2), especially as noted at 164-166.

<sup>14</sup> Below, in Section 6.2), especially as noted at 130.

## Part I – Understanding Positivist Theories of Legal Ethics

## **1) Legal Positivism and the Standard Model of Lawyering**

In the past decade, legal ethics has taken great interest in using philosophical approaches to deal with some of the central issues that arise in the field of legal ethics. My focus here is on views of legal ethics that support the Dominant Model of legal ethics, namely, the view supporting a strong role-differentiated distinction between professional morality and personal morality.<sup>1</sup> The role-differentiated morality that has been set out in the Dominant Model includes duties of zealous advocacy and client partisanship, in particular.<sup>2</sup> The legal ethicist Rob Atkinson sets out is a “[F]undamental question of professional ethics”<sup>3</sup> in the following way for the purpose of distinguishing those who adhere to the Dominant Model and those who adopt alternative views: “Should a professional always do all that the law allows, or should the professional recognize other constraints, particularly concerns for the welfare of third parties?”<sup>4</sup> He says that, “This question divides scholars of legal ethics and thoughtful practitioners into two schools: those who recognize constraints other than law’s outer limit, and those who do not”.<sup>5</sup> The views that are featured in the present section of my paper belong to the school that does not recognize constraints, *as part of the field of professional ethics*, on the behaviour of legal professionals other than the limits set by law. The authors who argue for this

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<sup>1</sup> For account of the Dominant Model of lawyering and legal ethics see Alice Woolley, *Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer* (1996) 9 Can. J.L. & Jur. 61; Trevor C.W. Farrow, “Sustainable Professionalism” (2008) 46 Osgoode Hall L.J. 51 [Farrow, “Sustainable Professionalism”] at 63-67. Finally, see the historical word of Lord Brougham in Joseph Nightingale, ed., *The Trial of Queen Caroline*, vol. 2, (N.p. Albion Press, 1821) at 8 whose idea about the proper function of the lawyer have been cited as the inspiration for the Dominant Model of lawyering.

<sup>2</sup> See generally Farrow, “Sustainable Professionalism”, *ibid.*

<sup>3</sup> Rob Atkinson, “How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day” (1995) 105 Yale L.J. 177 [Atkinson, “Perverted Professionalism”] at 184.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* [footnote omitted]. Let me emphasize that Atkinson is not saying that one of these two groups does not recognize “constraints outside of law’s outer limits” full stop. Of course, people whose views fall into the second school mentioned by Atkinson would (or could) recognize that, all things considered, there are constraints, such as general morality, on their behaviour besides positive law. Rather, this second group does not recognize constraints outside of positive law *in terms of the first order rules of professional ethics*. Note also that people with such a view may recognize moral or political arguments as *second order constraints*, or a second order extra-legal normative framework (extra-legal in the sense of outside or beyond the positive law), as part of professional ethics. One could say that this is the case at least with respect to the particular exclusive/inclusive legal positivist theories discussed in my present paper. See Atkinson’s discussion of such second order constraints or second order extra-legal normative frameworks in *ibid.* at 188, in which he mentions the “ultimate grounding” and the “morality at the wholesale” level of the views of legal ethicists who do not recognize first order or “retail level” extra-legal constraints within professional ethics other than the first order constraints provided by the limits of the positive law.

position most prominently within philosophical legal ethics uphold the Dominant Model of lawyering on the basis of the major legal positivist theories of legal philosophy. In presenting my Fullerian case later in this paper, I will, to varying degrees, argue from a procedural naturalist perspective against all three of the positivist theories that will be considered and thus against their defence of the Dominant Model of lawyering.

### **1.1) Law's Authority – A Common Theme of the Major Positivist Theories of Lawyering**

Before going into the specific details of the major positivist theories of lawyering, I will begin by summarizing an idea that is a structural commonality between the major positivist theories of lawyering as they are actually advocated by their proponents. The common feature is Joseph Raz's idea of the authority of law. Although not being the only way in which to express positivism, the idea of the authority of law has so captured the imagination of legal philosophers, and acts at such a first principles (or fundamental) level of positivism, that it is worth isolating as a common foundation that is shared by the major positivist theories of lawyering.

The two major theories of legal positivism in legal ethics, as in legal philosophy, are exclusive legal positivism and inclusive legal positivism. Their most noted proponents in the field of legal ethics are Tim Dare and Bradley Wendel, respectively. The distinction between these two kinds of positivism is explained in detail in the following two sections. Why is the idea of the authority of law so important to the way in which both of the major positivist theories of lawyering are actually argued? The reason is the relevance that the function of law has to both legal philosophy and legal ethics. In legal philosophy, various functional accounts of law<sup>6</sup>, including Fuller's own view, treat law as a functional kind, meaning that law's nature and conditions are determined by its functions, or by the performance of law's function in the case

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<sup>6</sup> Consider the debate in legal philosophy about functionalism within legal philosophy. For a view that is generally favourable to functionalism see Michael S. Moore, "Law as a Functional Kind" in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992) 188 [Moore, "Functional Kind"]. An anti-functionalist view is given in Leslie Green, "The Functions of Law" (1998) 12 *Cogito* 117 [Green, "Functions"]. Finally, a middle position is traced in Kenneth M. Ehrenberg, "Defending the Possibility of a Neutral Functional Theory of Law" (2009) 29 (1) *Oxford J. Legal Stud.* 91.

of *laws* or *legal systems* as candidates for membership in the category of “law”. This focus on function carries down into legal ethics.<sup>7</sup>

Dare spends significant time explaining the exclusive positivist view of the function of law. Having a clear sense of the function of law is important to Dare because, as he argues, “The point of the institution which supports a given role will feature significantly in any justification of that role and its role-obligations...The nature of the lawyer’s role and role-obligations it imposes depends upon the function of the role within the institution of which it is a part, and hence upon the function of that institution”.<sup>8</sup> Thus, the point of law will shape the role and duties of the lawyer.

Under the Razian account of law, the function of law is to be an authority in the technical sense meant by Joseph Raz. A positivist of the Razian kind would say that the role of law is to be an exclusionary reason that can be used to order society and settle disputes in a situation in which various parties will be able to cite their own conflicting conceptions of the good.<sup>9</sup> The law helps us get along despite our disagreements by stepping in as the authoritative reason for practical action.<sup>10</sup> A purported legal system properly belongs to the category “law” as long as the system *provides peremptory norms*<sup>11</sup> that work as society’s recognized dispute resolution process. Individual purported legal norms belong to the category “law” as long as they *are peremptory norms* within the same dispute resolution process.

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<sup>7</sup> See the following sources for functional theories of legal ethics: Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer’s Role* (Farnham, UK: Ashgate Publishing, 2009) [Dare, *Counsel of Rogues*]; W. Bradley Wendel, “Legal Ethics and the Separation of Law and Morals” (2005) 91 Cornell L. Rev. 67 [Wendel, “Legal Ethics & Separation”].

<sup>8</sup> Dare, *Counsel of Rogues*, *ibid.* at 59.

<sup>9</sup> See *ibid.* at 61, “The institutions and practices to which a procedural understanding of neutrality give rise allow the creation of stable and just communities, despite the presence of a widespread diversity of conflicting and perhaps even incommensurable conceptions of the good. They do so by mediating between this diversity of substantive views and concrete decisions that communities must take”.

<sup>10</sup> See Wendel’s endorsement of this view in “Legal Ethics & Separation”, *supra* note 7 at 86-93. Wendel puts the Razian argument in the context of resolving disagreements about the “torture memos” and provides various thought experiments, including Raz’s own arbitrator example in Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) [Raz, *Morality of Freedom*] at 41-42, to illustrate the way in which the Razian account would work to resolve societal disputes. Wendel also illustrates, in “Legal Ethics & Separation”, *supra* note 7 at 92, some features of how the Razian dispute resolution process works in a democracy.

<sup>11</sup> My reference to exclusionary norms in terms of their “peremptory force” or as “peremptory norms” is borrowed from Simmonds’ reading of Raz in N.E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) [Simmonds, *Law/Moral Idea*] at 162.

To dig deeper into the details of this practical reasoning, one sees that reason-giving<sup>12</sup> is the central idea that animates Raz's theory of the authority of law. It is essentially a theory about the reasons that a person considers in the activity of practical reasoning.<sup>13</sup> For the purpose of legal philosophy, it is especially tied to practical reasoning in the context of a dispute. Raz argues that a necessary condition for the existence of law is that law must have authority, meaning that, in the context of practical reasoning, law (conceived of as a social fact) is an exclusionary reason for action. It thus *replaces* other types of reasons, especially, but not limited to, the *moral* reasons that figure in an ethical dispute, and is not simply one among several reasons (and *kinds* of reasons) for action.

Of special interest for legal philosophy is that morality is kept separate and distinct from law as law plays its role in the activity of reason-giving. In Razian terms, Wendel describes the place that law and morality have in this theory of practical reasoning and the dispute resolution problem that is the impetus for what Raz argues is the function of law.<sup>14</sup> Wendel says, "Moral questions, by their nature, do not tend to have right answers that can be achieved if only the participants in a discussion persevere for long enough. The result of this kind of persistent, good-faith disagreement is the inability to engage in cooperative social action, in this case the effective defense of the citizenry".<sup>15</sup> With the problem identified in the case of moral disagreements, Wendel states, in general terms, the kind of solution that might be adequate to the task of solving the problem of the inability to engage in cooperative social action. Wendel says:

Because all citizens share an interest in working together to achieve [cooperative social action], they have a reason to prefer some procedural mechanism for resolving the disagreement to the inaction that results from the attempt to secure agreement based on deliberation. The goal of

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<sup>12</sup> To use a phrase from Michael S. Moore, "Authority, Law, and Razian Reasons" (1988) 62 S. Cal. L. Rev. 827 [Moore, "Razian Reasons"].

<sup>13</sup> See Raz's recent discussion of his theory as a theory of practical reasoning in his recent work Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) [Raz, *Between Authority*], c. 8.

<sup>14</sup> For another source in which Wendel describes and endorses Raz's thesis about the function of law as an authority, see W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010) [Wendel, *Fidelity*] at 105-113. This book is perhaps Wendel's most significant work in the field of philosophical legal ethics.

<sup>15</sup> Wendel, "Legal Ethics & Separation", *supra* note 7 at 96 [footnote omitted].



that procedure is to construct a normative framework that can be used to generate premises in a practical syllogism for officials who act in the name of society as a whole.<sup>16</sup>

The solution works around the contours of the disagreement, rather than directly with its substance. The solution thus stands back at some distance from the dispute. That is to say, the solution does not resolve the dispute in terms of declaring any particular moral answer to the question that is being debated. This is made clear when Wendel discusses the relevance that this dispute resolution process has to the moral disagreement that may have inspired it<sup>17</sup>, as Wendel explains:

The role of the lawmaking process is not to settle the moral issue permanently as a moral matter. Rather, it is to reach a provisional settlement that works well enough, for now, to accomplish the end in view.... the product of legislation is entitled to respect as an achievement-people disagreeing in good faith have done the best that they could to settle on a resolution of competing rights and values in a way that is respectful of the parties to the discussion.<sup>18</sup>

Also of note regarding views that are based on the authority of law is that it is not relevant for the function of law that there be a particular substantive norm chosen as the content of the exclusionary reason. As Dare argues, “[T]here is nothing in positivism itself which entails that communities must settle on any particular institutional legal arrangement. What is distinctive about the positivist conception of law is not the *content* of the legal systems it endorses, but the place of morality as a reason for action for those subject to law”.<sup>19</sup> There is no conceptual reason within positivism that would make Wendel not endorse this statement also. Even as an inclusive positivist, who, as will be discussed below, believes that morality can be incorporated into the law by way of the rule of recognition<sup>20</sup>, Wendel is not compelled by inclusive positivism, stated in its own terms, to say that any particular substantive content (especially substantive *moral* content) is chosen as the exclusionary reason. The key to the functional question discussed here is the reason-giving *function* of law, not the substance of the norms.

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<sup>16</sup> *Ibid.* at 97.

<sup>17</sup> Note that, although Wendel is discussing the relevance of the dispute resolution process to a *moral* dispute, in particular, the same process would be used for non-moral (e.g. economic or coordination debates) on the Razian theory.

<sup>18</sup> Wendel, “Legal Ethics & Separation”, *supra* note 7 at 97 [footnote omitted].

<sup>19</sup> Dare, *Counsel of Rogues*, *supra* note 7 at 64 [emphasis in original].

<sup>20</sup> Below, in Section 1.3), see my summary of inclusive positivism and Wendel’s use of this theory of jurisprudence in his own theory of lawyering.

Having discussed the dispute resolution process itself, Wendel summarizes a duty that officials of legal systems have given the way in which legal systems are geared toward accomplishing the function of law as characterized by the authority of law. The role of various officials is designed to be responsive to the process' functional role as a means of practical reasoning. Wendel argues:

After this settlement has been accomplished [by way of the authority of law], it is incumbent upon government officials, citizens subject to its directives, and lawyers who interpret the law not to 'unsettle the settlement' by reintroducing contested moral values as a basis for action.<sup>21</sup>

The details of what counts as abiding by this duty are part of the disagreement between the exclusive and inclusive schools of positivist lawyering.

Finally, Wendel tells us (1) the reason that explains the role that a legal philosophy based on the authority of law gives to legal officials and (2) what exactly would be wrong about a legal official such as a lawyer failing to keep their actions within the bounds of this role and the place that it has within the Razian dispute resolution process. According to Wendel:

The reason for this prohibition is not that his [i.e. the legal official's] belief is incorrect or his balancing of the relevant values is faulty.... [L]awmakers have already made a decision on the matter, which stands for a decision of society as a whole, and must be respected as the product of a process that is the best way to deal fairly with persistent uncertainty and debate over moral questions such as the one the officer faces. For the officer to proceed on the basis of his own, all-things-considered judgment would be ethical solipsism-an act of disrespect to fellow citizens, whose views on the matter are equally worthy of being taken seriously.<sup>22</sup>

This common theme between the major theories of positivist legal ethics is thoroughly Razian in terms of its endorsement of Raz's view of the function of law as a dispute resolution tool to be used in the act of practical reasoning. These two kinds of positivism part company in significant ways despite this functionalist agreement. The most important disagreement will be over the question of how the interaction of law and morality is affected by this particular functionalist theory of the authority of law.

## **1.2) Exclusive Legal Positivism – Authority and the Immiscibility of Law and Morality**

Exclusive legal positivism is one of the major schools of thought within positivism as a theory of legal philosophy. In his book, *The Counsel of Rogues?*, Tim Dare provides his argument for a jurisprudence of legal ethics that is based on exclusive legal positivism. I will use Dare's

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<sup>21</sup> Wendel, "Legal Ethics & Separation", *supra* note 7 at 97.

<sup>22</sup> *Ibid.* at 97-98 [footnote omitted].

account as my exemplar of exclusive legal positivism for the purpose of this paper because he has been the major voice in advocating this theory.

Dare argues against the inclusive positivist jurisprudence of law that is used by W. Bradley Wendel to develop a legal ethics theory of inclusive legal positivism. Under the exclusive positivist view, the thesis that morality cannot be incorporated into the law is a virtue that allows law to accomplish a particular moral virtue, namely the facilitation of a pluralist society despite differing views on important issues. As Dare puts it, “[T]he account assumes that we can identify law and the reasons for action it provides in a particular case without settling our substantive moral disagreement about what we ought to do in that case; it assumes, that is to say, the separability of law and morality”.<sup>23</sup> If morality can make its way into law, even in the way that it is said to do so under inclusive positivism<sup>24</sup>, then the moral disagreement is subject to return and the mediating function of law, the exclusionary reason-giving function within practical reasoning, is lost.<sup>25</sup> It is said that one cannot solve a moral disagreement by recourse to moral principles, the very same kinds of considerations that are being debated in the first place.<sup>26</sup>

Recall now the way in which exclusive legal positivists keep law and morality separate so that the mediating and preemptory role of law is not lost when the law uses concepts that are thought to belong to the category of morality. Even when moral concepts seemingly make their way into the law, as argued by Ronald Dworkin and the inclusive legal positivists, exclusive legal positivists will say that:

‘[M]orally laden’ provisions will be found in every developed legal system....The suggested equitable statute of limitations, and other provisions...seem to refer to moral values, values that one might expect to be part of disputed ordinary or background morality. According to positivists, however, such provisions do not direct lawyers and judges to these terms *as* moral terms. Instead they direct them to legal resources, to see what those terms require and how the law has interpreted them.<sup>27</sup>

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<sup>23</sup> Dare, *Counsel of Rogues*, *supra* note 7 at 63.

<sup>24</sup> As discussed in the following section of this paper.

<sup>25</sup> See Dare’s summary of Raz’s exclusive positivist critique of Hart’s inclusive positivism in Dare, *Counsel of Rogues*, *supra* note 7 at 69-70.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* at 65 [emphasis in original].

Accord *ibid.* at 71, “[The account that Dare supports] is more consistent with exclusive than with inclusive positivism. On that account [i.e. exclusive positivism], moral terms that appear in law do not direct judges

Dare goes on to put this statement in the context of an argument for the importance of exclusive positivism to the function of law in being a mediating device, a source of Razian reasons, which resolves disputes in a society with a plurality of views arising around moral questions and other contested topics. Additionally, he states affirmatively, rather than negatively as in the previous quote, the role that moral resources can play in the process of reasoning about law. He says:

[P]ositivism need not deny judges and lawyers access to moral resources, albeit to moral resources as they are incorporated into law in the guise of content-independent application criteria for the ostensibly moral terms which occur throughout law. Such an account, I think, comfortably describes legal practice, and better preserves the function of law as a device that mediates between inconsistent views of the good.<sup>28</sup>

Given this view of law and Dare's view that the nature and function of law determine the proper role of the lawyer, Dare turns his case against inclusive positivism and for exclusive positivism into a case against inclusive positivist *lawyering* and for exclusive positivist *lawyering*. On the basis of his exclusive positivist view of legal philosophy, Dare says: "The law allows advocates of very different views on [moral, political, economic matters, etc.] to live together despite their differences. The nature of the roles occupied by lawyer within the institutions of law is settled to a large extent by this mediating function of law".<sup>29</sup>

Dare therefore argues that the lawyer should interpret value-laden terms *as legal values*. He provides an argument for lawyers to constrain themselves from giving legal advice that would be based on morality and which may thereby, according to Dare's view, possibly reduce the autonomy of the client to engage in the publically recognized forums for conflict resolution. Dare's theory is therefore closely tied to an interpretation of legal philosophy in the jurisprudence of lawyering that also emphasizes client autonomy. It is also deeply related to the issue of lawyers seeking to shape their practice in a way that is responsive to their own moral views, which he, again, would say undermines the law's ability to perform its Razian mediating function. This undermining is something that may indeed be bound to happen if value-laden terms within the law are treated as *moral* values rather than as *legal* values. A lawyer

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to the resources of ordinary morality: they do not direct lawyers and judges to these terms as moral terms. Instead they direct them to legal resources, to see what those terms require and how the law has interpreted them, where that inquiry is an empirical inquiry into the legal pedigree rather than a moral inquiry into the content of those terms".

<sup>28</sup> *Ibid.* at 73.

<sup>29</sup> *Ibid.* at 59.

attempting to make sense of moral terms incorporated into the law under an inclusive positivist view of law would have some likelihood of reading those moral terms according to his/her own particular view of morality. Dare thus argues in the following way against lawyers' attempts to practice law in a manner that is guided by their own view of the substantive morality of the case. He says:

Lawyers who calibrate their professional efforts according to their own view of the good – or indeed according to any particular view of the good – not only 'privilege' the view they favour and disenfranchise the view of the client, they undercut the strategy by which we secure community between people profoundly divided by reasonable but incompatible views of the good...It is not up to lawyers to determine what we will do as a community, what rights we will allocate and to whom.<sup>30</sup>

Having stated what is wrong with a lawyer who seeks to allow his/her own view of morality shape his/her practice of law, Dare states the case affirmatively for an exclusive positivist view of legal practice. Dare argues:

...[Decisions about the client's rights] are things to be decided, not in private in the offices of particular lawyers, but in the public arena of politics where everyone can have a say, or in the public domain of the courts where reasons must be given and opportunities exist for challenge and representation.<sup>31</sup>

In this theory, then, a lawyer's avoidance of the use of morality in shaping his/her work as a lawyer provides the benefit to practical reasoning of facilitating the Razian process of reason-giving and the role of law in facilitating cooperation among individuals who may have differing opinions about contested issues.

Of great interest in Dare's theory is also the way in which he develops his support of exclusive positivist lawyering in light of the values of the standard conception of lawyering, which he supports. Take the following instance in which Dare argues about the way in which the standard conception's principle of neutrality<sup>32</sup> aides the lawyer in facilitating, at a practical level, the mediating function and the preemptory position of law under the exclusive positivist view.

Dare posits:

The complexity of the procedures upon which a pluralist community such as ours must rely means that lawyers do have tremendous power in this regard. Because of their legal expertise,

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<sup>30</sup> *Ibid.* at 74.

<sup>31</sup> *Ibid.* at 77.

<sup>32</sup> *Ibid.* at 8, summarizes the principle of neutrality in the following way: "[The lawyer must remain professionally neutral with respect to the moral merits of the client or the client's objectives...the lawyer must not allow their own view of the moral status of the client's objectives or character to affect the diligence or zealotry with which they pursue the client's lawful objectives".

they are better placed than any other group of citizens to work in and with our legal and political institutions. The principle of neutrality recognizes this power and its potential for abuse....It [i.e. the principle of neutrality] guards against the possibility that someone might be denied rights allocated by a legal system because its lawyers find those rights or their allocation to that person morally objectionable.<sup>33</sup>

Thus, the principle of neutrality guards against what Dare thinks is a normatively perilous situation in which the application of a lawyer's moral views undermine the Razian function of law. The lawyer is required to perform his/her function in pursuit of the mediating function of law even despite his/her own personal moral qualms. Additionally, of course, the lawyer's own moral status is said to be protected from association with the betrayal of his/her own moral views by the principle of non-accountability, which makes the client, rather than the lawyer, morally accountable for the actions done by the lawyer on the client's behalf.<sup>34</sup>

Although Dare defends what we can call the standard conception of the role of a lawyer, he develops the duties of being a lawyer under the standard conception (the principle of neutrality, the principle of non-accountability and the duty of partisanship or zeal) in a carefully limited way. Dare's moderated statement of the principles of the standard conception of lawyering is particularly notable in the case of the principle of partisanship or zeal. Dare distinguishes between pursuing the client's interest (i.e. pursuing the principle of partisanship) with "mere-zeal" vs. pursuing the client's interest with "hyper-zeal".<sup>35</sup> Simply, "mere-zeal" is an expression of partisanship in which the lawyer seeks to secure for the client all that the client is legally entitled to obtain under law, while "hyper-zeal" is another expression of the idea of partisanship in which a lawyer will attempt to secure for the client everything that the law can be made to give even when the provision of the particular benefit (i.e. what the law can be made to give) in the case of the particular circumstances at hand is not the purpose of the law in this case.<sup>36</sup> In support of the toned-down obligation of mere-zeal, Dare says, "The institutional rights of law structure [the lawyer's] responsibility. Their job is to act on the client's behalf, *relative* to the institutions of law. It is not their job to pursue interests that are not protected by law".<sup>37</sup> While insisting on the duty of mere-zeal (i.e. the duty to fully pursue all that the client is

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<sup>33</sup> *Ibid.* at 74.

<sup>34</sup> *Ibid.* at 75.

<sup>35</sup> *Ibid.* at 76.

<sup>36</sup> *Ibid.* at 76.

<sup>37</sup> *Ibid.* at 80 [emphasis in original].

legally entitled to obtain under law), Dare also firmly supports mere-zeal as the proper limitation of the lawyer's duty of zealous advocacy. Yet Dare argues forcefully for the duty of mere-zeal so as to keep away from what he would view as the problem of not being sufficiently committed to zealously pursuing the client's legal entitlements. He says:

Lawyers who fail to exercise mere-zeal, who take it upon themselves not to pursue legal entitlements available to their clients when their clients wish them to do so, privilege whatever moral view they are following in preference to that of their client and undercut the procedures which allow advocates of a plurality of views to live together in communities. Furthermore, though we often admire people who sacrifice their own interests for the benefits of others, the moral quality of these sacrifices depends crucially upon it being the rights-holder who makes the sacrifice. It [is] hard to imagine the circumstances in which I act well by sacrificing some entitles of yours, though there are many circumstances in which we think well of you for doing so.<sup>38</sup>

Thus, according to Dare, the lawyer's duty of zeal is calibrated to the client's legal entitlements. This places proper and balanced limits on the temptations of hyper-zeal and the temptation of a style of lawyering that would be insufficiently committed to zealous advocacy on behalf of the client.

In makes his distinction between mere-zeal and hyper-zeal, Dare shows his agreement with David Luban about the potential and factual excesses of the standard conception as it has been applied (or misapplied) in practice. But, Dare does not believe these excesses to be necessary features of the standard conception.<sup>39</sup> In fact, Dare argues that an exclusive positivist theory of law that is derived on the basis of Razian reason-giving itself provides a reason for acting with mere-zeal rather than hyper-zeal. Dare argues:

Notwithstanding its pedigree, however, I do not think the attempt to pin a duty of hyper-zeal on the standard conception [of legal ethics] is warranted. Indeed the appeal to pluralism allows us to see why lawyers do not have a duty of hyper-zealous advocacy...if [Dare's view] is an accurate account of the role of the lawyer, it seems to follow directly that it is not their function to allow clients to satisfy interests beyond those allocated by law.<sup>40</sup>

To see in greater detail the way in which hyper-zeal undermines the preemptory and exclusive positivist function of law, consider again Dare's quote above in which he says, "The institutional rights of law structure [the lawyer's] responsibility. Their job is to act on the client's behalf, *relative* to the institutions of law. It is not their job to pursue interests that are not

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<sup>38</sup> *Ibid.* at 77.

<sup>39</sup> See Dare's discussion of the separability of the Standard Model and hyper-zeal as well as his discussion of the wrongs of hyper-zeal in *ibid.* at 78-86.

<sup>40</sup> *Ibid.* at 78.

protected by law".<sup>41</sup> To go beyond mere-zeal would be to undermine the authority of law. Rather than law replacing other kinds of reasons in resolving a dispute, the substantive law, in a case where a lawyer secures for the client all that the law can be made to give, is replaced in the process of practical reasoning by the interests of the lawyer's client, which may or may not be in alignment with the client's legal entitlements. Hence, Dare argues against the hyper-zeal expression of the standard conception of lawyering:

An understanding of the duty of zealous advocacy that portrays lawyers as being allowed or obliged to use every lawful tactic to prevent the legal system addressing a case is simply mistaken....It goes wrong because it fails to see how the duties of lawyers are derived from a proper understanding of their roles. I am quite happy to concede that this may be a revision of the standard and well-pedigreed understanding of the standard conception. If it is, then so be it: it is one which gives proper place to the moral considerations which inform the lawyer's role, while holding on to the idea that such roles are subject to role-differentiated obligations.<sup>42</sup>

Dare's theory thus offers strong, but measured, ideals of service to the client on the basis of a theory of law that does not allow morality to be incorporated into the law. His is an exclusive positivist theory of lawyering.

### 1.3) Inclusive Legal Positivism – Authority, Recognition and the Miscibility of Law and Morality

As was the case with the previous section, I will use a particular theorist, Bradley Wendel, as the flag-bearer of inclusive legal positivism. Here too, the reason for using Wendel is his prominence in arguing for his preferred theory.

Despite the Razian functionalist foundation discussed above<sup>43</sup>, Wendel takes his theory in a decidedly non-Razian direction. Wendel attempts to carve out a space for his theory in between the exclusive positivist view of law and lawyering and the natural law view of law and lawyering. The key to the inclusive positivist view is that morality *can* be a necessary condition for the existence of laws within a particular legal system, *can* make its way into the legal system as a norm and not even as a necessary condition, *but* that there is no necessary connection between law and morality. Wendel thus tells us:

Between these extremes of legal advising as essentially an ordinary moral interaction and an amoral domain of 'pure' law, there is a middle ground in which moral norms can be incorporated

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<sup>41</sup> *Ibid.* at 80 [emphasis in original]; quoted above at note 37 and accompanying text, in the present section.

<sup>42</sup> *Ibid.* at 80.

<sup>43</sup> Above in Section 1.1).



into positive law, but in which the moral obligation to obey the law does not depend on the overlap between legal prescriptions and the demands of ordinary morality. This latter position best describes the relationship between law and morality in legal ethics.<sup>44</sup>

Wendel summarizes the view to which he subscribes in the following way, “Inclusive positivists believe that moral principles may be a feature in a legal system in the sense that they are identified as part of law by the rule of recognition, as long as there is a conventional practice among officials of making decisions with reference to moral criteria”.<sup>45</sup> For example, a moral condition may be part of a state’s constitution and might thus be a condition for the valid creation of statute law by the legislature. Of great importance is that the moral conditions brought in through this example are not connected by necessity to the validity of laws within the legal system or to the validity of any legal system. The role of the rule of recognition is thus the key that both allows moral values to become incorporated into the law but to not become connected by necessity or to become conditions of validity in a way that would undermine the separability thesis.<sup>46</sup> Thus, Wendel endorses the following account of the inclusive positivist theory:

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<sup>44</sup> Wendel, “Legal Ethics & Separation”, *supra* note 7 at 72.

Wendel emphasizes both the various possibilities and the limits that his view places on the links between law and morality.

Further to this point, *ibid.* at 100, “[There are] a variety of avenues for incorporating moral values into law, despite the separation between law and morals that is a necessary aspect of the law’s claim to legitimate authority. The separation is not absolute, but it is important to notice the point at which moral values enter the process of making and interpreting law. The standard lawyers’ argument does contain a grain of truth, which is that lawyers are not permitted to make all-things-considered moral judgments about all facets of the work they perform in a representative capacity. This does not mean, however, that morality is completely squeezed out of law...”

<sup>45</sup> *Ibid.* at 102. Wendel also summarizes Hart’s idea of the rule of recognition as a rule (or multiple rules) that “specifies binding criteria for legal officials to use in deciding whether a given norm is a rule that is part of a legal system”, *ibid.*; citing H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) [Hart, *Concept of Law*] at 94-95, 100.

<sup>46</sup> The separability thesis is the idea that there are no necessary connections between law and morality. See Hart’s statement of this idea, without specifically using the term “separability thesis”, but instead giving a definition of “positivism” in H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv. L. Rev. 593 [Hart, “Positivism”] at 601, n. 25, #2 and doing the same in Hart, *Concept of Law*, *ibid.* at 185-186. See, in Jules L. Coleman, “Negative and Positive Positivism” (1982) 11 J. Legal Stud. 139 at 140-141, the first use of the term “separability thesis” to refer to the definition of “positivism” just cited from Hart. For an account of various takes on the separability thesis, see generally, Leslie Green, “Legal Positivism”, *The Stanford Encyclopedia of Philosophy* (Fall 2009), Edward N. Zalta, ed., online: Center for

In this kind of 'inclusive' positivism, moral values can become part of law – a 'social fact' in jurisprudential terms – to the extent they play a role in the conventional practices of judicial reasoning. Classic examples include the Eighth Amendment's prohibition on cruel and unusual punishment, the requirement of good faith and fair dealing in contract law, and the reasonableness standard in negligence.<sup>47</sup>

Interestingly, Wendel not only states the inclusive positivist theory in the traditional way that is careful to protect the place of the separability thesis. He also points out that his way of stating the inclusive positivist claim is consistent with the functional theory of law that Raz proposes and that we saw Dare and Wendel adopt above.<sup>48</sup> Thus, when law incorporates morality *via* the rule of recognition, this must not upset the law's ability to act as an exclusionary reason. Wendel states the details of the theory in the following way:

But in an important sense these incorporated moral terms are still separate from legal reasons, in that it is not necessary to ascertain the *truth* of these moral principles in order to determine whether a proposition of law incorporating them is actually part of the law in a given legal system. Criteria for legal validity that included the truth of moral standards would be unable to coordinate action in the face of disagreement, but criteria that could be applied in a content-neutral manner would be able to facilitate the coordination function of law because it would not be necessary to resolve the disagreement in order to ascertain the legal validity of a given norm. Discerning the *legal* validity of a norm would be a matter of locating it in the sources specified by the relevant rule of recognition, and would not require an independent moral argument.<sup>49</sup>

To that end, Wendel also illustrates the theory by means of a case study that will be discussed later in my paper: the interpretation of a legal defence, necessity, which was suggested as possibly being available in a situation involving the application of the legal norms prohibiting torture.<sup>50</sup> If the defence of necessity is thought to incorporate moral terms into the law, then how does it do so? Wendel explains that, here too, the way in which the moral term "necessity" has been incorporated into law is based on the moral term's ability to partake, along with the rule of recognition, in the generation of a social fact, not on the moral term's objective substantive truth. The incorporated term becomes a standard of assessment in legal interpretation by virtue of its status as a social fact. As Wendel explains:

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the Study of Language and Information, Stanford University  
<<http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>>.

<sup>47</sup> Wendel, "Legal Ethics & Separation", *supra* note 7 at 101 [footnotes omitted].

<sup>48</sup> Above in Section 1.1).

<sup>49</sup> Wendel, "Legal Ethics & Separation", *supra* note 7 at 101-102 [emphasis in original, footnotes omitted].

<sup>50</sup> The "torture memos" proposal of the use of the defence of necessity, including, among other things, my summary of Wendel's criticism of the "torture memos" legal advice on this point, is discussed below in Section 5) at 117, especially note 13; 119, especially note 21; Section 7.1) at 159-163; and Section 7.2), note 50.

Critically...the social fact that constitutes the pedigree of a legal norm is not an objectively true moral judgment, but is instead the *belief* by the relevant legal official in a moral judgment. In the case of [the defence of] necessity [as applied to a case like the “torture memos”], there is a difference between these two would-be sources of law:

(A) The harm associated with torturing a suspected terrorist outweighs the expected benefit of the information that may result from the interrogation, given the uncertainty that the detainee has valuable information and the unreliability of information obtained through torture.

(B) *In analogous cases, decisions by judges interpreting the necessity defense show that a court is likely to conclude that the harm associated with torturing a suspected terrorist outweighs the expected benefit of the information that may result from the interrogation, given the uncertainty that the detainee has valuable information and the unreliability of information obtained through torture.*<sup>51</sup>

Wendel goes on to explain the consequences that would arise for a Razian theory if it was indeed the moral terms’ objective substantive truth that was the standard of assessment in legal interpretation:

[T]he authority of law would indeed be undermined if those subject to it could revisit the underlying moral dispute and reengage in the controversy over the necessity of torture in a particular case. But the italicized text in (B) locates the source of law not in a true moral judgment about the necessity of torture, but in the beliefs and practices of judges issuing opinions in which they consider the necessity of torture. As Jules Coleman puts it, the relevant rule of recognition might contain a clause that refers to ‘some noncontentful characteristic of moral principles.’ The authority of law would be undermined by a rule of recognition that made moral truth a criterion of legality, at least if we understand the rule of recognition epistemically, because our disagreement about moral truth would lead to the inability of officials to identify the law reliably.<sup>52</sup>

Finally, for the purpose of explaining this aspect of Wendel’s theory, he provides a response to the possible objection that this kind of inclusive positivism is incompatible with a Razian theory of authority. The possible objection is that, although secondary instances of reference to moral principle can be said to refer to moral terms as social facts, rather than to the objective all-things-considered truth of moral claims, it would still appear that the initial instance of reference to a moral principle (e.g. the first mention or use of a moral principle by a judge) would incorporate a moral principle *qua* moral principle, rather than simply making use of a moral principle *qua* social fact. If that is the case, then it would seem that the dispute resolution process does not make reference to a Razian exclusionary reason in the first instance of incorporating the moral term and thus does not, at that key moment, resolve a moral dispute

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<sup>51</sup> Wendel, “Legal Ethics & Separation”, *supra* note 7 at 108 [emphasis in original].

<sup>52</sup> *Ibid.* at 108-109 [footnotes omitted].

by looking to a source that is outside of the substance of the moral dispute. Wendel gives an answer which refers to H.L.A. Hart's theory of adjudication:

At some point, though, surely a judge's decision is based on morality itself and not on a previously incorporated moral judgment. The chain of judicial decisions must end somewhere, with a kind of moment of Ur-Incorporation in which the judge made reference not to some other judge's beliefs (which are social facts), but to her own beliefs about morality, which are exactly the sorts of things that would undermine the authority of law if pervasively made a part of conventional legal interpretation. In these marginal cases, Hart would say that a judge is engaged in lawmaking (which he calls the exercise of discretion) rather than in legal interpretation, and that there simply was no law on the relevant question prior to the initial act of judicial creativity.... The judge's decision does not 'thereby convert morality into pre-existing law,' but it fills in a gap where the law previously did not exist.... Thus, the law can fulfill the action-guiding function that is characteristic of any practical authority.<sup>53</sup>

Thus, social facticity is said to be kept throughout the law by way of the ability of the judge to instantiate the rule of recognition and to "fill the gap" with more (new) law rather than a norm from morality.

Having set up this legal philosophical aspect of Wendel's argument, we are in a position to summarize the way in which he applies the part-Razian, part-inclusive positivist theory to the context of lawyers. Wendel states, in general terms, these two main aspects of his theory. He first makes the point that, in order to properly perform their task within an inclusive positivist image of the legal system, lawyers will have to treat the law as having the ability, through the rule of recognition, to incorporate moral values (again, conceived of as contingent social facts, in the way mentioned above, rather than the substantive all-things-considered morally correct answer or what they personally think is the substantive all-things-considered morally correct answer). This includes a certain value-laden interpretive activity, but is limited in such a way that it will not undermine the law's ability to perform its authoritative function as an exclusionary reason. Wendel thus sets out the lawyer-client relationship under his theory as follows:

Obviously, if one purpose of having lawyers is to enable clients to plan their conduct around the possibility of legal sanctions, lawyers must be permitted to make reference to values that will play a role in the decision-making process of judges. But the role of lawyers can be further connected with the role of law. If one of law's objectives is to enable citizens to act together, as a society, despite persistent moral conflict, then the duties of lawyers must be understood derivatively as furthering this end of law. Thus, insofar as lawyers interpret and apply the law to

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<sup>53</sup> *Ibid.* at 109 [footnotes omitted]. Note also that Wendel discusses the notion of a practical authority in *ibid.* at 108-111.

their clients' problems, they are required not to interfere with the law's capacity to coordinate activity.<sup>54</sup>

He goes on to explicitly state the limitation on the kind of moral reasoning that a lawyer may do by saying, "My broad claim, which I have defended elsewhere, is that lawyers acting in a representative capacity do not have an obligation to do right in the first-order moral terms that would otherwise apply to an all-things-considered evaluation of what one should do. Rather, lawyers have an obligation to do right with regard to the law".<sup>55</sup>

Of interest especially to the legal ethics aspect of Wendel's theory is the way in which he deals with some of the classic issues of legal ethics theory, especially the issue of the place of the "Dominant Model" of lawyering and the duty of zealous advocacy. Like Dare,<sup>56</sup> Wendel is careful to limit the ambit of the duty of zealous advocacy such that it is consistent with the legal philosophy that underpins the legal ethics aspect of his theory. If the law is to act as an authority in practical reasoning, i.e. as an exclusionary reason, then its ability to perform this function is undermined, for example, by an approach in which the lawyer tries to use law as a mere tool, make it give whatever s/he can and avoid its application when it is inconvenient for his/her client. Wendel makes this position explicit and states the ways in which lawyers are to limit their advocacy to be consistent with these functional purposes:

Lawyers may not treat the law instrumentally, as an obstacle to be planned around, but must treat legal norms as legitimate reasons for action in their practical deliberation. Compliance with the law means more than seeking to avoid sanctions – it entails an attitude of respect toward legal norms. Because citizens are obligated to treat the law as legitimate – and lawyers, as agents of their clients, cannot have any right to treat the law instrumentally that is greater than that of their clients – lawyers are prohibited from manipulating legal norms to defeat the substantive meaning of these norms. The torture memos are a perfect case study to illustrate the application of a general jurisprudential thesis about the locus of moral responsibility in lawyering, because they show how lawyers can commit a moral wrong vis-à-vis their obligation to serve as custodians or trustees of the law, even while the law excludes recourse to first-order moral considerations in practical reasoning.<sup>57</sup>

From this summary, one can understand the details of Wendel's theory of lawyering as drawing from Raz's theory of the authority of law and Hart's inclusive legal positivism. Wendel's theory of lawyering is thoroughly positivistic and committed to the adversarial model of

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<sup>54</sup> *Ibid.* at 105-106.

<sup>55</sup> *Ibid.* at 72.

<sup>56</sup> Recall my summary of Dare's view on this point, above, in Section 1.2) at 16-18.

<sup>57</sup> Wendel, "Legal Ethics & Separation", *supra* note 7 at 72-73.

adjudication, but places constraints on the standard model of lawyering, as does the theory of Tim Dare.

## Part II – Legal Philosophy and the Internal Morality of Law

## **2) Fuller and the Rule of Law**

### **2.1) Fullerian Legal Theory – The Internal Morality of Law**

We will review some of the key features of the legal theory of Lon Fuller here. This is important for the purpose of this paper because, before developing a Fullerian theory of the ethics of lawyering, it is necessary to have an understanding of whether Fuller’s legal theory has anything instructive to say about the relationship between law and morality and whether Fuller’s theory is sufficiently rich to support theoretical expansion from legal philosophy into other fields of ethics such as legal ethics. Does this theory have the normative legs to walk or were its limitations shown long ago by legal philosophers? Is there anything of moral value to the principles of legality? These questions about Fuller’s legal theory will be answered by asking whether (1) Fuller provides a theory of law that has a strong argument for being an accurate account of law (certainly not in its totality, but in some philosophically relevant aspect and (2) whether there is anything in Fuller’s theory that can sustain obligations (moral or otherwise).

Kristen Rundle provides the broad outline of the structure that can be used to undertake such a project when, in her recent work on Fuller, she says, “[A] proper understanding of Fuller’s jurisprudence requires that we begin with his enduring interest in the distinctiveness of law’s form, and then, from this starting point, witness how he proceeds to interrogate the implications of that form for the character, existence and normativity of law, and, indeed, for the enterprise of legal philosophy itself”.<sup>1</sup> According to Fuller, law is formally distinct as a type of governance by being an “enterprise of subjecting human conduct to the governance of general rules”.<sup>2</sup> Dealing with issues of the existence of law, he sets out an account of the conditions that a system must meet in order to govern human conduct in this way and thus to be law. Building on these conditions, Fuller deals with the normative implications thereof and develops his legal theory of procedural naturalism, which has implications for the basic questions that legal philosophy asks, such as what law is and how law relates to morality. We can understand more about the uniqueness of Fuller’s legal philosophy and the distinctness of the form of law by having a thoroughgoing understanding of the elements which comprise

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<sup>1</sup> Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012) [Rundle, *Forms Liberate*] at 2.

<sup>2</sup> *Ibid.*



Fuller's procedural naturalism. Fuller provides these elements in Chapter II of *The Morality of Law*, perhaps the most famous and most cited portion of Fuller's work.<sup>3</sup>

The functional aspect of Fuller's account of procedural naturalism, provides a necessary condition for the existence of law is that it perform the function of guiding human conduct through the provision of general rules. From there, Fuller identifies eight desiderata that are used to determine the question of whether a purported legal system performs the rule-setting, conduct-guiding function of law. These desiderata are: (1) Generality – the legal system should have general rules; (2) Promulgation – laws should be published; (3) Prospectivity – laws should be prospective; (4) Clarity – laws should be clearly stated and understandable; (5) Consistency – laws should be consistent with one another; (6) Possibility – laws should not command the impossible; (7) Constancy – laws should not be subject to constant change; (8) Congruence – consistency between the law as declared and as administered.<sup>4</sup> Fuller says that "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract".<sup>5</sup> Plainly, one cannot be guided by a rule that commands him/her to act, or refrain from acting, yesterday or by a law that commands something that it impossible for him/her to do. Even more clearly, the truism among Fuller's desiderata, law cannot have general rules if it is inconsistent with the desideratum of generality in virtue of, to take the extreme case, all laws being commands to individuals rather than being stated for general application.

From that functionalist thesis, Fuller's theory becomes classified under the heading of natural law as he adopts a moral thesis which says that the rule of law and its desiderata, in addition to being functional conditions, are also *moral* conditions for the existence of law. Briefly, the desiderata of the rule of law are, as one aspect of their nature, moral conditions because they (1) prevent certain evils from being done to citizens<sup>6</sup>, in specific terms, (2) pursue

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<sup>3</sup> Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) [Fuller, *Morality of Law*] c. II.

<sup>4</sup> *Ibid.* at 39. Fuller undertakes a detailed exposition of these desiderata in *ibid.* at 46-91.

<sup>5</sup> *Ibid.*

<sup>6</sup> Most evidently, Fuller's rule of law conditions prevent the moral evils that are addressed directly and explicitly in his eight desiderata as related to the functional purpose of guiding human conduct. For

certain moral values (such as respect for individual autonomy)<sup>7</sup>, in general terms, and thereby, (3) in Fuller's ambitious view, make legal systems tend away from evil, such as from the evil of tyrannical regimes.<sup>8</sup>

Jeremy Waldron has a sophisticated account of what I have just called *Fuller's functionalist thesis and moral thesis, which together, in a two-step argument, make up Fuller's internal morality of law (Fuller's Internal Morality Thesis)*. Waldron looks at the possible ways in which these two steps might be expressed, the options available to legal philosophers in terms of affirming or denying the theses and, finally, the positions taken by Fuller and Hart.<sup>9</sup> These two steps show the logical structure of Fuller's case for the internal morality of law, which posits, as Rundle says generally about Fuller's theory, that "[T]he question of whether one is in fact governing through law is always measurable by the extent to which the morally significant demands of lawgiving [as expressed in the desiderata of the rule of law] are met".<sup>10</sup> According

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example, the desideratum of prospectivity guards against what Fuller calls "the brutal absurdity of commanding a man today to do something yesterday", *ibid.* at 59.

<sup>7</sup> *Ibid.* at 162-163.

<sup>8</sup> Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630 [Fuller, "Positivism & Fidelity"] at 636, arguing that "coherence and goodness have more affinity than coherence and evil", at 637, arguing that "even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law"; Fuller, *Morality of Law*, *supra* note 3 at 152-167, in which Fuller chronicles "the substantive aims of law" and the ways in which the internal morality of law facilitates the pursuit of certain moral ends. In *The Morality of Law*, *ibid.* at 154, Fuller asks, rhetorically, in response a Hartian objection about the compatibility of the rule of law with iniquity, "Does [H.L.A.] Hart mean to assert that history does in fact afford significant examples of regimes that have combined a faithful adherence to the internal morality of law with brutal indifference to justice and human welfare?" In this statement, Fuller goes further than I could accept in terms of the idea that law tends away from evil. Not only does he say that law tends away from evil, the thrust of his rhetorical question suggests that law has very successfully *avoided* evil. As summarized below, in Section 2.3.3) at 62-63; and Section 3) at 72-73, with the example of the treatment of women, Luban has shown that such a factual/historical claim would not be accurate.

Nonetheless, this does not mean that there do not exist elaborations upon Fuller's theory of legal philosophy that could lead me to agree with a more modest version of his idea that law tends away from evil, especially in a way that is fitting for a discussion of the ethics of lawyers. I summarize these elaborations below in Section 2.3.2) at 51-58; Section 3) at 73-76, especially; and Section 4.4).

<sup>9</sup> Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller" (2008) 83 N.Y.U. L. Rev. 1135 [Waldron, "Hart's Equivocal Response"] at 1139-1144; N.E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) [Simmonds, *Law/Moral Idea*] at 65, 81 also noted the two-step (functionalist and ethical) structure of Fuller's argument.

<sup>10</sup> Rundle, *Forms Liberate*, *supra* note 1 at 4.

to this view, “To abuse law is, at a certain point, to lose law”.<sup>11</sup> Doing particular kinds of moral wrongs undermines the function of law and thus the legal validity of a purported legal system.

## 2.2) The Positivist Challenge – The Rule of Law is Not a Moral Condition

It is sometimes difficult to gauge the exact degree to which legal scholars accept Fuller’s thesis. Legal philosophers, including Hart and Raz have expressed their agreement with that idea that, in order for something to be law, it must be able to perform the Fullerian conduct-guiding function of law to at least some degree.<sup>12</sup> Hart and Raz also agree, to a large extent, with Fuller about the rule of law conditions that a system must meet in order to perform the conduct-guiding function of law.<sup>13</sup>

On the topic of the morality of the rule of law, however, Raz sharply disagrees with Fuller. Rather than being functional conditions for the existence of law with moral aspects to them, Raz argues that the principles of legality are simply conditions of efficacy for a legal

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<sup>11</sup> *Ibid*; As Rundle also notes, *ibid.*, discussing obstacles to the “understanding and embracing” of Fuller’s view, Fuller’s idea of the internal morality of law sets an “[A]vowedly idealistic tenor of Fuller’s project...set a high bar for a lawgiver, and thus also a high bar for what ought to be designated as a legal system. It is a normatively demanding view of law”.

<sup>12</sup> Waldron, “Hart’s Equivocal Response”, *supra* note 9 at 1144-1169 catalogues the instances in which Hart seems more amenable to Fuller’s view, especially the functionalist points; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2d ed. (Oxford: Oxford University Press, 2009) [Raz, *Authority of Law*] at 219-226, in particular, the example that Raz gives at 226 about the minimal functional ability to cut, which is required of a knife. While this point is used to criticize Fuller’s moral thesis, it is indeed an acknowledgement, albeit in unenthusiastic one, of the merits of the functionalist aspect of Fuller’s case.

<sup>13</sup> See H.L.A. Hart, “Problems of Philosophy of Law” in Paul Edwards, ed., *The Encyclopedia of Philosophy*, vol. 5 (New York: Macmillan, 1967) 264 [Hart, “Philosophy of Law”] at 273-274, where Hart runs through an account of the conditions of the rule of law, many of which are similar to Fuller’s, such as prospectivity, clarity, promulgation, etc., while also proposing conditions, such as respect for the principles of natural justice and lack of bias in the judiciary/judicial independence, not included in Fuller’s list of the eight desiderata of the rule of law (but which Fuller would not necessarily reject since Fuller’s eight desiderata are not meant to be taken as a closed list, see Fuller, *Morality of Law*, *supra* note 3 at 38-39, where Fuller says “[T]he attempt to create and maintain a system of legal rules may miscarry in *at least eight ways*” [emphasis added]).

See Raz, *Authority of Law*, *ibid.* at 214-219, where Raz gives a list of conditions similar to those of Hart and Fuller, and where Raz also proposes conditions, such as judicial independence and access to justice, that are beyond what Fuller proposes in the eight desiderata, Raz, *Authority of Law*, *ibid.* at 217.

Note also that, with respect to some of these additional criteria that Hart and Raz propose, such as judicial independence/freedom from judicial bias and respect for natural justice, there might be a case to be made that they could be subsumed under Fuller’s desideratum of congruence between the law as declared and as administered.

system to be able to perform its function and to be excellent *as law*. Raz argues that just as a knife must have some minimal capacity to cut in order to perform its function and satisfy one of the functional conditions of being a knife, so too must law have the ability to perform its function of guiding human conduct. However, Raz argues that the eight conditions do not actually promote moral values. They are simply conditions of efficacy and are morally neutral. Additionally, the fact that the conditions of law's efficacy are compatible with a great deal of immorality indicates to Raz that they cannot be considered to be moral conditions, and certainly not moral virtues.<sup>14</sup> On the basis that it fails in its moral claim, Raz argues that Fuller's procedural naturalist argument does not succeed and thus that Fuller does not prove any necessary connection between law and morality.

Hart, on the other hand, is much more equivocal than Raz on this topic. Greater detail on Hart's differing views about the morality of the rule of law is found later in this paper.<sup>15</sup> Hart's equivocations do not appear in any direct interactions with Fuller. When Hart is directly considering Fuller's proposal, Hart makes arguments like his clever comparison between Fuller's

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<sup>14</sup> Raz, *Authority of Law*, *ibid.* at 224-226. For a debate specifically about this same argument, see Matthew H. Kramer, "On the Moral Status of the Rule of Law" (2004) 63 Cambridge L.J. 65 [Kramer, "Moral Status ROL"] on the positivist side of this argument and N.E. Simmonds, "Straightforwardly False: The Collapse of Kramer's Positivism" (2004) 63 Cambridge L.J. 98 on the side of procedural naturalism.

Raz additionally makes an argument attempting to minimize the moral significance of the rule of law by saying that it is merely a negative value that would prevent evils that either (1) could only be at risk of materializing where there is law or (2) that are materialized wherever law is seen, although they are also seen elsewhere in addition to law. See Raz, *Authority of Law*, *ibid.* at 224. I will not directly address that argument in this paper. The reason is that the distinction between a negative and a positive moral value for the purpose of the question of whether the procedural naturalist thesis goes through is largely trivial. Whether the rule of law (1) provides us with moral values that must be achieved in order to have law or (2) provides us with a set of conditions pertaining to moral evils, typically raised by law, that must be avoided in order for us to have law, the result would still be that there are moral conditions that are necessary conditions for the existence of law, which is the thesis of procedural naturalism. Of course, I will not dispute that a positive value is more satisfying than a negative value. This is why I endorse Simmonds' thesis, especially for the purpose of lawyering, about the moral value and relevance of the rule of law. Simmonds' thesis is contrary to Raz's negative value thesis and is developed, below, in Section 2.3.2) at 44-49, where I summarize Simmonds' case for the positive value of the rule of law in virtue of the rule of law's embodiment of moral values; below, in Section 2.3.2) at 49-51, in terms of Simmonds' argument that the criticism from compatibility with wicked regimes does not follow; and, below, in Section 2.3.2) at 51-58, where we can find my summary of Simmonds' argument for the link between the rule of law and justice as it pertains to the moral relevance of the rule of law.

<sup>15</sup> Below, in Section 4.3.2) at 86-89.

purported internal morality and the internal conditions of efficacy for poisoning another person.

<sup>16</sup> Hart argues that there are indeed conditions that a person must meet in order to poison someone. However, the achievement of such “excellence” does not recommend to us the suggestion that the conditions for effective poisoning are *moral* conditions. The conditions of law’s efficacy are like the conditions of efficacy for poisoning and are not moral conditions merely by virtue of the fact that they are necessary for law to perform its function. When Hart is making such arguments, I will place him into the Razian school of thought about morality and the rule of law. This is the focus of the present section of the paper. At other times, however, Hart is more willing to accept, either explicitly or implicitly, that the desiderata of the rule of law are indeed moral conditions. For now, let us consider replies to the argument of which Raz has recently been the champion and to which Hart sometimes subscribes. Throughout the section, I will refer only to Raz because of his prominent role here, but please take “Raz” when he is mentioned in this section to include Hart too when Hart takes the view on the anti-Fullerian side of his equivocation about the moral status of legality.

## **2.3) Defending Fuller – Arguing for the Morality of the Rule of Law**

### **2.3.1) The Positivist Critique Does Not Follow or Is Not Sound**

I will begin with some general responses that have been given to the positivist critique of Fuller’s theory of the internal morality of law. The authors whose work I cite here do not build their own Fullerian theories of law. Rather, they have discussed the positivist criticism of Fuller and see convincing reasons to conclude that the positivist critique of Fuller, especially as it has been made by Raz, misses the mark.

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<sup>16</sup> In H.L.A. Hart, Book Review of *The Morality of Law* by Lon L. Fuller (1965) 78 Harv. L. Rev. 1281 [Hart, “Book Review”] at 1285-1286, Hart famously argues:

“[T]he author’s insistence on classifying these principles of legality as a ‘morality’ is a source of confusion both for him and his readers.... [T]he crucial objection to the designation of these principles of good legal craftsmanship as morality, in spite of the qualification ‘inner,’ is that it perpetrates a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. (‘Avoid poisons however lethal if they cause the victim to vomit’....) But to call these principles of the poisoner’s art ‘the morality of poisoning’ would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned”.

One of the major arguments that Raz offers for his view is that, even when the legal system abides by the principles of legality, it is still possible for the legal system to be evil, on balance.<sup>17</sup> This is a criticism of the moral status of the rule of law. One can state this particular criticism in at least three versions. I will refer to the general argument just mentioned, a major criticism given by Raz of the idea of the internal morality of law, as the “Compatibility and Amoralism Thesis”. Stated differently, the idea is that the positivist thesis regarding the rule of law’s amorality has a relationship of some kind with the rule of law’s compatibility with immorality. This argument has two weak versions and one strong version, the various measures of strength referring to the boldness of the normative claims made by the different versions of the thesis. According to one weak version, the rule of law does not constitute an internal *morality* of law because, despite the fact that the rule of law makes, or may make, a contribution to the “moral quality of law”<sup>18</sup> in the direction of moral goodness, or away from moral evil, the rule of law is still compatible with great immorality within the legal system. Thus, this version argues for direct logical entailment of amorality from compatibility with evil and does not make any claim, or does not necessarily make any claim (meaning that a variety of stances are available), about the contribution (not the ability to settle the issue) that the rule of law makes to the moral quality of law.

Another weak version, instead of being open to the idea that the rule of law could make no contribution to the moral status of law, has the specific feature of accepting that the rule of law makes a morally good contribution to the moral quality of law. In addition, rather than holding that compatibility with evil entails a condition’s amorality, this second weak version holds that what one should conclude, on the basis of the rule of law’s compatibility with evil, is that the rule of law does not make a particularly substantial contribution to the moral status of law, even though the rule of law does indeed make a positive moral contribution. Like the first weak version, this second weak expression attempts to draw direct logical entailment from compatibility with evil to a particular moral evaluation of the rule of law.

On the other hand, the strong version of the Compatibility and Amoralism Thesis states that the rule of law does not constitute an internal morality of law because the rule of law, *by*

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<sup>17</sup> See note 14 and accompanying text, above.

<sup>18</sup> Waldron, “Hart’s Equivocal Response”, *supra* note 9 at 1163.

*reason of the fact that it is a condition of efficacy and thus a mere amoral functional condition, does not make any contribution (even a prima facie contribution that, as it so happens, is consistently unsuccessful at being determinative of the moral status of the rule of law) to the moral status of the rule of law. The strong version, rather than attempting to go directly from compatibility to amorality, introduces a definite moral thesis about the contribution that the rule of law could possibly make to the moral quality of the rule of law. This contribution is non-existent because the rule of law is capable of being used for, not just merely allowing, evil in no lesser measure than it is capable of being used for good. In this case, compatibility is the product of the reasoning process, the conclusion of the argument, rather than a premise or indicator of law's moral quality as moral or amoral.*

In response to the weak version of the Compatibility and Amorality Thesis, I will draw an analogy to an argument made by Waldron about a related issue: the ability of the rule of law to generate political obligation, i.e. a moral duty to obey the law.<sup>19</sup> Jeremy Waldron has made a significant contribution to the understanding of the legal philosophy of Lon Fuller. Waldron recognizes that Fuller, although being a *procedural* naturalist, viewed the principles of legality as being deeply tied with the achievement of certain substantive moral and political goods. On the topic of political obligation, Waldron argues that, even if some of the positivist theses about the relationship between the rule of law and morality are true, positivists are still not justified in concluding that the principles of legality are conditions of efficacy rather than conditions of morality. This is the argument that I will analogize in order to demonstrate that the weak

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<sup>19</sup> For surveys of the debate within legal philosophy over political obligation, the *moral* duty to obey the law, see Leslie Green, "Law and Obligations" [Green, "Law and Obligations"] in Jules L. Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 514 [Coleman & Shapiro, eds., "Handbook of Jurisprudence"]; George Klosko, "The Moral Obligation to Obey the Law" in Andrei Marmor, ed., *The Routledge Companion to Philosophy of Law* (New York: Routledge, 2012) 511; M.B.E. Smith, "The Duty to Obey the Law" in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, 2d ed. (Chichester, U.K.: Wiley-Blackwell, 2010) 457. These authors deal with the debate in terms of (1) the various reasons for denying or affirming the existence of the moral duty to obey the law (especially the proposed groundings of the duty) and (2) the extent of the moral duty (generalized to the legal system or specific to particular laws, kinds of laws, persons, roles, relationships with the law or relationships governed by law), if it exists.

The issue of political obligation is briefly mentioned as a future research topic for my theory of Fullerian lawyering below, in the Conclusion, at 175.

version of the Compatibility and Amoralism Thesis does not follow and that compatibility with evil does not logically entail a conclusion about the moral contribution that the rule of law makes to the moral quality of law.

In arguing about Hart's response, which Waldron described as equivocal,<sup>20</sup> to the idea that the rule of law constitutes an internal *morality* of law, Waldron proposes that Hart might be able to accept what I will call Fuller's "Internal Morality Thesis"<sup>21</sup> that the rule of law makes a positive contribution to the moral status of law (thus giving up a strong version of the Compatibility and Amoralism Thesis on the question of the moral contribution of the rule of law to the moral quality of law). At the same time, because the vindication of the rule of law is compatible with great immorality within the legal system, Hart could reject the idea that such a conclusion in Fuller's direction in terms of this first question could be determinative of the separate issue of political obligation.<sup>22</sup> In the same way that is done by the weak versions of the Compatibility and Amoralism Thesis, compatibility with immorality is also taken here to be sufficient to prove that the concept that is compatible with immorality, in this case the rule of law, cannot generate political obligation.

Hart could indeed take this viewpoint; however the conclusion would not be favourable to the separability thesis. The reason for this is that the separability thesis demands a stronger insistence on separability than Waldron's option offers Hart. In addition to denying that there are any necessary connections between law and morality, the separability thesis, obviously, denies any arguments about political obligation that rely on theses made in natural law theories of jurisprudence about the connection between law and morality. Simply, the separability thesis, while denying a natural law thesis, also has to deny any argument about law that relies on these natural law theses as premises within the argument. Taking up the viewpoint of which Waldron suggests Hart might avail himself would involve remaining consistent with the separability thesis' denial of arguments that depend upon Fuller's procedural naturalist case (i.e. refusing to

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<sup>20</sup> Waldron's discussion of Hart's equivocations on the topic of the internal *morality* of law is summarized in greater detail below, in Section 4.3.2) at 86-89.

<sup>21</sup> I will use the term "Internal Morality Thesis" to refer both to Fuller's theory about the internal morality of law and to refer to an aspect of my own Fullerian theory of lawyering proposed, below, in Section 4.3). In either case, I will clearly indicate whether I am referring to Fuller's own theory or to an aspect of the theory of philosophical legal ethics that I am building on the basis of Fuller's jurisprudence.

<sup>22</sup> Waldron, "Hart's Equivocal Response", *supra* note 9 at 1163.



use a natural law thesis as a premise in another argument) but would involve undermining the separability thesis' direct response to the procedural naturalist thesis itself.

Waldron points out that the principles of legality do not need to have determinative force over issues such as whether there is a moral duty upon the inhabitants of a state to obey the law, in order to support a natural law thesis of the kind that Fuller wants and for the principles of legality to indeed constitute an internal *morality* of law. Waldron argues:

[T]he separability thesis is not only supposed to deny that whether or not a norm is law has conclusive moral implications; it is also supposed to deny that it has any *prima facie* moral significance. The separability thesis is certainly not satisfied by showing that although a norm's being law has some moral implications, those implications are not strong enough to settle the question of political obligation [i.e. the question of whether there is a moral duty to obey the law].<sup>23</sup>

Thus, in this case, the separability thesis' denial of the political obligation purportedly generated by Fuller's procedural naturalist internal morality of law, accompanied by the acceptance of the idea that the rule of law does make an affirmative contribution to the moral quality of law is not an account of legal philosophy that could sustain the separability thesis with respect to the moral quality of law. This is because various positivist ideas, including the separability thesis, require more than that purported conditions of moral normativity not have the ability to determine the answer to a particular moral issue that is being asked about the law (such as the moral issue of political obligation). Ideas such as the separability thesis, and the separability thesis' specific argument for the amorality of the rule of law, also require that the relevant concept not have any *prima facie* moral relevance. The account that Waldron offers to Hart explicitly does not do so and thus fails as a positivist thesis. Such a stance would be deficient, and even counterproductive, in the effort to show that Fuller's theory does not provide an internal *morality* of law. To put this conclusion from Waldron in terms of the Compatibility and Amorality Thesis, compatibility with immorality may show that the rule of law cannot determine the issue of political obligation, and that the rule of law cannot determine the moral quality of a legal system. However, this compatibility with immorality would not be sufficient to show that the rule of law does not constitute a *morality* of law or does not have *prima facie* moral value such that the separability thesis would be true.

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<sup>23</sup> *Ibid.* at 1164.

Just as it would not be enough for a positivist argument on the topic of political obligation to show that the rule of law is only prima facie morally significant, the same is true for the moral status of the rule of law in relation to the moral status of the legal system. An identical problem would arise for positivism when it comes to weak versions of the Compatibility and Amoralism Thesis, which would recognize, or be open to, the rule of law's ability to make morally good contributions to the moral quality of legal systems, but which would then attempt to head off Fuller's Internal Morality Thesis on the basis of the suggestion that the rule of law cannot be determinative of the moral quality of legal systems. Just as in Waldron's argument about political obligation, and working off of the structure in the previous quote, we see that it is not enough for the separability thesis to deny that the rule of law has conclusive moral implications. The separability thesis must also deny the prima facie moral significance of the rule of law. An author is not sufficiently supportive of the separability thesis from a positivist perspective if s/he admits the functional thesis of Fuller's theory of the internal morality of law, accepts that the rule of law has some moral implications, but disclaims the moral relevance of the rule of law because the vindication of the rule of law is not strong enough to ensure that the legal systems in which it is vindicated are not morally evil.

Thus, even if one were to grant the premise that the rule of law is compatible with substantial immorality within legal systems, a thesis that Fuller might accept but substantially qualify or outright oppose<sup>24</sup>, it would not be entailed from that, as would have been argued under weak versions of the Compatibility and Amoralism Thesis, that the rule of law is an amoral condition or is not a particularly important moral condition. The rule of law would be shown to *not be determinative* of the moral quality of the legal system, but could still have substantial moral value. This moral value could contribute to the moral quality of law or have prima facie moral significance in terms of the moral quality of the legal system. The separability thesis requires a denial of all of these kinds of value. This reply to weak versions of the Compatibility and Amoralism Thesis cuts deep into what exactly would be required for a purely positivist theory of law to succeed. It would require far more than showing that internal morality is not determinative of law's moral quality. Therefore, while the compatibility between the vindication of the rule of law and evil within the legal system can be part of a positivist argument that the

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<sup>24</sup> Above at note 8 and accompanying text.

rule of law does not provide an internal *morality* of law, the conclusion stated in the weak version of the Compatibility and Amoralism Thesis does not follow logically from the premises of the argument.

Seeing that this positivist criticism of Fuller would not prove the truth of the positivist position on Fuller even if the criticism were true (i.e. seeing that this particular positivist criticism of Fuller is not logically valid), I turn to arguments over what I have called the strong version of the Compatibility and Amoralism Thesis: the question of whether positivists are correct to say that the rule of law is not a *moral* condition for the existence of law (i.e. whether the one of the major premises in this particular positivist criticism of Fuller is sound). Arguing against the strong version will require both that positivist arguments for the rule of law's amorality be undermined and that an affirmative case be put forward for the moral value of the rule of law. I take up this case for the remainder of Section 2) and also for Section 3) of this paper.<sup>25</sup>

Against the Razian and Hartian thesis that Fuller's eight desiderata represent mere internal conditions of efficacy, I begin with the work of Allan C. Hutchinson. Hutchinson has criticized some of the strongest advocates of positivism, especially when they gloss over the role that interpretation and contested meaning have in determining what the law is. He does not adopt the strict fact/value distinction that many positivists would like to say is so well-established in law.<sup>26</sup> On the point of the internal morality of law, he rejects Raz's attempt to *moralize* the rule of law. Hutchinson argues:

Although Raz would still likely insist that the Rule of Law is more aptly thought about in terms of efficacy than morality, there is a significant difference between whether tools are suited to their chosen function and whether law is sufficiently knowable to guide people's conduct. To use Raz's example, it is one thing to criticize knives as being insufficiently sharp to accomplish their cutting tasks, but it is another thing entirely to condemn law for punishing people when they have no idea why and for what they are being punished. While conformity with the Rule of Law will obviously not itself guarantee a 'good' legal system, its complete flouting will itself be a moral failing and contribute to the goodness or badness of the legal system, regardless of the substantive cut of its normative content.<sup>27</sup>

The argument that Hutchinson provides here is that, in agreeing with the functional case for the rule of law, Raz has adopted a "qualitative dimension to law's existence".<sup>28</sup> Importantly,

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<sup>25</sup> Below in Section 2) at 37-63, Section 3).

<sup>26</sup> Allan C. Hutchinson, "Razzle-Dazzle" (2010) 1 Jurisprudence 39 [Hutchinson, "Razzle-Dazzle"] at 57-58.

<sup>27</sup> *Ibid.* at 54 [footnote omitted].

<sup>28</sup> *Ibid.* at 55.

this qualitative dimension is not analogous to the failure of a knife to cut. We can readily identify moral wrongness in the action of punishing someone “when they have no idea why and for what they are being punished”.<sup>29</sup> Hutchinson briefly discusses the moral content of the “qualitative dimension” to law’s existence when he mentions the function of law in guiding people’s conduct and the failure to achieve this function when one is “punishing people when they have no idea why and for what they are being punished”. This response to the positivist critique is developed and turned into part of the affirmative case of some strongly Fullerian theories that will be discussed later in this paper.<sup>30</sup>

For now, let me turn to a response to an interesting critique of Fullerianism, especially from the perspective of this paper. This critique is really just a subset of the more general critique that the rule of law is compatible with a great deal of evil.<sup>31</sup> The criticism currently under consideration takes the specific focus of the role that *people* have in bringing about the evil with which the rule of law is compatible. Taking political realities into account, positivists argue that the moral force of the principles of legality is undermined by the fact that rulers who are hostile to the purported moral values of the rule of law may abide by the rule of law for their own strategic reasons while working to create a system that is immoral overall.<sup>32</sup>

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<sup>29</sup> *Ibid.* at 54.

<sup>30</sup> This affirmative case is the proposal of positive or affirmative moral content within the rule of law. In proposing such content, the authors that I discuss develop the idea of why it is morally wrong to violate what Hutchinson has called the “qualitative dimensions to law’s existence”, *ibid.* at 55, and thus why it is wrong to do things such as “punishing people when they have no idea why and for what they are being punished”, *ibid.* at 54. See proposals about the positive moral content of the rule of law summarized below, in this same section, note 33, and accompanying text, as given by Waldron; Section 2.3.2) at 44-49, 51-58, below, as suggested by Simmonds, whose theory is itself Fullerian; and Section 2.3.3) at 60-63, and Section 3) at 68-69, below, as discussed by Luban. All three proposals for the affirmative/positive moral content of the rule of law centre on the notion of respect for individual autonomy/human agency.

<sup>31</sup> It is typically not set apart as a distinct objection from the objection that the rule of law is compatible with evil. Nonetheless, the objection raises interesting issues about the people actually involved in creating legal regimes, in this case evil regime, and is thus worth highlighting as an expression of the compatibility with evil objection.

<sup>32</sup> The best articulation of this criticism can be found in Matthew H. Kramer, *In Defence of Legal Positivism: Law without Trimmings* (Oxford: Oxford University Press, 1999) at 63-70, where Kramer develops the objection as “[A] first-person statement of [the] normative proposition”, at 63; Kramer, “Moral Status ROL”, *supra* note 14, in which Kramer makes this positivist critique while considering the “reasons-for-action”, at 67, that play into the reasoning of legal officials in relation to the practical application and use of the rule of law.

Against the thesis that the moral status of the principles of legality are undermined by the ability of scoundrels or evil rulers to pursue their goals even while abiding by the rule of law, Waldron responds by showing how that attack on the moral quality of the principles of legality also fails to prove the positivist thesis even though the substance of the attack is true. Waldron says:

Many (if not all) legal positivists regard it as definitional that the function of law is to guide conduct. That law cannot, in general, guide human conduct unless its directives are clear, public, prospective, practicable, and relatively constant relates directly (as Fuller noticed) to the moral ideal of respecting the human capacity for responsible agency and self-monitoring. The idea that, if one is to rule human beings, one should work *with* this capacity-rather than short-circuiting it through manipulation or terror-is an idea of considerable moral significance; a system of rule is better if humans are ruled in this rather than in some other way. Of course, a ruler may have reasons of his own for trying to guide the conduct of his subjects (rather than galvanizing it in some other way), and those reasons need not themselves involve moral respect for the dignity of human agency. No one is denying that rulers may have nonmoral reasons for abiding by the principles of legality. But that does not deprive the principles of their moral significance, nor does it mean that their critical connection with law is purely a result of rulers' characteristic opportunism. Law itself may be an enterprise unintelligible apart from the function of treating humans as dignified and responsible agents capable of self-control; unscrupulous rulers must make what they can of that fact when they decide, for reasons of their own, to buy into the 'legal' way of doing things.<sup>33</sup>

Just as the inability of the principles of legality to have a determinative role on the content of law or the moral quality of the legal system or a subset of norms within the legal system does not imply that the principles are conditions of efficacy rather than conditions of morality, so too it is the case that the status of the principles of legality is not determined by their inability to have determinative role in the practical reasoning of and regarding a corrupt ruler or regime.

Thus, having seen general arguments from both Hutchinson and Waldron against the mere-efficacy criticism, the principles of legality stand planted firmly as moral conditions. The

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Note also, beyond the topic of such less than benevolent rulers, my summary of Luban's argument, below, in Section 2.3.3) at 62-63, Section 3) at 72-73, where Luban shows the way in which actors in legal systems can participate in the creation or allowance of the kind of evil that the rule of law should abhor (namely, the subjugation of groups of people, e.g. women) while not totally undermining the validity of the legal system on rule of law grounds. Luban argues that, unfortunately, the rule of law seems to be able to tolerate the subjugation of vast groups of people within a society and legal system.

<sup>33</sup> Waldron, "Hart's Equivocal Response", *supra* note 9 at 1167 [emphasis in original, footnotes omitted]. In Simmonds, *Law/Moral Idea*, *supra* note 9 at 78-99, Simmonds, in response to Kramer, makes a similar argument to Waldron's, and furthermore argues that wicked regimes will frequently have affirmative reasons to deviate from the rule of law.

principles and the general Fullerian theory, therefore, are a key to an appreciation of the relationship between law and morality and, for the purpose of this paper, the relationship between law, morality and lawyering.

How far do the general arguments summarized in this section go in terms of arguing against positivism? Hutchinson makes a point that both emphasizes the weakened position in which his argument puts positivists of the Razian kind *vis-à-vis* Fuller, but also hints at the possible compatibility between Fuller's procedural naturalism and certain kinds of legal positivism. Hutchinson says:

None of this [meaning Hutchinson's arguments as quoted in this section of my paper] challenges the basic and salutary positivist precept that law can be a vehicle for immorality as much as it can be a bulwark against it. However, what it does suggest is that, if Raz is considered to be the most die-hard of positivists in his adherence to a strict law/morality divide, then both Raz and other positivists are left very exposed and in need of much greater defence than is presently on offer in *Between Authority and Interpretation*.<sup>34</sup>

I would suggest that the same is true for Waldron's arguments as summarized in this section. The arguments that I have summarized here from Waldron also do not challenge "the basic and salutary positivist precept that law can be a vehicle for immorality as much as it can be a bulwark against it". However, as Hutchinson said of his own view, Waldron's general criticisms do present challenges for Raz and other positivists, especially given their acceptance of the necessity of the rule of law. This argument is measured between its acknowledgement of at least one part of the procedural naturalist thesis (i.e. that the rule of law is indeed a moral condition) and its view of the consequences for positivism. Hutchinson is not arguing that Fuller's internal morality is compatible with every positivist thesis. Indeed, the idea of internal morality is not compatible with the positivist separability thesis: the idea that there is no necessary connection between law and morality.<sup>35</sup> However, Hutchinson's argument does suggest some non-trivial compatibility between the procedural naturalist and the positivist in terms of the limits of the rule of law's ability to determine, all things considered, the moral status of a legal system. I briefly discuss some compatibility between Fuller's view and Hart's positivism below.<sup>36</sup> I believe that procedural naturalism can have quite a lot in common with

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<sup>34</sup> Hutchinson, "Razzle-Dazzle", *supra* note 26 at 55 [footnote omitted].

<sup>35</sup> The positivist separability thesis was discussed above in Section 1.3), note 46.

<sup>36</sup> Below in Section 4.3.2) at 86-91.

certain kinds of positivism, sometimes more in common than certain versions of positivism have with one another.

### **2.3.2) Moral Robustness through the Rule of Law – Simmonds’ View of “Law as a Moral Idea”<sup>37</sup>**

Having considered some general arguments in reply to the positivist criticism of Fuller, I turn now to the work of two theorists, Nigel Simmonds and David Luban, who have each developed robust affirmative cases for Fuller and procedural naturalism. <sup>38</sup> Of these two, Simmonds is actually a Fullerian, whereas Luban would be best described as having an admiration for Fuller’s work. Neither of these two affirmative cases have the compatibility with positivism that is possible in the case of the general defences of Fuller summarized in the previous section.

A recent, rich, and particularly rigorous reading of Fuller’s legal philosophy has been given by the legal philosopher N.E. Simmonds in his book, *Law as a Moral Idea*. Simmonds gives a multi-faceted account of the ways in which Fuller’s principles of legality are not only functional principles but are also moral principles.

Before looking at Simmonds’ response to the Razian/Hartian critique of the morality of the rule of law, consider the reply that might be offered by Simmonds specifically to Raz’s central jurisprudential thesis discussed above. <sup>39</sup> Simmonds’ view runs counter to the view of Raz and his refutation of Raz would specifically make use of the rule of law to undermine Raz’s jurisprudential proposal. <sup>40</sup> Simmonds would argue that the account of authority that Raz proposes skates over a question about the nature of law. If we are to hold, as we are by Raz,

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<sup>37</sup> Simmonds, *Law/Moral Idea*, *supra* note 9.

<sup>38</sup> There are also other strong affirmative defences of Fuller. Robert S. Summers, for example, explains the affirmative moral value of the rule of law in terms of fairness. The desiderate of the rule of law, Summers says, “[S]ecure that the citizen will have a *fair* opportunity to obey the law [emphasis in original]”, Robert S. Summers, *Lon L. Fuller* (Stanford: Stanford University Press, 1984) at 37. One could that that Summers’ affirmative case for the morality of the rule of law could be put in terms of Simmonds’ more which ranging theory, which will be developed in the present section of this paper.

<sup>39</sup> Above in Section 1.1).

<sup>40</sup> Simmonds’ arguments here are primarily against the rule of recognition, but they would also apply to theories of law that attempt to say that purported law can exist as law in virtue of its social facticity before the purported law interacts with morality or the moral claims of citizens. Thus, the criticisms summarized here apply to Raz’s idea that citizens can turn to law as an exclusionary reason in the process of practical reasoning.

that legal reasons are able to replace other kinds of reasons in the activity of practical reasoning, then it is essential for us to know what it means to give a legal reason. What is the nature of a legal reason? Or, what are the conditions for giving a legal reason?

Carrying over the case from Fuller's theory about the rule of law, Simmonds argues that we can only know that we are dealing with the category of law, and thus giving legal reasons, if we know that we have law on the matter for which we are giving legal reasons. That is so because, before we can purport to give legal reasons, we must be able to have some way of categorizing our reasons as belonging to the category of "law" or "legal".<sup>41</sup> How can a rule or a norm, more generally, be categorized as belonging to the category of "law"? Simmonds argues:

A fundamental question for legal theory concerns the basis of legality. How does a rule acquire the character of law? Not by the simple fact of enactment, we may say: for the enactment of rules can create law only when the enactment was itself authorized by law. Nor by the simple fact of acceptance by some powerful cadre of 'officials': for law is invoked by judges as a justification for their decisions, and judges could not intelligibly invoke the mere fact of their acceptance of a rule (for what might be wholly self-regarding reasons) as a justification for their decision.<sup>42</sup>

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<sup>41</sup> Before a person can act on the basis of a legal reason (and therefore an exclusionary reason) s/he must know whether the purported exclusionary reason is indeed a legal reason. S/he must know how to identify a legal reason.

Note also that Raz's theory of law's preemptory force suffers an extra set of problems that will not be discussed in the subsequent sections of this paper because it applies so specifically to Raz's argument rather than to positivist theories in general. Simmonds argues in *Law/Moral Idea*, *supra* note 9 at 162, that Raz's argument about law's preemptory force is also undermined in terms of its positivism by its own condition of preemptory force. Simmonds argues there that "[T]he idea of law is fully realized only when we feel that we can rely upon the compliance of others, and this we cannot do in the absence of coercive enforcement of the rules". Simmonds does not connect the dots of this argument here, it is fairly straightforward. If "coercive enforcement of the rules" is necessary for the full realization of law even when law is conceived in terms of Razian preemptory rules, then we might ask whether there are any conditions for the "coercive enforcement of the rules". Here again, the rule of law comes in as a necessary condition. To cite some quick examples, one cannot have coercive enforcement of the rule of the desiderata of generality (i.e. the requirement that the purported legal system actually have rules) and logical consistency are not respected. The rule of law and morality have here a way to establish a necessary connection between law and morality not just by having priority of necessity in relation to Raz's theory of the authority of law, but by actually being part of the conditions for the full realization of the idea of law under Raz's own theory.

Additionally, as will be seen immediately following this footnote, Simmonds argues that social facts and acceptance by officials are not sufficient to identify law. The rule of law is one of the conditions for knowing that the reasons in question are *legal* reasons.

<sup>42</sup> *Ibid.* at 159. Simmonds restates this idea at other instances. For example, he argues at 170: "[L]egality cannot simply be a matter of the derivability of one rule from another, or the subsumability of an action



Since legality is one of the necessary conditions for the existence of law, we can only know that we have law if law accords sufficiently with legality (specifically with the principles of legality). The rule of law, under this account, has priority as functional condition over Raz's functional argument from dispute resolution. Even if Raz does indeed provide a convincing account of a functional condition for the existence of law, and even if it is able to forestall the entrance of morality into law through an inclusive positivist approach, Raz's theory could not stand against the Fullerian approach because Fuller's functional condition must be achieved before Raz's functional condition can even be considered. As in the case of a digital media player, which must be able to store media (or possibly access some source for streaming) before it can be used to output media for consumption, law must also have the capacity to guide human conduct before it can be used to resolve disputes in the way that Raz proposes.<sup>43</sup>

Under Fullerian procedural naturalism, the principles of legality (i.e. the functionally prior conditions) are moral principles. We are back where we left off after Fuller made his contribution to legal philosophy. Fuller's idea, because it is a necessary condition for the existence of law, is able to show a targeted necessary connection between law and morality through the rule of law.

Simmonds takes this idea of the rule of law's priority among the various conditions for the existence of law and develops an adjudicative account from it.<sup>44</sup> He says:

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under a rule. Such derivability or subsumability represents legality only when the rule invoked as a source of validation is itself a law. The legality of that validating rule (its status as a law) cannot always be derived from a superior rule, for this would involve an infinite regress. Nor can the regress be blocked by the idea of derivability from a rule of recognition that is simply accepted by the judges rather than the validating by a higher derivation. For a rule of recognition accepted by the judges can confer legality only if it is itself the rule of recognition of a system of law".

See Simmonds' detailed rebuttal of Hart and Hart's view about place of the rule of recognition as a criterion of legality in *ibid.*, c. 4.

<sup>43</sup> This functional priority does not necessarily mean that the rule of law is more important or even more functionally important than Raz's functional point. It simply means that the rule of law must be satisfied before the authority of law in any discussion about whether a particular social norm meets the conditions of being "law".

<sup>44</sup> The following quotations on adjudication, including in the subsequent footnote, mainly cite the rule of recognition as the positivist validity condition over which the rule of law has priority in terms of the provision of a theory of adjudication. However, I have been suggesting over the past several pages that Simmonds also believes that the rule of law has priority over the condition of law's authority. It is fair to suggest that Simmonds would be of the same view when developing his theory of adjudication. This is to

In fact, the rule of recognition can only ever form an abbreviated statement of the way in which the value of legality bears upon the judge's duty. The judge's duty is not fully reducible to a duty to follow a basic rule of recognition, but a much broader duty of fidelity to law. To determine the precise scope and content of this duty, a judge must reflect upon the idea of law, in the light of our collective historical experience of attempts to realize that idea. The idea of law is the idea of a domain of universality and necessity within human affairs, making it possible to enjoy a degree of freedom and independence from the power of others, in the context of life within a political community.<sup>45</sup>

He develops it in more detail with respect to a specific aspect of the adjudicative task, explaining:

Judges order sanctions against defendants, and justify this by setting out the relevant laws. They do not justify the imposition of sanction by pointing out that the defendant has violated a rule that the judges happen to accept. Nor do they justify the sanction by pointing out that the rule violated was a just rule. Nor do they tell us that, given all of the circumstances, the enforcement of the rule is morally justified. Instead, they point out that the rule violated was a law. This is not an irrelevant classificatory footnote to the judgment, but its foundation: the judge does not conclude that enforcing the rule is the right thing to do (given its derivability from the rule of recognition, or its justice, or a host of other considerations) and then add that, as it happens, the rule is a law. It is the fact that the rule is a law that provides the basis for the justification of the decision. The conception of law implicit within this practice is one wherein the legality of a rule is fundamental to its justificatory force.<sup>46</sup>

With these arguments, Simmonds shows that, as it pertains to the rule of law, positivist theories, including Raz's theory about the authority of law, are incomplete, both as legal theories and as theories of adjudication.

If Simmonds is correct in the argument just made and if the rule of law is indeed a moral condition, then Razians will be disappointed to see that they cannot use law's authority as a way to argue that there is no necessary connection between law and morality and that the law does not incorporate morality into it. This is where the debate over the moral nature of the rule of

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say, Simmonds' view of the rule of law's priority over various positivist theses (including the rule of recognition and the authority of law) would carry over in terms of the theories of legal philosophy that have criterial priority when developing a theory of adjudication.

<sup>45</sup> Simmonds, *Law/Moral Idea*, *supra* note 9 at 188-189. I will develop the points about freedom and independence from the power of others at 44-49, just below, in the current section. Those points are more relevant to the moral aspect of this argument, but I have reproduced them in this quote for the sake of context.

On the present point, see also *ibid.* at 196, "The judge's duty is one of fidelity to law, and this is never fully reducible to a duty to follow a basic rule of recognition. For the fact that a rule of derivable from a rule of recognition cannot intelligibly be offered as a justification for a judicial decision unless the judge can claim that the system containing that rule is a system of law".

<sup>46</sup> *Ibid.* at 172.

law becomes relevant. There is a line of defence available to Razians even if Simmonds is right that one cannot know whether a legal reason is being given without knowing whether the purported legal reason abides by the rule of law. If the above<sup>47</sup> Razian arguments against the moral quality of the rule of law are correct, Razians can then admit that satisfaction of the rule of law, to them a *mere condition of efficacy*, is needed in order to provide positivistic Razian reasons while continuing to maintain that legal reasons replace moral reasons in practical reasoning, as a matter of political philosophy, and in terms of achieving what Raz construes to be a necessary condition for the existence of law, namely, law's authority. Razians will want, then, to continue to assert that legality and its principles are purely conditions of efficacy and are not themselves moral conditions. I have already given a general argument above from Hutchinson and Waldron about why this line of defence will not succeed for Raz.<sup>48</sup> However, there is a more morally-focused case to be made from a more committed natural law perspective. Toward that end, let us examine Simmonds' argument for considering the principles of legality to be moral conditions.

There are two approaches that Simmonds takes in making his argument. The first is to propose a plausible positive moral content for the rule of law. Simply, if the principles of legality are moral conditions, which moral values do they pursue? Simmonds says that the rule of law is tied to the value of the autonomy of human beings. This is a familiar argument about the positive moral content of the rule of law. As Rundle says:

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. This is not a moral objective that is imposed on the enterprise of lawgiving from without. It is, rather, simply something that follows from the formal distinctiveness of law as the enterprise of subjecting human conduct to the governance of general rules.<sup>49</sup>

Simmonds, in making the argument on this front, draws out the relevance that such a claim has for moral and political philosophy. In making this argument, he shows the way in

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<sup>47</sup> Above, in Section 2.2) at 29-30.

<sup>48</sup> Above, in Section 2.2), Section 2.3.1) at 31-33, for my summary of the positivist critique of the moral status of the rule of law (a critique which I called the "Compatibility and Amoralism Thesis"); Section 2.3.1) at 33-37, for my summary of scholarly responses to the weak version of the critique; and 2.3.1) at 37-39, for my summary of scholarly responses to the strong version of the critique.

<sup>49</sup> Rundle, *Forms Liberate*, *supra* note 1 at 2. See also *ibid.* at 3, where Rundle says, summarizing an aspect of Fuller's legal theory, "[L]aw is also intrinsically moral for how its form—that of governance of general rules—presupposes the legal subject's status as a responsible agent. Thus, law is also intrinsically moral for how, if it is to function, it must maintain and communicate respect for that status of agency".

which such a view about the moral content of the rule of law explains various other theses about governance by law. He says:

One possibility would be to say that the conditions of legality are the conditions of liberty as independence. For the fact that a rule forms one part of a system of rules embodying those conditions would explain many of the features that we tend to associate with legality. Thus it would explain why we tend to associate legality with the subsumability of actions under rules, and the derivability of rules one from another. It would also explain how the legality of a rule can intelligibly form part of a justification for the state's use of force, or for a judicial decision; and it would explain why the precise nature of legality has been continuously contested, so that 'the nature of law' continues to be a major philosophical problem that is not capable of being resolved by simple description of familiar institution. Perhaps legal thought is at bottom a continuous reflection upon the possibility of realizing (and so fully comprehending) its own guiding ideals.<sup>50</sup>

In the course of playing out a thought experiment about the move from a pre-legal to a legal world, Simmonds looks into the role that the rule of recognition and the rule of law play in this transition. As a conclusion of this allegory, he argues, "If the invention of a rule of recognition *can* be regarded as a step from the pre-legal to the legal world, this is perhaps because the invention embodies a new insight: the understanding that it is only by creating a domain of universality and necessity within human affairs that values of freedom and independence can effectively be realized".<sup>51</sup> The way in which law creates a domain of

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<sup>50</sup> Simmonds, *Law/Moral Idea*, *supra* note 9 at 159.

<sup>51</sup> *Ibid.* at 184. See the allegory at 182-189 [emphasis in original].

Rundle, in *Forms Liberate*, *supra* note 1 at 2 [footnote omitted] helpfully discusses what it means, from the perspective of moral and political philosophy (with a focus on the value of individual autonomy) to be in one particular kind of pre-legal world (or non-legal world) as opposed to being in the legal world. "Fuller's vision of law begins and never sways from the view that to label something as 'law' is to designate a distinctive mode of governance. Law is a formally recognisable alternative to rule by men, and this difference is made especially clear when we consider the status that is enjoyed by the subjects of a legal as opposed to some other kind of order. To be a legal subject, Fuller insists, is not merely to be a member of 'a subservient populace ready to do what they are told to do', but rather to be a participant in a distinctly constituted social condition in which one is respected as an agent". Seeing this kind of distinction can help fill out the details of transition that Simmonds is discussing and make clear what is gained by governance through law.

N.B., though, that Simmonds is not in agreement that the rule of recognition does mark the step from the pre-legal to the legal world. After constructing a thought experiment dealing with the step from the pre-legal to the legal world, in which Simmonds shows the way in which a legal system could come to exist solely on the basis of the clear definition and enforcement of what would have been customary rules for a society that resolved conflicts largely by compromise rather than by the strict application of rules, Simmonds, in *Law/Moral Idea*, *supra* note 9 at 186-187, says, "The activity of doctrinal scholarship has its roots here, in the attempt to articulate as discrete rules the pattern of expectations and practices that

universality and necessity within human affairs is of course, in the view of Fuller and Simmonds, through the rule of law.<sup>52</sup>

Importantly, again, Simmonds develops the idea into a theory of adjudication. Refer to the earlier quotation<sup>53</sup> in which Simmonds mentions the relevance that freedom and

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have made up the customary life of a community. There may also be an effort to integrate the provision of formal legal procedures and remedies with the background of customary understandings within which they operate. At some much later stage a distinct set of criteria for the 'validity' of legal rules might emerge (a 'rule of recognition'). But, far from being the step that marks off the legal from the pre-legal world, the development of such criteria tends to be an expedient aimed at addressing deficiencies in what is already fully recognizable as a legal order....The step from the pre-legal to the legal world is to be found, not so much in the introduction of a specific institution such as the rule of recognition, but in the growing appreciation that, by creating a domain of universality and necessity within human affairs, we may realize forms of freedom and independence that would not otherwise be conceivable". Preceding the existence of a legal system would have been a customary society in which members could not count on the application of those customary norms to resolve disputes but would instead need to proceed on the basis of compromise for the sake of continued harmony between the disputants, without the benefit of clear rules to structure the relationships and dealings between the members of society.

<sup>52</sup> Simmonds, *Law/Moral Idea*, *ibid.* at 188. In the last several pages, above, notes 45, 46 and accompanying text, and, more generally discussed at 41-44, above, in the present section, I summarized how Simmonds applies the *functional* step in the argument to the case of adjudication. Here, I explain how Simmonds applies the *ethical* step in the two-step Fullerian procedural naturalist argument (this two-step argument was discussed above, in Section 2.1), especially note 9 and accompanying text) to the case of adjudication. In the present citation, *ibid.* at 188, consider that Simmonds, making the *ethical* step in the argument, says, "[I]t is insufficient to explain how judges might be *guided* by the rule of recognition, for judges must *justify* their decisions. The mere fact that the decision is derivable from a rule of recognition accepted by the officials could not intelligibly be offered to the litigants as a reason that *justifies* the decision. For this reason, we should not think of legality as simply a matter of derivability from a basic rule of recognition. For such derivability will confer legality only if the system, of which the rule of recognition forms part, is itself a system of law. The features that qualify a system as legal in character (features provisionally identified in Fuller's eight *desiderata*) necessarily entail the provision of domains of optional conduct that are independent of the will of others. It is the provision of such domains of conduct that forms the value of legality, and provides the basis for the legal judgment's justificatory force" [emphasis in original; Simmonds refers to his discussion in *ibid.*, c. 4 as well].

He does the same in *ibid.* at 191, arguing "To provide a justification, the rule must be derivable from a system that exhibits certain properties that go beyond the acceptance of criteria of recognition. Those properties will mark the system as one that approximates to the ideal of the rule of law; and they will be logically tied to the notion of freedom as independence from the power of others.

There is, therefore, no sense of 'law' in which law can be detached from the value that we call 'the rule of law', or in which legality is reduced to a simple matter of derivability from a rule of recognition...What follows from this is that judicial invocations of the law, in the context of justifications for decisions, must be construed as ultimately appealing to the ideal (of the rule of law) from which they derive their justificatory force".

<sup>53</sup> Above at note 45.

independence from the power of others have in allowing judges to apply the law in a way that is consistent with the judge offering the law as a justification for the application of the norms that will be imposed. Of particular interests here is the fact that Simmonds also states the adjudicative aspect of the argument from the perspective of those who are subject to adjudicative decisions by the court. He says:

[L]egal systems offer us less interpretive guidance the further they depart from the requirements of justice. The more remote from justice that a body of law may be, the greater the scope that it will leave for the exercise of ungrounded choice by the judge who must interpret its provisions. Since legality is the set of conditions within which we can be independent of the power of others, and since subjection to the choices of the judge is a clear subjection to the power of another, significant departure from justice tends to breed departure from legality.<sup>54</sup>

This reverse perspective on the act of adjudication is important for a full understanding of the relevance of Simmonds' theory to practical reasoning, and thus as a robust counter theory to Raz's authority-based and positivistic account of law and law's relationship to practical reasoning.

This proposal is important both for ethical reasons and also for reasons of specific relevance to political philosophy. At a purely ethical level, if the conditions of legality are the conditions for the exercise of independent decision-making, the conditions for human beings to be self-guiding, then the conditions of legality play a central role in one of the most widely-supported and perhaps foundational values of ethics.<sup>55</sup> At the level of political philosophy, autonomous decision-making is one of the central values in understanding why *government (or the state) itself* and the *use of force* by the government (or the state) are justified. This, indeed, is one of the central questions in understanding why *law*, as a set of norms imposed by the

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<sup>54</sup> Simmonds, *Law/Moral Idea*, *supra* note 9 at 198. Simmonds's view on the relevance of justice in relation to the rule of law is considered below, in this same section at 51-58. For now, let us focus on the relevance that the present quote has for the purpose of proposing an adjudicative model that is based on respect for individual autonomy.

<sup>55</sup> Numerous philosophical theories of ethics, government, etc. have treated personal autonomy as an important ethical value. To choose only a few examples from the rich western canon on the subject, consider: (1) the deontological ethics of Immanuel Kant in *Groundwork of the Metaphysics of Morals* trans. & analyzed by H.J. Paton (New York: Harper & Row Publishers Inc., 1964) at 69-71, 74-77, 87-89, 97-99, 110-115; the political philosophy (especially the state of nature theories of) John Locke, *Second Treatise of Government*, ed. by C.B. Macpherson (Indianapolis: Hackett Publishing Company, 1980) at 52-65, 107-124 & Thomas Hobbes, *Leviathan*, ed. by Edwin Curley (Indianapolis: Hackett Publishing Company, 1994) at 106-110, 136-145; finally, see the more recent political philosophies of John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Belknap Press, 1999) at 171-221 & Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 10-53.

state, is justified. Thus, Simmonds provides a robust way of understanding the moral value of the rule of law.

To put this into a helpful moral framework, consider a distinction that Jeremy Waldron has drawn between two different kinds of moral significance. These two are: (1) contingent moral significance and (2) non-contingent moral significance. Contingent moral significance is when a value is morally significant “[S]imply because the properties of a system of rule[s] associated with observance of the [value, in this case the principles of legality,] happened to be properties that *other* moral principles made morally significant”.<sup>56</sup> On the other hand, non-contingent moral significance is when “[T]he moral significance of the [value, in this case the principles of legality,] were not coincidental, if it were such that the principles of legality themselves embodied certain moral principles or moral values”.<sup>57</sup> Simmonds’ account of the moral value of legality is clearly an example of non-contingent moral significance. The principles of legality do not simply have moral value because they happen to promote personal autonomy. They *themselves embody* the value of personal autonomy, are themselves valuable as a way of organizing government and a political society, and finally, in the case of Simmonds’ argument about the possibility of achieving certain values (notably the rule of law and justice) only in conjunction with one another<sup>58</sup>, have “criterial connections”<sup>59</sup> with law and provide the avenue by which other moral values have the same kind of criterial connection with law.

The second kind of argument used by Simmonds in arguing that the conditions of the rule of law are moral conditions is a refutation of the idea that the moral character, or lack thereof, of the rule of law can be determined simply by pointing out that wicked regimes are capable of abiding by the rule of law. This defence of Fuller was considered above in my summary of the arguments given by Hutchinson and Waldron.<sup>60</sup> Simmonds gives a similar argument, but it is worthy of independent consideration in light of the arguments given by

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<sup>56</sup> Waldron, “Hart’s Equivocal Response”, *supra* note 9 at 1165 [emphasis in original].

<sup>57</sup> *Ibid.*

<sup>58</sup> More below, in this same section at 51-58, about the ability to abide by, or vindicate, certain moral values only in conjunction with one another.

<sup>59</sup> Waldron, “Hart’s Equivocal Response”, *supra* note 9 at 1140, at which Waldron explains criterial relations as being a situation in which a concept, idea or other condition is “among the necessary criteria for the proper application of” a concept, and at 1141 where he uses the term “criterial connection” within the meaning just given for criterial relations.

<sup>60</sup> Above in Section 2.3.1).



Simmonds about the positive moral content of the rule of law in the first of these two arguments. Simmonds' second response to the critique of procedural naturalism points out that it simply does not follow that a set of principles is not ethical in nature simply because it is possible for a government to act in accordance with the principles and yet still be immoral. The conclusion that a norm or set of norms are amoral<sup>61</sup> does not follow from the norm's/set's inability to secure goodness as the definitive moral quality of the system of which the norm/set of norms is a condition of validity.<sup>62</sup> The rule of law does push in a particular direction. The non-determinativeness of that push does not imply moral neutrality. Simmonds, arguing on the basis of the positive moral content of the rule of law, says:

Hart emphasizes the importance for legal theory of the 'internal point of view', and claims that this point of view need not be a moral attitude of any sort. Officials, he tells us, can accept and apply a system of law for entirely non-moral prudential reasons. In this, he may well be correct. But, unfortunately for his argument, all of the contexts in which officials can accept and follow such a system for non-moral reasons are parasitic upon moral considerations, or are dependent upon the [legal] system already existing. Given the existence of a system of law, the officials of a wicked regime may well find that they can exact and enforce laws that advance their wicked goals. But this does not demonstrate that the establishment of a system of law where none exists would itself help to advance their wicked goals. A system of law involves certain commitments, in particular a commitment to use force only against those who have violated the rules, and such commitments would not be serviceable for wicked goals, for (contrary to that claims of some positivists) such restrictions on the use of violence would not serve to increase the efficiency of the regime's pursuit of its goals, but would rather impede that pursuit. Wicked regimes may maintain existing legal systems, but when they do this they do it in order to exploit the moral value that is widely associated with government by law, or simply because the strategic behaviour of the individuals composing the regime makes it impossible to capture the gains that would flow from a wholesale abandonment of legality.<sup>63</sup>

If that is true, then a wicked regime may abide by the rule of law but it does so against an ethically rich counterforce.

Other legal philosophers, such as the natural law theorist John Finnis, have also argued that the fact that a wicked regime can abide by the rule of law does not prove that the rule of law is an amoral condition of efficacy. Finnis says that "A tyranny devoted to pernicious ends has no self-sufficient *reason* to submit itself to the discipline of operating consistently through the demanding processes of law, granted that the rational point of such self-discipline is the very

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<sup>61</sup> I.e. A norm's status as a mere condition of efficacy rather than also as a *moral* condition (a norm belonging to the category of morality).

<sup>62</sup> Simmonds' argument is highly similar on this front to those of Waldron and Hutchinson summarized above in Section 2.3.1).

<sup>63</sup> Simmonds, *Law/Moral Idea*, *supra* note 9 at 188 [footnotes omitted].



value of reciprocity, fairness, and respect for persons which the tyrant, *ex hypothesi*, holds in contempt”.<sup>64</sup> According to Finnis, this is because “Adherence to the Rule of Law (especially the eighth requirement, of conformity by officials to pre-announced and stable general rules) is always liable to reduce the efficiency for evil of an evil government, since it systematically restricts the government’s freedom to maneuver”.<sup>65</sup> Thus, although the rule of law can exist in both the context of a just regime and a wicked regime, the fact that a regime can abide by the principle in both contexts does not show that the rule of law is merely a morally neutral condition of efficacy. In fact, the rule of law, although not being able to prevent all wickedness, works directly against it in specific ways. The rule of law may not always be able to redirect a state that is enacting wickedness into its law; however, this inability does not mean that the rule of law is indifferent towards the moral quality of a state’s law, especially given that the rule of law attempts to guide the law away from specific kinds of moral wrongs. This is the insight of Simmonds and Finnis in terms of the moral status of the rule of law.

In addition to making the case just stated in favour of the internal *morality* of law, Simmonds expands the argument for the morality of the rule of law in an innovative way. He does so by dealing with the debate over the ontology of normative values at the levels of moral and political philosophy. Specifically, his concern is the debate over the ontological relationship that normative values have with one another. Simmonds rejects both pluralism about values, which holds that “[V]alues [are] distinct and competing”<sup>66</sup> such that “[P]olitics must at some point be a matter of ungrounded choice between equally fundamental and incommensurable values”,<sup>67</sup> and the opposing view, monism about values, which holds that values are “[M]utually entailing or at least mutually compatible”<sup>68</sup>. Against monism, he says that values can come into conflict such that the vindication of one does undermine the vindication of the other,<sup>69</sup> and, against pluralism, he criticizes it on the basis that it can “[E]ncourage an anti-rationalist and voluntarist approach to politics that emphasizes the need for sovereign decision and discourages

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<sup>64</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 273 [emphasis in original].

<sup>65</sup> *Ibid.* at 274.

<sup>66</sup> Simmonds, *Law/Moral Idea*, *supra* note 9 at 176. Simmonds discusses pluralism about values in more detail in *ibid.* at 74-76.

<sup>67</sup> *Ibid.* at 176.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.* at 74-76, and also acknowledged throughout 177-180, especially 180.

reasoned reflection on politics”.<sup>70</sup> Simply, monism proposes a vision that is not realistic and pluralism proposes a view of the relationship between values that makes reasoning about them too readily cynical and prepares us to stifle the use of reason through the whole process of the pursuit of values (we must simply choose between values). As an alternative to the understanding of the relationship between values, Simmonds proposes that:

Perhaps values stand in a more complex relationship, both to our practices and to each other, than we are inclined to imagine. Perhaps our practices express values that they fail to realize, so that we can understand the practice only by its approximation to, and orientation towards, the value. Perhaps certain values (complex political goods, such as that aspect of freedom that consists in independence from the power of others) can be fully understood only by reflection upon their embodiment in practice. Since practices can exist and possess an identity only within broader patterns of ethical life, they may embody values that are to a large extent distinct yet nevertheless bound together in complex ways. Perhaps, for this reason, some values can compete yet can fully be realized only in conjunction.<sup>71</sup>

Simmonds uses this approach in reasoning about the relationship between the rule of law and other values. If legality does have moral value, then taking this moral value into consideration, especially in the context of practical reasoning, will require the consideration of whether, and how, other values, such as justice, and even respect for individual autonomy (the value that is embodied in the rule of law), fit into Simmonds’ normative structure, a structure in which some values can move in different directions and yet be vindicated only in conjunction with one another.

Simmonds elaborates this account of the relationship between values in the context of discussing the notion of fidelity to law. He raises a problem related to fidelity to law that is involved in the interpretive activity of adjudication, saying, “If we assume that the law consists of a finite body of rules, we are committed to the idea that there are penumbral cases that are not resolved by the rules. How then does the judge’s duty [of fidelity to law] bear upon the decision of those cases?”<sup>72</sup> Simmonds is talking here about substantive legal rules. Pursuing this line of reasoning, Simmonds notes that no “default strategy”, i.e. no default rule that is specifically supposed to providing assistance for substantive interpretive challenges in penumbral cases will work because the boundary between core and penumbral cases cannot be

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<sup>70</sup> *Ibid.* at 76.

<sup>71</sup> *Ibid.* at 176.

<sup>72</sup> *Ibid.* at 196.

discerned.<sup>73</sup> Thus, such a rule would be unhelpful because, “Fidelity to law requires an effort to reduce such uncertainties whenever reasonably possible, and it therefore precludes adoption of a default strategy”.<sup>74</sup> On this basis, Simmonds concludes that:

In the penumbral case, the best the judge can do (from the viewpoint of legality) is to decide the case justly. For justice consists of objective principles that apply to all cases with equality and impartiality (to doubt this is to say that there is no justice, only beliefs about justice). In the absence of a clearly applicable legal rule, the closest that the judge can come to respecting the value of independence from the will of another is to be guided by his understanding of the value of justice.<sup>75</sup>

It is interesting that, in Simmonds’ view, the impetus for the judge to give an interpretation that is guided by justice comes not only from the requirements of general morality but also from the duty of fidelity to law. Additionally, Simmonds argues that the impetus for a judge to be guided by justice applies not only to penumbral cases but to every case that arrives before him/her. This is because of Simmonds’ reasoning that ambiguities between core and penumbral cases make the boundary between these two categories indiscernible.<sup>76</sup>

But how, exactly does a justice-guided interpretation reduce uncertainties about law? The explanation proposed by Simmonds is that a commitment to justice-guided interpretation moves the legal system away from the uncertainty that is created by allowing the legal system to proceed on the basis of ungrounded choice, a source of uncertainty. He says, “[L]egal systems offer us less interpretative guidance the further they depart from the requirement of justice. The more remote from justice that a body of law may be, the greater the scope that it will leave for the exercise of ungrounded choice by the judge who must interpret its provisions”.<sup>77</sup> But in the opposite direction, a justice-guided interpretation provides grounding for legal interpretation by orienting that interpretation towards a value that is objectively worth pursuing. This cannot be done, however, without the rejection of pluralism about values, which posits ungrounded choice not as a virtue, but as a reality of reasoning about values.

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<sup>73</sup> *Ibid.* at 196 [footnote omitted].

<sup>74</sup> *Ibid.* at 197.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.* at 196.

<sup>77</sup> *Ibid.* at 198.

Dealing also with the question of the relationship between values, Simmonds argues about what it takes to vindicate the moral values of justice and legality. As noted just above,<sup>78</sup> Simmonds re-emphasizes that, often, an individual moral value cannot be achieved on its own. Instead, the moral value must be achieved in conjunction with other moral values, even moral values that, in some respects (although certainly not in totality) conflict with original moral value that one hopes to vindicate.<sup>79</sup> In Simmonds' account of moral ontology, one ethical value will sometimes depend on another, or two or more values may be mutually supporting. Simmonds makes the case that this is true of the moral values of justice and legality:

Since legality is the set of conditions within which we can be independent of the power of others, and since subjection to the choice of the judge is a clear subjection to the power of another, significant departure from justice tends to breed departure from legality.

What this suggests is that, while justice and legality are distinct and can compete with each other, legality can only fully be achieved where justice is achieved also. For only when the law is just will the judge's 'justice-guided' interpretations be a smooth and natural fit for the law.<sup>80</sup>

Of special note is that Simmonds argues that justice and legality are in a relationship that is mutually supporting, specifically a relationship of mutual necessity. Thus, he says:

But not only can legality only be fully achieved where justice is also achieved, but the reverse also holds: justice cannot be fully realized without legality. For the judge's decision is just only if it can be shown that the sanctions inflicted upon the defendant contain nothing arbitrary: every feature of the treatment of any litigant must be shown to stem from some general consideration that applies impartially to everyone....[I]ndeterminacy can be overcome by having established rules of law that implement some specific scheme for the realization of justice....Legality and justice are distinct concepts and values, and are capable of competing with each other. But each of the two values can be fully realized only in conjunction with the other. Outside the context of law, the idea of justice can seem empty and arbitrary: even if invoking justice is not like banging on the table to reinforce a demand, it still seems to leave plenty of room for individual variation of opinion. Detached from its background in justice, the law will be a set of rules permeated by penumbral situations where the will of the judge must be decisive. Only in the union of legality and justice is either idea fully realizable.<sup>81</sup>

The ontological aspect of Simmonds' unique proposal about the morality of the rule of law is thus based on a mutually necessary connection between justice and the rule of law, where the rule of law supports our pursuit of justice by helping us avoid indeterminacy in our institutional pursuit of justice and justice supports the rule of law by orienting our pursuit of justice away from ungrounded choice (another kind of indeterminacy). This mutual necessity is

<sup>78</sup> Above, in the present section, note 71 and accompanying text.

<sup>79</sup> Simmonds, *Law/Moral Idea*, *supra* note 9 at 176-182.

<sup>80</sup> *Ibid.* at 198.

<sup>81</sup> *Ibid.* at 198 [footnote omitted].

seen in the context of the idea of fidelity to law and shaped by a recognition of complex relationships between values, as proposed in Simmonds' account of moral ontology.

As a brief note in relation to Simmonds' view of the mutual necessity between justice and the rule of law, consider Fuller's own discussion of the connection between legality and justice. He develops an early version of the arguments that Simmonds elaborates so richly, and which I hope to introduce into consideration within the field of philosophical legal ethics. Fuller argues that a legal system must vindicate the rule of law to some extent for it to even be possible to ask basic questions of justice with respect to that legal system, which he refers to as a "meaningful appraisal of the justice of law".<sup>82</sup> Additionally, Fuller explores the way in which the rule of law contributes to the vindication of justice, arguing a ruler or lawmaker will act more morally responsible "[I]f he is compelled to articulate the principles on which he acts".<sup>83</sup> More broadly, Fuller argues about the necessity of law for the vindication of moral values within society, including the way in which law gives these values practical/applied/actionable meaning.<sup>84</sup> In the two passages just cited, Fuller is boldly making an argument that might be used to support one end of the mutual necessity between law and morality. He is articulating one way in which legality is necessary to stave off the kind of indeterminacy that would undermine the vindication of justice.

Moreover, while discussing the practical pursuit of the rule of law, Fuller makes a point relating to interpretive guidance and the connection between law and *morality*. His argument here can be seen as containing an implication of the structure of value relationships (especially with respect to the practical vindication of values) in light of Simmonds' proposed mutual necessity between the rule of law and moral values. This is an idea that could be developed with a particular interest on *justice* as a moral value if one were to want to take that focus. Fuller argues that the implementation of moral rules within a legal system has a certain kind of relationship with the vindication of the desiderata of the rule of law. Fuller says that, "[T]o the extent that the law merely brings to explicit expression conceptions of right and wrong widely shared in the community, the need that enacted law [abide by certain desiderata such as the

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<sup>82</sup> Fuller, *Morality of Law*, *supra* note 3 at 157, and continued at 157-159.

<sup>83</sup> *Ibid.* at 159.

<sup>84</sup> *Ibid.* at 205-207.

desiderata of promulgation, clarity and retroactivity] diminishes in importance".<sup>85</sup> Using Simmonds' language, one could argue that Fuller's proposed structure is sensible because the vindication of morality reduces ungrounded choice. Some desiderata are perhaps partially designed to ensure that law can provide guidance in case of ungrounded choice. This may mean that, for the ungrounded choice to be legal and to guide conduct, the ungrounded choice must be promulgated, clear and prospective. However, if the choice is not ungrounded, then, understandably, the importance of strictly vindicating some desiderata may lessen because the purpose of the desiderata is achieved in other ways or is less applicable to the case at hand.

Let me develop this idea at a deeper level using some of Simmonds' ideas. If the mutually necessary connection between the rule of law and justice addresses parallel challenges in each value, then perhaps the vindication of one value can address the challenge to the extent that the vindication of the other value is less necessary with respect to addressing the parallel challenge. Therefore, if the mutually necessary connection between the rule of law and justice addresses the challenge of indeterminacy as that challenge pertains to the vindication of both values, then perhaps the reduction of indeterminacy by way of the vindication of one of the values, let us say justice, can lessen the need to vindicate the rule of law *to the extent that we pursue the vindication of the rule of law for the rule of avoiding the problems of indeterminacy*. Practically speaking, the reduction of indeterminacy by way of the vindication of the value of justice may mean a lesser need to spell out every aspect of law by way of statutory law. Some benefits that statutory law provides with respect to indeterminacy may be achievable by way of the vindication of justice, for example.

The Fullerian arguments cited and expanded upon here provide support for, and development of the structure and implications of, the idea of mutual necessity proposed by Simmonds as part of the ontological aspect of Simmonds' argument. The result of Simmonds' analysis, especially taken in light of Fuller's own views, is a robust place for morality within the law by virtue of the moral value that legality itself embodies and with which it is necessarily connected.

Returning to the Razian model, then, it turns out that since, on Simmonds' view, legality is a necessary condition for giving legal reasons and since legality cannot be achieved without

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<sup>85</sup> *Ibid.* at 92.

justice, it is also necessary that purported *legal* reasons be consistent with justice in order for them to indeed be *legal* reason. Under this view, justice is in a transitive relationship of necessity with law. If justice is a necessary condition for the rule of law and the rule of law is a necessary condition for the existence of law, then, by way of the mediating condition of the rule of law, justice has a necessary connection with law. On Simmonds' view, before we can even talk about law's authority, we must establish the existence of law (or at least the satisfaction by law of conditions (such as the condition that law must be able to guide conduct) that are both necessary for its existence and necessary to even be able to ask the question of authority). If one of the conditions for the existence of law is the vindications of the rule of law and of justice, then these two conditions take conceptual priority over the ability of law to act as an authority. The vindication of justice thus has criterial priority, by way of its necessary condition with the rule of law, over the authority of law as a condition for the existence of law.

For the Fullerian, this argument both broadens the reach of procedural naturalism (in applying to conceptual analysis of law, theories of adjudication, and now, even practical reasoning about law) and makes it more of an ethically rich theory. If correct, the argument is deeply problematic for the Razian and for other positivists who wish to critique the procedural naturalism of Lon Fuller as merely being a condition of efficacy. It may still be true that the peremptory answer that is provided when one considers legal reasons in light of the rule of law and associated moral values such as justice would not accord with the answer that morality would have purely on its own terms, *all things considered*. Thus, this does not mean that the entirety of morality would be determinative over the nature, content or moral excellence of law. An exclusionary reason might ultimately be a legal reason that is shaped substantially by the necessary moral requirements introduced by the rule of law and yet still deviate from the norms of general morality overall. Legal reasons, even abiding by the necessary moral conditions of the rule of law, may replace certain kinds of moral reasons that underlie a dispute, and which would be determinative of the resolution of the dispute under general morality. Thus, legal content that abides by the rule of law, and even its necessarily connected values of justice, may still be overall inconsistent with the demands of general morality and this may be completely proper *from a legal point of view*.

However, even despite the circumscribed reach of morality in terms of the standards of legal validity under Simmonds' theory, the legal reasons under this theory would no longer be the kind that Raz supports. Crucially, legal reasons would no longer be purely social facts. Legal reasons could not replace other reasons solely on the basis of their facticity. Because of the criterial priority of the rule of law and the status of the rule of law as a moral condition, there would, instead, be an ability to replace reasons in a dispute only with a norm that is in accordance with the robust internal *morality* of the normative source (i.e. law). This is a strong defence of the Fullerian rule of law thesis, which holds that law must answer, in some key ways, to morality.

### 2.3.3) Luban's Fuller – "Natural Law as Professional Ethics"<sup>86</sup> – Morality through Roles

David Luban's reading of the legal philosophy of Lon Fuller is so deeply tied to the ethics of lawyering that it is indeed properly classified in a robust sense as both a work in legal philosophy and in legal ethics. Luban's discussion of Lon Fuller and legal ethics comes several years before my contribution to this field.<sup>87</sup> Luban reads Fuller's legal philosophy as providing guidelines for the lawyer in his/her role as maker and shaper of policy, as a lawmaker.<sup>88</sup> Perhaps of greatest significance is that Luban, more than anybody else, treats the relationship between legal philosophy and legal ethics as a two way street. Indeed, as Tim Dare has said<sup>89</sup>, the nature of law (in terms of concepts and resulting institutions) will have a profound impact on the features of the lawyer's role on what constitutes the proper approach to the task of giving legal advice. However, according to Luban's reading of Fuller, the nature of the task of lawyering also has profound implications for our understanding of the nature and concept of law. Indeed, Luban even argues that looking at Fuller's theory "as a professional ethics of lawmaking"<sup>90</sup>

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<sup>86</sup> David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) [Luban, *Legal Ethics*] at 99.

<sup>87</sup> See especially David Luban, "Rediscovering Fuller's Legal Ethics" (1998) 11 *Geo. J. Legal Ethics* 801 [Luban, "Rediscovering Fuller"].

<sup>88</sup> Luban, *Legal Ethics*, *supra* note 86, c. 3.

<sup>89</sup> Above in Section 1.1), note 8 and accompanying text; citing Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role* (Farnham, UK: Ashgate Publishing, 2009) [Dare, *Counsel of Rogues*] at 59.

<sup>90</sup> Luban, *Legal Ethics*, *supra* note 86 at 117.



provides an answer to the question of what makes Fuller's account a natural law theory.<sup>91</sup> Luban explains that according to his reading of Fuller, the internal morality of law "derives moral requirements of the lawmaker's job from features unique to the lawmaking enterprise. Unlike other natural law theories, however, the morality implicit in Fuller's concept of law is the morality of lawmaking, not the law made".<sup>92</sup> In a dramatic statement of the profundity of the relationship between law and lawyering, Luban says, "If the possibility of the independent legal advisor is an illusion, so is the possibility of law, understood as anything more than the directives in a society of bad men [in Oliver Wendell Holmes Jr.'s sense] and sheep".<sup>93</sup>

Consider first why Luban says that Fuller's theory is about lawyering. If the internal morality of lawmaking was about a role, would it not be the role of legislating or governing? Luban replies:

Rulers make decisions and devise policies, but decisions and policies are not yet laws. Embodying decisions and policies in the form of laws is a tricky business, technically difficult in exactly the same way that embodying private parties' intentions in a legal contract is difficult – and the people who carry out each of these lawmaking tasks are (what else?) *lawyers*. Thus, the rule of law relies on the professional ethics of lawyers (even if they do not call themselves lawyers or belong to the bar).<sup>94</sup>

Luban is working with an expansive definition of "lawyer" here. It is based on function rather than traditional formal criteria such as even licensing. Taking this view, the most important thing from the perspective of the functional aspect of the rule of law is that guiding conduct according to law requires a specific kind of expertise in the lawmaker, a kind of expertise<sup>95</sup> that is characteristic of lawyers. This expertise is both used to draft laws and to provide advice on them to the non-lawyer.

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<sup>91</sup> As stated above in Section 2.2) at 29, especially notes 12, 13 and accompanying text, the great issue of contention about Fuller's theory is not the idea that the rule of law is a necessary functional condition for the existence of law. On the contrary, the issue is whether the rule of law is also a moral condition. To what extent does the rule of law substantiate natural law theory by providing a necessary connection between law and morality? See my summary of the positivist criticism of Fuller on this point about the moral status of the rule of law in Section 2.2), above.

<sup>92</sup> Luban, *Legal Ethics*, *supra* note 86 at 117.

<sup>93</sup> *Ibid.* at 160.

<sup>94</sup> *Ibid.* at 100 [emphasis in original].

<sup>95</sup> For example, Luban in the previous quote, *ibid.*, cites the role of transactional lawyers in translating the wishes of two parties into a contractual document that encapsulates their agreement in a way that accords and plays off of the norms of society. See also Fuller's philosophical, and partly sociological, discussion of transactional lawyering skills in Lon L. Fuller, "The Lawyer as an Architect of Social Structures" [Fuller, "Lawyer as Architect"] in Lon L. Fuller, *The Principles of Social Order: Selected Essays of*

Having established the functional role that lawyers occupy in ensuring that *law* plays its functional role in guiding conduct, Luban explains the moral aspect of the rule of law in a way that accords with more conventional readings of Fuller. In Luban's account of Fuller, the enterprise of law "presupposes a moral relationship between governors and the governed – a moral relationship aimed at promoting the self-determining agency of the governed".<sup>96</sup> Similar to the values identified by other authors such as Simmonds, Luban says that the values underlying Fuller's theory of internal morality are "respect for the governed, respect for the autonomy of the governed, and trust in the governed".<sup>97</sup> Citizens depend on both the lawyer-as-legislator and the lawyer-as-interpreter. They depend on the lawyer-as-legislator to enact laws and create and maintain a legal system that abides by the internal morality of law and thus indirectly supports the general moral values of respecting the autonomy of citizens. In the context of a system of law that cannot be effectively navigated by a non-lawyer on his/her own, the citizen depends on the lawyer-as-interpreter to steer him/her through this system.

Explaining in deeper detail his view of how morality makes it into Fuller's theory, Luban says:

[Fuller] is not tendering a general commitment to moral realism, but rather making the more specific claim that institutions, particularly legal institutions, although they are entirely human creations, have moral properties of their own – properties that their designers may never have intended or even thought about, and that are connected only indirectly to general morality. Identifying the morality of institutions, the virtues and vices of participating in them, is a matter of discovery, not invention – a matter of reasons rather than fiat.<sup>98</sup>

One should be careful to not conclude from this that Fuller, or the Lubanian Fuller, rejects moral realism or what the legal philosopher Brian Leiter calls strong objectivism.<sup>99</sup> One might even make the case that Fuller's theory of the morality that makes law possible would fail in normative terms unless the internal morality of law is understood in terms of such strong

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*Lon L. Fuller*, rev. ed. by Kenneth I. Winston (Oxford: Hart Publishing, 2001) [Fuller, *Social Order*] at 285-287, in particular, as well as the continued philosophical and sociological analysis at 287-291.

<sup>96</sup> Luban, *Legal Ethics*, *ibid.* at 126.

<sup>97</sup> *Ibid.* at 112.

<sup>98</sup> *Ibid.* at 118.

<sup>99</sup> Strong objectivism is particular way in which to interpret the metaphysics of a particular subject. See Brian Leiter, "Objectivity and the Problems of Jurisprudence", Book Review of *Law and Objectivity* by Kent Greenawalt, (2002) 72 Tex. L. Rev. 187 [Leiter, "Book Review"] at 192; Jules L. Coleman & Brian Leiter, "Determinacy, Objectivity, and Authority" (1993) 142 U. Pa. L. Rev. 549 [Coleman & Leiter, "Determinacy"] at 607.

theories of moral reality.<sup>100</sup> In any case, rather than arguing that Fuller rejects moral realism or strong objectivism, Luban is saying that objective/general morality (i.e. a source of morality not an ontological thesis about that source) is only indirectly relevant to the function of law through the moral properties of legal institutions, or the internal morality of law.

Fuller would likely have been pleased overall with Luban's reading of his theory and the special linkage that is drawn between the rule of law and lawyering. Indeed, when discussing examples of systems that failed to live up to the rule of law, Fuller mentions legal officials such as judges and lawyers among those who failed in their duties to prevent the erosion of the *legal* character of the system. In the case of pre-WWII Germany, Fuller says:

Hitler did not come to power by a violent revolution. He was Chancellor before he became the Leader. The exploitation of legal forms started cautiously and became bolder as power was consolidated. The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle.<sup>101</sup>

Thus, Fuller would at least have recognized that the relevance of his theory is readily understood through the roles of the actors within the legal system, including lawyers prominently.

Luban also provides a refutation of the positivist argument that the values of the rule of law are of functional importance rather than being morally valuable themselves. Luban explains the *functional* importance (i.e. the first half of making Fuller's functionalist procedural naturalist case) that Fuller's theory places on morality through the image of sinking into nothingness by sinning or doing evil. As a purposive or functional concept loses its ability to perform its function, it not only becomes a *bad* instance of the functional thing that it is, it also has the potential to no longer properly belong to the purposive or functional category. We see no resistance from Raz to this first part of the theory. As noted above<sup>102</sup>, Raz and other positivists are willing to recognize the rule of law as a necessary condition for the existence of

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<sup>100</sup> Below, in the Conclusion, at 172-173, I note the opportunities for future scholarship on the topic of the relationship between my own theory of Fullerian lawyering (my theory being presented below in Section 4) and meta-ethical theory, which is not discussed as one of the concern of this present paper. I should hasten to note, however, that I am not arguing that it is Luban's view that we should read Fuller's theory in terms of a theory such as moral realism. Rather, I am merely saying that the statement quoted does not rule out a take on Fuller that is based in meta-ethical theories such as moral realism and that it is possible to make a case that Fuller's jurisprudence might depend on such meta-ethical theories.

<sup>101</sup> Fuller, "Positivism & Fidelity", *supra* note 8 at 659.

<sup>102</sup> Above, in Section 2.2), notes 12, 13 and accompanying text.

law. Thus, Raz would likely be happy to say that a legal system does indeed sink into a nothingness (from the perspective of its membership in the category of law) when a legal system does not abide by the rule of law.

However, Luban additionally explains the moral aspect of the Fullerian procedural naturalist case when he gives an elaboration that refutes Raz's insistence upon treating the requirements of the internal morality of law as conditions of efficacy rather than as moral conditions. Luban's argument is in line with Hutchinson's case against Raz, but Luban gives the argument the distinct flavor of being made through the concept of the morality of the role of the lawyer. Using the examples of a steam engine<sup>103</sup> and a light switch rather than a knife, Luban says:

There is nothing distinctively moral about converting stream power to usable mechanical energy or turning lights on and off.... Matters are different, however, when the purposively defined entity is a person defined though her social or occupational role ('parent', 'physician', 'lawyer', 'lawmaker'), and the means by which she fulfills the role's purpose create a long-term relationship with other people. In such cases, the standard of success implicit in the purposive concept is not just fulfillment of the occupation's ends narrowly conceived. Instead, the standard of success is fulfillment of these ends in a manner consistent with the moral relationship, for if the role-occupier chronically betrays the moral relationship, the other parties will dissolve it. Under this standard a relationship that originates only as a means to an end becomes incorporated into the end itself.<sup>104</sup>

Although Luban provides a powerful defence of Fuller's idea of internal morality and ties this defence squarely to the role of the lawyer, Luban does not go with Fuller in thinking, with reasonable confidence, that this truth makes law tend away from evil. Luban perceptively points out that, even in societies that abide by the rule of law, certain groups of people have suffered evils of the very kind that rule-of-law-values are supposed to prevent. For example, Luban argues, women have not been accorded the same rights to determine the course of their own lives as men.<sup>105</sup> But the rule of law is supposed to protect the rights of people to lead autonomous lives by regulating their conduct under a system of rules that guide conduct. And

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<sup>103</sup> This steam engine reference can originally be found in Lon L. Fuller, *The Law In Quest of Itself* (Chicago: Foundation Press, Inc., 1940) [Fuller, *Law in Quest*] at 10-11, where Fuller makes the argument that, when it comes to "purposive human activity", there is a link between "value [i.e. the excellence with which a purpose is achieved] and being [i.e. membership in the ontological category that is related to the purposive activity]".

<sup>104</sup> Luban, *Legal Ethics*, *supra* note 86 at 109.

<sup>105</sup> *Ibid.* at 127-129.

yet, even with these rules, some groups have not enjoyed the same benefits to an autonomous life.

The preceding has been an explanation of Fuller's theory of law and several contemporary takes on his work. I have presented arguments responding to Raz's criticism of the rule of law as merely a condition of efficacy. This was needed because if there is nothing moral to the principles of legality, then it will be impossible to argue that the rule of law represents an internal morality of law and it will be difficult if not impossible to derive a theory of ethical lawyering that is based in the ethics and jurisprudence of Lon Fuller. Let us now consider how these theories can be used to derive approaches to lawyering that accord with Fuller's theory of law.

### **3) Luban's Fuller – "Natural Law as Professional Ethics" – Doing the Morality of the Lawyering Role**

In the previous section, I discussed the way in which David Luban interprets Fuller's legal theory to be both a theory of lawyering and a theory of law. I will continue discussing Luban's ideas but with a slightly different focus. The purpose of citing Luban previously was as a source for the argument that Fuller's theory of law is truly a natural law theory, and that the rule of law is a *moral* condition for the existence of law. In this section of the paper, I will take a bigger picture approach to Luban's interpretation of Fuller. Rather than using Luban's argument to prove a point about Fuller's legal philosophy, I am interested in filling in the details of Luban's interpretation of Fuller as a theory of both legal philosophy and legal ethics. Here, I will treat it as one of the contenders in positing a theory of legal ethics that is based on analytical jurisprudence. What is the view of legal ethics that Fuller's theory is held out by Luban to be?

Luban's account of a Fullerian theory of law can be summed up in the following statements:

(i) "[T]he most significant actors [in a legal system] are not judges, nor as [H.L.A.] Hart believes, officials more generally, but lawyers. The lawyer-client consultation is the primary point of intersection between 'The Law' and the people it governs, the point at which the law in books becomes the law in action".

(ii) Luban argues that the role of a lawyer *as an advisor* is just as important as the lawyer's role as *an advocate*.

(iii) "[B]ecause lawyer-client consultations occur behind a veil of confidentiality, the integrity of the legal system depends to an enormous degree on the rectitude of the legal advisor".

(iv) "[L]awyers advising clients about the law's meaning must not deflect their own interpretive responsibility on to hypothetical others, whether those others are courts or non-judicial actors [i.e. must not give legal advice to a client in a way that simply predicts the action of a legal official]. Instead, [a lawyer's] obligation is simply to explain the law in books. So, in the end, [Luban identifies] law with the law in books, as mediated through the interpretive community of lawyers".<sup>1</sup>

A great portion of Luban's work is dedicated to the task of arguing for the jurisprudential importance of the lawyer's interpretive role. The first major step in this argument

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<sup>1</sup> David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) [Luban, *Legal Ethics*] at 131-132.

is for Luban to show that greater interpretive engagement is needed from those governed by the legal system than simply that they act according to a system of positively-stated rules. Luban is interested in the task of showing that more needs to be said about the way that legal norms relate to human conduct than that the norms be positively-stated and thereby oblige citizens who live under them. There is an interpretive story that must be told in between the positive statement of the norms and the norms being followed by citizens as obligations. In telling this story, Luban adds a great deal of substance to Fuller’s view about the normative and ontological relationship between law and the work of officials within the legal system when Fuller said that law is an enterprise that is “[D]ependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals”.<sup>2</sup>

Taking an evaluation of Hart’s legal theory as his starting point, Luban argues that Hart is wrong in the way that he thinks the ideas of internal and external perspectives towards norms take shape in terms of being conditions that determine the status of a system of norms as a *legal* system. The internal and external perspectives are views that people can take towards norms that purport to be in force in a particular context. Luban cites Hart’s definition of the internal perspective, in which one “accepts and uses [legal norms] as guides to conduct” and the external perspective, in which one is “content merely to record the regularities of observable behaviour” and to draw correlations from these observations that give reportable accounts about the rules that the society in question regards as providing a standard for normative evaluation but by which the observer does not feel normatively bound.<sup>3</sup> Hart argues that the conditions that these concepts provide with respect to the existence of law are (1) that officials of the legal system must take the internal perspective with regard to the legal system’s secondary rules and (2) that most citizens must abide by the positively-stated primary rules most of the time.<sup>4</sup> If this is achieved, then in Hart’s view, there is a legal system. Thus, for the

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<sup>2</sup> Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) [Fuller, *Morality of Law*] at 145.

<sup>3</sup> H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) [Hart, *Concept of Law*] at 89; Luban’s citation of Hart can be found in Luban, *Legal Ethics*, *supra* note 1 at 136.

<sup>4</sup> Hart, *Concept of Law*, *ibid.* at 116; See Luban’s citation of Hart on this point in Luban, *Legal Ethics*, *supra* note 1 at 137.

purpose of determining the existence of a legal system, it is not essential that citizens who are not legal officials take either the internal or external perspectives on law. As long as citizens obey the positively-stated primary rules most of the time, the purported legal system has met the minimal standard of citizens' obedience for the purpose of assessing its validity as a legal system. To put this in the terms of the conditions just outlined from Hart's theory, (1) officials must state the positive law and use it as a guide to conduct and (2) citizens must follow the norms *qua* obligations.

Luban argues that such an account of the nature of law and legal systems is incorrect.<sup>5</sup> Problematically for Hart, the way that his theory of internal and external perspectives is set up, as summarized in the previous paragraph, is such that, although it was, in part, intended to demonstrate the way in which law is actually different in nature from the Austinian command theory of law (which I will summarize shortly)<sup>6</sup> and thus to close off the command theory in terms of the way that the legal system is to deal with the concept of "obligation", Hart's view is consistent with a slightly modified version of the command theory of law. As I will summarize now, Luban shows how the Hartian command-like theory can even be framed and criticized by a slightly different analogy to Hart's own "gunman writ large" thought experiment.

Recall that the command theory of law, also a positivist theory but a different kind from Hart's own, is the idea that law is the command of the sovereign.<sup>7</sup> Hart's classic retort to this argument is that such a theory does not have the ability to normatively oblige citizens, an ability that should be properly attributable to a legal system.<sup>8</sup> This is because a sovereign who is

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For Hart's discussion of the distinction between primary and secondary rules, see Hart, *Concept of Law, ibid.* at 79-99, especially at 81, where Hart provides a definition for the terms "primary rules" and "secondary rules", which roughly translates to the idea that primary rules are the substantive rules of the legal system and that secondary rules are rules about rules (i.e. rules about activities such as making and amending rules).

<sup>5</sup> For the entirety of Luban's argument, as summarized in the following several paragraph of this paper, see Luban, *Legal Ethics, ibid.* at 137-143.

<sup>6</sup> The most widely-known proponent of the command theory of law is John Austin. For his account of the command theory, see John Austin, *The Province of Jurisprudence Determined*, ed. by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995), Lecture 1 [Austin, *Province of Jurisprudence*] at 18-37. See also the beginning of Hart's account of this theory in Hart, *Concept of Law, supra* note 3 at 6-8.

<sup>7</sup> Austin, *Province of Jurisprudence, ibid*; Hart, *Concept of Law, ibid.*

<sup>8</sup> See Hart's criticism of the Austinian theory of law in Hart, *Concept of Law, ibid.* at 82-85 and Hart's theory of obligation generally in *ibid.* at 82-91; See Luban's citation and criticism of Hart on this point in Luban, *Legal Ethics, supra* note 1 at 137.



merely regularly obeyed lacks legitimacy. Such a system, rather than instantiating law, is analogous to a gunman writ large. Obedience is secured by the threat of force, rather than by any normative force. Therefore, to a Hartian, the lack of normative legitimacy is sufficient to keep a set of rules outside of the realm that is proper to legal systems.

Turning now to the problem for Hart, consider (1) his opposition to purported legal systems that lack normative legitimacy because they are analogous, in terms of their ability to create obligations, to the illustration of the gunman writ large and (2) in applying the concepts of internal and external perspectives, his statement that one of the sets of features that distinguishes legal systems from the gunman writ large is (a) the instantiation, to at least of minimal level, of internal perspective among the officials of a legal system, and (b) citizens' obedience of legal norms as obligations, even if merely from the external perspective. Through Luban's analysis of these two ideas, we will see why he comes to the conclusion that "It isn't just the fact of [citizens'] obedience, but their *reasons* for obeying, that make a system of primary and secondary rules enforced by an official class into a legal system".<sup>9</sup>

Luban argues that the second of Hart's positions in the previous paragraph, causes problems in light of the first position staked out in the same paragraph. As Luban explains, a system in which the officials adopt the internal perspective but the citizens do not is a system in which, "[O]rdinary citizens regard the law as nothing more than a coercive structure imposed on them by officials".<sup>10</sup> This is described by Luban as a "make-believe legal system" that operates in a mafia-like way, with rules that the mafia, i.e. the officials, create and use to assess the behaviour of one another but which hardly has normative legitimacy with respect to the average citizen who is also forced to abide by the same rules.<sup>11</sup> Thus, legal officials state the positive law and do indeed take the internal perspective. However, due to the missing middle step that would lead to normative legitimacy, citizens who would follow the positively-stated law in such a situation would not be treating the rules as an obligation, but rather as a command backed by force. What is missing is a step to create interpretive engagement, an interpretive step that gives the legal rules normative status and thus makes the law more than a mere command. What is the importance of what we might call this normative-interpretive step?

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<sup>9</sup> Luban, *Legal Ethics*, *ibid.* at 139 [emphasis added].

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 138.

Citing Fuller, Luban makes the case that a system that lacks this interpretive step also has a paucity of reciprocity between lawgivers and citizens.<sup>12</sup> In order to move away from this system that lacks normative legitimacy in relation to its citizens, the law must create the requisite normative reciprocity between lawmakers and citizens and thereby bring citizens, in a certain proportion, into the internal perspective along with legal officials. It is for this reason that Luban comes to the conclusion that, “While not all citizens need to adopt the internal point of view toward all the laws all the time, a substantial number of citizens must adopt it toward most laws much of the time”.<sup>13</sup>

For there to be such reciprocity, for society to be governed by obligatory rules and for citizens to be brought into the internal perspective, law should meet certain conditions of normative legitimacy. Luban, again citing Fuller, says that the use of “commands or directives” must be done in such a way that “lawgivers and citizens...share ‘notions of the limits of legal decency and sanity’” and that there is a requirement that “legal rules...be communicated intelligibly to citizens and...impose reasonable expectations on them”.<sup>14</sup> What are the standards that lawgivers must meet in order to show legal decency in dealing with citizens as well as communicating intelligibly and imposing reasonable expectations on them? This is the point at which the theory becomes Fullerian in the most easily recognizable way. Luban gives the rule of law the status of necessary condition in the process of doing the normative-interpretive process that turns a positively-stated legal norm into a reason for action that actually conveys normative information to the citizen.<sup>15</sup> Desiderata such as the requirement of prospectivity protect the interests of legal decency; the desideratum of promulgation and clarity assure that legal rules are communicated intelligibly; and the desideratum of logical possibility assures that legal rules impose reasonable expectations. The lawyer cannot convey normative information and reasons unless the information, reasons, and the way in which both are conveyed abide by the rule of law. There may also be other conditions needed for citizens to adopt the internal perspective, instead of treating the law as merely being an externally-originated command that is backed up by force. Nonetheless, the rule of law is indeed one of the necessary conditions for this to

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<sup>12</sup> *Ibid.* at 139; citing Lon L. Fuller, *The Anatomy of Law*, (New York: Praeger, 1968) [Fuller, *Anatomy*] at 63.

<sup>13</sup> Luban, *Legal Ethics*, *ibid.*

<sup>14</sup> *Ibid.*; citing Fuller, *Anatomy*, *supra* note 12.

<sup>15</sup> Luban, *Legal Ethics*, *ibid.*, n. 23, and Luban reference in that same footnote to the arguments that he makes in *ibid.*, c. 3.

happen and thus to create legal obligations and normative reasons for obedience to the law. What is interesting about this argument by Luban is that, just as the rule of law was argued by Simmonds to be a necessary precondition for the law to perform a Razian function of being an exclusionary reason, so too here Luban argues that the rule of law is a necessary precondition for the law to achieve the kind of normative status that law must have in order for the Hartian argument against the command theory of law to succeed.<sup>16</sup>

In the previous few paragraphs, I have been summarizing the reasons from which Luban thinks that there must be a normative-interpretive process that gives *law* its normative legitimacy (and its ability to oblige). In addition to greater normative-interpretive depth, Luban brings forward an epistemic issue that must be dealt with by any theory that takes seriously the interpretive aspect of the law's ability to act as the normative guide that it supposed to be and thus to oblige us in the relevant way. This is the stage of the argument at which Luban fully brings out the *interpretive* aspect of the normative-interpretive step that is needed to create legal *obligation*. Of special relevance is that this is also the stage at which the morality of law becomes interpreted by Luban as a morality of *lawyering*. Put briefly, lawyers are in a special position of knowledge and skill. This position gives them the capacity to undertake the normative-interpretive activity that would allow them to impose or interpret (i.e. be involved in lawmaking and advising about the law made) in a way that would satisfy the normative conditions (i.e. the rule of law) for creating obligations for other citizens. Most people who are supposed to be subject to the normativity of law are not in a position to undertake the normative-interpretive activity because they are not practically capable of sufficiently understanding or acquiring knowledge about the law for such interpretation activity to even

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<sup>16</sup> This points to an interesting and, I would argue, successful argument on the part of theorists who have recently made the Fullerian case. One of their approaches has been to piggyback on some of the most insightful aspects of the major positivist theories and to point out that such features are not possible without the features of law, namely the rule of law, that occupied the focus of Fuller's work. Interestingly, both of these entry points, the role of law as a means of dispute resolution in pluralist societies (in Raz's theory) and the nature of law as a normative set of reasons rather as commands (a Hartian contribution), are normative theses about the rule of law. The observation to draw here may be that before legal systems can do any of the normative things that law is supposed to do (positivists do indeed argue that part of what makes law the kind of thing that it is said to be is the normative role that law is supposed to have), the legal system must abide by the rule of law. It would, presumably, be harder to make an argument about purportedly purely descriptive positivist ideas. For example, we might find it more difficult, although perhaps not impossible, for the rule of law to be a necessary condition to the identification of law as a social fact.

take place. This applies to citizens generally but also to other groups of people who might not initially have come to mind when considering Hart's account of the way in which a society and its various members must adopt the internal perspective in relation to legal norms.<sup>17</sup> Luban states the problem in the following way:

As Hart notes, 'ordinary citizens' – perhaps a majority – have no general conception of the legal structure or of its criteria of validity...The ordinary citizen may take the internal point of view toward rules without knowing exactly what those rules prescribe, or even how to find out on his own...It is too much to expect that non-officials share those standards – what Hart calls the rule of recognition – which are technical and recondite. But what Hart says of ordinary citizen holds for most officials as well. Why should we suppose that pest-control officers, driving examiners, building inspectors, police detectives, and state pension administrators grasp the rule of recognition? Why suppose that the President of the United States grasps it? It seems most likely, in fact, that they have no better knowledge of the structure of precedent or the canons of statutory interpretation than do other, ordinary citizens...<sup>18</sup>

Given the nature of such a problem, if law is to have the important normative-interpretive step between the positive statement of the law's legal norms and the norms' obliging of citizens, there must be a group of citizens who can solve the epistemic issue and thus allow for the normative-interpretive activity to take place. This group, according to Luban's reading of Fuller, is the legal profession, specifically, lawyers. Luban says, "[T]he people in government whom we expect to master the rule of recognition in the legal system are not

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<sup>17</sup> Hart, *Concept of Law*, *supra* note 3 at 89.

<sup>18</sup> Luban, *Legal Ethics*, *supra* note 1 at 140.

Later, at 142, Luban tones down the degree to which he argues that citizens, both ordinary citizens and officials, are unable to engage in reasoning about and interpretation of the law. He says: "Legal reasoning is not rocket science, nor is it an arcane glass bead game played among adepts. Its distinctive methods are continuous with other forms of reasoning; but they are specialized enough, and require enough background knowledge, that lawyers' arguments rather than lay arguments form the central case of the internal point of view".

I suspect that Luban is aware here that if the law were to most people as rocket science is to them, then not even the intermediating normative-interpretive role of lawyers would truly be enough to bring most people into the internal perspective. For this case to work, Luban needs lawyers to perform a necessary task, but the law surely cannot be taken from the internal perspective if lawyers must be consulted to understand every point and if, even after detailed explanation, most people will still not be able to make much of the concepts, as would often be the case for the layperson even after having rocket science explained to them.

Note that this epistemic point also provides a powerful argument about the need for access to justice, *ibid.* at 143, n. 34 and accompanying text.

'officials' in general, but *lawyers* in particular."<sup>19</sup> He goes on to say that, "Arguably, a necessary precondition for a rule-of-law regime is the existence of a uniformly trained, politically independent, and suitably large and vigorous legal profession. Lawyers are, after all, the primary point of contact between private individuals and institutions and the law".<sup>20</sup> Lawyers translate the law for clients and represent them in their disputes before the institutions of the law.

Without this interpretive process, which facilitates both basic and sophisticated epistemic access to the law, there is no sense in which there can be *reasons* for obeying the law. In Luban's view, then, lawyers make the internal point of view possible and raise an interesting distinction in relation to the internal perspective. Luban says:

[T]here can be more than one internal point of view...ranging between that of ordinary citizens or officials who adopt the law as their own, but know it only as 'the law' without having any clear idea how to identify it or argue within its distinctive vocabulary and mode of reasoning, and that of the trained lawyer who maneuvers comfortably within it.<sup>21</sup>

As Luban says, "If the possibility of the independent legal advisor is an illusion, so is the possibility of law, understood as anything more than directives in a society of bad men [in the Holmesian sense] and sheep".<sup>22</sup> In fact, it is even more problematic than Luban says. He is certainly correct, given his view of law, to say that the ability of law to normatively oblige citizens would be lost without the lawyer. Additionally, however, taking into consideration the epistemic difficulty makes it even worse. Without independent legal advisors to solve the epistemic aspect of the problem, it is as if the gunman is barking orders at us in a language that we cannot understand. The gunman, or the legionary to consider another example, is speaking to us in Latin and we speak Gallic exclusively. Some of the information may be carried through, perhaps even through threatening gesticulations of his sword. Nonetheless, without the role of the lawyer (the role of the lawyer being broadly conceived as Luban does<sup>23</sup>) we are neither in a position to understand, in any proper measure, the nature of the orders given by the source, nor therefore to be part of the process in which we can come to be obliged.

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<sup>19</sup> *Ibid.* at 140 [emphasis in original].

<sup>20</sup> *Ibid.* at 141.

<sup>21</sup> *Ibid.* at 142.

<sup>22</sup> *Ibid.* at 160.

<sup>23</sup> Recall the passage quoted in Section 2.3.3), note 94 and accompanying text, above; where I cite *ibid.* at 100.

Just how important is the role of lawyers, whether they are engaged in the creation and drafting of policy at the government level, for example, or giving legal advice to a client about a discrete legal dispute? Luban makes the following argument on that subject. Comparing the role of lawyers generally to the role of a particular body at the top of the judicial branch of the government of the United States, Luban says,

A single Supreme Court decision can influence the behaviour of thousands or even millions of people for decades to come. However, the Fullerian argument reminds us that Court decisions can have this effect only to the extent that those beneath the Court in the hierarchy of authority take up and support the decision rather than passively resisting it or maneuvering around it. From a genuinely realist point of view, the latter phenomena matter at least as much as what the Court does.<sup>24</sup>

Making a point about the real world efficacy of any particular positively-stated legal norm, Luban holds that the ability of legal norms to oblige is filtered through the interpretive community that controls the ground level treatment that it receives as well the epistemic conveyance of the normative content to the population at large. Thus Luban argues further that:

A better metaphor than [Dworkin's idea of] law's empire is law's landfill, the dregs of legal authority contained in the millions of lawyer-client conversations on which our actual legal civilization is erected....the advice of lawyers to clients involves genuine interaction, conferring the legitimacy necessary to make law out of the 'gunman writ large'. For better or worse, their morality is the law's morality.<sup>25</sup>

Luban lays out a powerful and seamless natural law theory of law and lawyering. According to this theory, a positivist theory of law lacks the normativity to create legal *obligations*. Lawyers are a necessary part of the creation of these obligations and their morality in performing their normative-interpretive process is therefore the law's morality. This is the level at which Fuller's morality of law acts as a morality of lawmaking and provides us with a unified procedural natural theory of law and lawyering.

What does Luban himself make of this Fullerian theory of "Natural law as professional ethics" that he has explicated?<sup>26</sup> Recall Luban's argument, summarized above<sup>27</sup>, that one cannot treat the satisfaction of the rule of law by the legal system as a guarantee that law or the legal system tends away from evil. The objection that Luban makes to this theory is one that presents

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<sup>24</sup> *Ibid.* at 146.

<sup>25</sup> *Ibid.* at 160.

<sup>26</sup> *Ibid.* at 99.

<sup>27</sup> Above, in Section 2.3.3) at 62-63. Recall especially the example given at note 105 and accompanying text in that same section.

a powerful limitation to the normativity of Fuller's natural law theory. Luban argues that a society can abide by the rule of law and yet expressly exclude others, such as women, "from the community whose freedom it aims to enhance".<sup>28</sup> Such a society may abide by the rule of law, yet there is considerable reason to think that it does not tend away from evil because it contains a vast amount of injustice when it comes to the treatment of groups of people that are not granted the full benefit of the concern of the rule of law. If lawyers participate in this process in such an unjust society, then it becomes the case that the morality of the rule of law, conceived of both in terms of the law made and the lawmakers (i.e. the lawmaker's morality) is compatible with a great amount of evil, and, more importantly, does not tend away from evil.<sup>29</sup> The morality of the lawmaker, in this case, is said to allow the failure to achieve the autonomy of the group that is being so mistreated. It seems, then, that the morality of lawyering under the Fullerian view that Luban articulates fails to tend away from evil in meaningful ways.

Luban's criticism here seems true if one takes the moral normativity of the rule of law to be found only in the respect for human autonomy. However, things change once one comes to the conclusion, as Simmonds does, that there is even more to the morality normativity of the rule of law than respect for human autonomy and once one realizes the criterial position of the rule of law (including in its more morally robust expressions) in relation to other criteria for the existence of law. Recall that, according to Simmonds, a legal system cannot abide by the rule of law unless the legal system also satisfies the demands of other related moral values such as justice.<sup>30</sup> It seems perfectly plausible that there could be a legal system with a less morally robust notion of the rule of law as presented by Luban, in which the conditions of the rule of law are satisfied and which is thus oriented towards the promotion of the autonomy of certain individuals while expressly excluding others, such as women, from the community whose freedom it aims to enhance. However, that same plausibility is not present if our notion of the

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<sup>28</sup> Luban, *Legal Ethics*, *supra* note 1 at 128.

<sup>29</sup> *Ibid.* at 126-130.

<sup>30</sup> I do not claim that Simmonds' view provides such a strong moral buttress that it can guarantee that law always tends away from evil. However, the argument that Simmonds provides significantly reduces the number and kinds of evils that are compatible (compatibility considered in the sense of principles, meaning harmoniousness as a matter of degree, more harmonious than not, rather than the binary on/off sense of rules) with the rule of law. His argument also provides a theoretical avenue through which we could plausibly argue for the necessary connection between the rule of law and other moral ideas, thus further reducing the scope within which evil can be consistent with the rule of law and have a deleterious effect on the degree to which law tends away from evil.

rule of law is conceived of in the more morally robust way that Simmonds present. I will not launch into a treatise on justice here. Nevertheless, it is antithetic to the very idea of *justice* that a legal system could satisfy the demands that justice makes of that legal system while simultaneously excluding certain persons within that society (e.g. women) from the community in relation to which the legal system attempts to satisfy the demands of justice. One of the central ideas of justice, under the heading of procedural justice, is that such disparate treatment is not to be practiced.<sup>31</sup>

From the perspective of the rule of law and its particular necessary connection with justice, the exclusion of women or any other person from being part of the community whose freedom law aims to enhance is particularly egregious. The rule of law, because of the necessary connection between the rule of law and at least certain aspects of morality, will be concerned with any failure of the legal system to fulfill the requirements of justice, but it will be a particular concern for the rule of law when the legal system perpetuates an injustice that denies a person the benefit that is designed to be protected and enhanced by the rule of law. Thus, while one might be able to modify the rule of law as conceived of by Luban (a conception that does not include a necessary connection between the rule of law and justice) to generate the kinds of moral wrongs that Luban mentions, one cannot do the same with the rule of law as conceived of by Simmonds (a conception that includes a necessary connection between the rule of law and justice).

To make the conclusion concrete, the implication of this rebuttal is that, given the necessary connection between the rule of law and justice, under Simmonds' view, and the argument made in the previous paragraph, the status of legal systems as belonging to the

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<sup>31</sup> I acknowledge that, for a complete account of such an argument, one might have to engage in a discussion about the various types of justice (e.g. procedural, retributive, distributive, etc.). It may be that only certain types of justice have a necessary connection with the rule of law. My conjecture at this stage of my thinking is that many kinds of justice are necessarily connected with the rule of law (although they may not all be as onerous as one another to be satisfied for the purpose of their necessary connection with the rule of law). Certainly, I would argue, procedural justice is one of those that are necessarily connected. Procedural justice is related in its normative concerns to desiderata of the rule of law, such as the desideratum of generality, and some instances of the desideratum of congruence between the law as stated and the law as enforced. Thus, there is at least enough of a relationship between the rule of law and justice to make it such that the unjust treatment of women by the legal system is assessed for the purpose of determining, *via* the relationship between the rule of law and justice, the degree to which the rule of law is satisfied and thus the degree to which a legal system exists.



category *law* is lesser in the case of those legal systems that treat women, or other members of society, in such a way that these persons are excluded from the community, the freedom of which law aims to enhance. Does this mean that these societies do not have law? I am hesitant to say that this is the case because the exclusion of groups such as women from the full benefits of the rule of law has been so deep and so long-lasting. The result of adopting such a view would be that law might be said to have not existed until the middle of the 20<sup>th</sup> century even in the industrialized world. That seems implausible to me. In that sense, I am, admittedly, setting a lower minimal standard of justice that must be vindicated within the legal system so as to not undermine the legal system's abidance of the rule of law to such an extent that the status of the legal system would be undermined by its failure to vindicate justice, with which the rule of law is necessarily connected.<sup>32</sup> However, because of my extrapolations of the Simmondian argument, I am indeed prepared to say that, as these formerly excluded groups have been brought into the community whose freedom the law seeks to enhance, and as the procedural injustice faced by these groups has become lesser, the various legal systems that have made these progressive steps have made themselves less at odds with the objective normative ontology in which we find the necessary connection between justice and legality. The rule of law has been enhanced as societies have treated more people as proper beneficiaries of its protections. Thus, these various advances have made their respective legal systems more in line with legality, and thus fuller members of the category of "law".

If one considers the aspect of Luban's argument which says that the rule of law will *not* give us *all* of the normativity that we might want law to have, I am in full agreement because of Luban's argument about states that have sufficiently vindicated the rule of law in order to have a legal system and yet have shown indifference to the wrongs committed against large groups of people, such as women, whose freedom the rule of law aims to enhance. However, in light of Simmonds' powerful interpretation of the Fullerian theory of law, we can expect quite a bit

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<sup>32</sup> Another consideration of Simmonds' Fullerian theory might set a higher standard of justice that must be met so as to not undermine the vindication of the rule of law to such an extra that the purported legal system actually fails to belong to the category of law. Doing so would likely lead to the conclusion that many more purported legal systems are not legal systems at all. Such a strong view of the minimal level of justice consistent with the rule of law might, even when not reaching the conclusion that a purported legal system does not belong to the category of law, see many more instances than I would of legal systems that as less fully "legal" because of their failure to vindicate justice.

more than Luban imagines we can actually get when he says that it is too optimistic to think that the rule of law makes law tend away from evil. We can expect more normative, and particularly moral, substance to make its way into the rule of law, and thus also into a theory of lawyering developed off of the rule of law, than would be done under a Fullerian theory that is viewed as a rich procedural theory with a bare minimum of morality or even than a Fullerian theory that is understood as a rich procedural theory with an equally rich understanding of libertarian autonomy but which ends there in its ability to contribute *moral* ideas. With moral values such as justice built in, law's tendency away from evil, and thus the tendency away from evil of lawyering that lives up to law's values, may be more powerful than Luban imagined.

### Part III – A New Proposal for the Philosophy of Lawyering

#### **4) Legal Ethics as a Moral Idea, Embracing Fullerian Normativity**

##### **4.1) The Need for Theories of Legal Ethics that Go Beyond Positivism**

Positivists have at times recognized a permission for lawyers to discuss more than the positive law in advising clients. This admission could not help but have been made given that such permission is granted in various codes of conduct that govern the legal profession. However, William Simon argues that the positivists are mistaken in thinking that this is the only way in which lawyers will end up discussing moral values, as well as other values, with their clients. To this end, Simon says:

The Dominant View does concede grudgingly that clients are often interested in more than the 'law,' as the Positivist defines it. No one would deny that a client might wish to voluntarily repay a time-barred debt because of ethical or reputational reasons. Thus the [American Bar Association's] *Model Rules* [of Profession Conduct] say...that the lawyer, in advising the client, 'may refer not only to law but to other considerations such as moral, economic, social and political factors....' But the rule creates only a license, not a duty (and the option here is simply discussion, not active protection). This permissive stance seems a function of the Positivist's mistaken view of legality, which converts many important legal concerns into (mere) 'moral, economic, social, and political factors'.<sup>1</sup>

But this permission-based stance is not an accurate description of the relationships between law, lawyers and their clients. There is a connection between law and morality that the positivist theories do not appreciate and which make the discussion of moral values not just permitted, but a necessary feature of good lawyering. This is what positivist theories of law and lawyering miss. This argument can come from a myriad of naturalist directions. Take, just as an example, the case made by one of the most prominent naturalist philosophers of legal ethics, William Simon. He states his own case for a relationship between lawyering and morality that goes beyond the permission for a lawyer to discuss moral considerations in the course of giving legal advice.

In William Simon's Dworkinian view, a discussion of moral values in law and legal advice is inevitable given that moral considerations necessarily enter into the interpretation of legal sources that are laden with values that come from sources outside of the law, including from

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<sup>1</sup> William H. Simon, *The Practice of Justice* (Cambridge, MA: Harvard University Press, 1998) [Simon, *Practice of Justice*] at 43. Simon cites Rule 2.1 of the American Bar Association *Model Rules of Professional Conduct*. The *Model Rules* are available at American Bar Association, *Model Rules of Professional Conduct*, online: [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) [ABA, *Model Rules*].

morality.<sup>2</sup> Given the nature of this interpretive process and the particular normative aspects that make it complete, Simon would argue that a lawyer must indeed engage in moral interpretation as part of the task of being a lawyer and interpreting the law.

Simon's theory about the role of value-laden terms in law presents an interesting contrast to the positivist theories of legal ethics, including the functional ones based on the Razian reason-giving of Dare and Wendel.<sup>3</sup> The necessity for a judge to interpret value-laden principles in assessing the legal merit of a case that comes before a court, and thus the analogous necessity of a lawyer's undertaking a similar interpretative activity when giving legal advice, provides an entry place for morality. This entry place for morality, furthermore, does not bring interpretive necessity as an outside influence on the law. Rather, the interpretive task is internally facilitative of the values and exigencies of the legal system because it is indeed the legal system itself, and its own interpretive requirements, that call for the lawyer to take moral values into account in giving content to the moral terms that are found in the law.

Therefore, and conceptually against the argument made by Dare that lawyers pre-empt the function of the legal system when lawyers take into consideration moral values in advising the client, under Simon's Dworkinian theory, a positivist legal system, as a source of normativity, cannot be a preemptory guide in the pre-interpretive way that Razians such as Dare seem to envision. The relevant legal terms and principles acquire their meaning only in the interpretive actions of the court and with lawyers taking part in that process. Lawyers are, all the while, engaging in the interpretation of principles *and values* (including moral values) in the advising and advocacy stages.

This is Simon's theory explaining the need for legal ethics to go beyond positivism. I find it sympathetic in many ways. My own view is based on the work of Lon Fuller. In the same way

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<sup>2</sup> See generally, Simon's Dworkinian theory of lawyering set out in Simon, *Practice of Justice, ibid.*, especially for my present purposes at 38-40.

<sup>3</sup> Theories such as those of Dare and Wendel had not been articulated at the time during which Simon wrote the source that I am citing. Simon has not since then published a wide-ranging retort to these theories. He has, however, critiqued theories of lawyering that are based on positivism in William H. Simon, "Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives" (2010) 23 *Geo. J. Legal Ethics* 987 [Simon, "Role Differentiation"], and engaged directly with the ideas of Wendel in William H. Simon, "Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn", Book Review of *Lawyers and Fidelity to Law* by W. Bradley Wendel (2012) 90 *Tex. L. Rev.* 709 [Simon, "Book Review"], in which he reviewed W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010) [Wendel, *Fidelity*].

that Simon does, my argument is that positivism's understanding of the relationship between law and morality is incomplete for the purpose of explaining and normatively prescribing the features of the practice of lawyering. My case is developed throughout the rest of Section 4) and draws on sections 2) and 3), in which I summarized arguments explaining the way in which Fuller's legal philosophy shows that positivism misses something fundamental about the full normative nature of law.

#### **4.2) Moral Robustness and the Fullerian Nature of my Theory**

The Fullerian argument that I am about to present in this section of the paper could be developed to varying degrees of normative moral power. Another way that this could be said is that the degree of normative moral power of a Fullerian theory of legal ethics depends on the reading of Fuller that we adopt. Fuller's own original work and various interpretations of his work suggest differing views on the robustness of the morality that can be incorporated into law *via* the rule of law. I argue that versions of Fullerian legal philosophy that have what I call "thin moral normativity", are consistent with significant aspects of a wide range of answers to the questions of legal philosophy and philosophical legal ethics (including certain forms of positivism, if the positivist views are dialed down, such as by weakening the separability thesis) and with the application of these varied theories to the case study of the "torture memos". Within this group of "thin moral normativity", I include interpretations of Fuller's legal philosophy that do not believe that a great deal of morality can make its way into law through the rule of law. The moral norm that is incorporated under such a view is typically some limited version of respect for autonomy.

On the other hand, there are also versions of Fullerian legal philosophy that have what I call "thick moral normativity". Such views, with the most notable and robustly moral being Simmonds' view, argue that a rich moral value of respect for individual autonomy is incorporated into law by way of the rule of law. Additionally, and perhaps most importantly, Fullerian theories that have "thick moral normativity" hold that other moral values, such as justice, are incorporated into law or have a mediated necessary connection with law by way of

their relationship with the rule of law and the latter's relationship to law. Simmonds, again, is the most prominent example.<sup>4</sup>

I will develop a philosophical account of lawyering that, being based on the views of Lon Fuller, has a particular and focused interest in the relationship between law and morality. Within that project and the task of bringing it to bear on legal ethics, large portions of the theory, including the principles of my theory that are stated below,<sup>5</sup> will be amenable to theories that are willing to accept, or find friendly company, with only "thin moral normativity" and its advocates. A Fullerian theory of legal ethics could find philosophical allies in numerous and varied schools of thought, even among those that are modelled after the ideas of Fuller's interlocutors. Thus, while I will push back against specific points within other philosophical theories of legal ethics, I will not, in my discussion of the general principles of Fullerian lawyering, argue wholesale against certain rival theories of philosophical legal ethics that may be amenable to such views. Indeed, a notable aspect of my Fullerian account is the degree to which it may allow for a rapprochement between the jurisprudential theories of Hart and Fuller through the application of their jurisprudential theories to philosophical legal ethics. The aspects of my theory that are drawn directly from Lon Fuller may find allies in a great variety of legal theories.

The use of the terms "thin" and "thick" to describe various conceptions of the rule of law will be familiar to those who have studied legal philosophy.<sup>6</sup> I wish to draw a distinction, however, between the "thin" and "thick" as they are often used in legal philosophy and the way that I intend to use the words. The usage in legal philosophy is to refer to "thin" and "thick" conceptions of the rule of law. The ideas referred to in this usage have also been called "procedural" and "substantive" conceptions of the rule of law, relating respectively to descriptions of "thin" and "thick" conceptions of the rule of law.<sup>7</sup> However, this usage runs together two ideas that should be distinguished analytically. Legal philosophers have discussed "thin" or "procedural" in lights of the procedural or formal requirements that these "thin"

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<sup>4</sup> See my summary of this aspect of Simmonds' theory above in Section 2.3.2) at 51-58.

<sup>5</sup> Below in sections 4.3), 4.4).

<sup>6</sup> Allan C. Hutchinson & Patrick Monahan, eds., *The Rule of law: Ideal or Ideology* (Toronto: Carswell, 1987) [Hutchinson & Monahan, *Rule of Law*] at 100-102.

<sup>7</sup> Paul P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) 21 P.L. 467 [Craig, "Rule of Law Framework"].

account place on law. Such requirements include ideas like independence of the judiciary and Fuller's eight desiderata.<sup>8</sup> Conversely, they have noted at least two reasons for which a person could classify the rule of law as "thick" or "substantive". These reasons are: (1) substantive values, such as justice, have a necessary connection with the rule of law, or perhaps more specifically, a necessary connections with procedural justice (i.e. the value being embodied in "thin" or procedural conceptions of the rule of law<sup>9</sup> and (2) justice, or other moral values besides the traditionally-argued respect for individual autonomy, are part of the very definition of a particular conception of the rule of law or are embodied by the rule of law such that one cannot know what the rule of law means without working out what justice means.<sup>10</sup> If this is the definition of "thick" or "substantive" conceptions of the rule of law, then Simmonds' view undoubtedly qualifies as such a conception of the rule of law because of the necessary connection between law and justice in his theory.

However, it is a mistake to use the necessary connection between the rule of law and substantive moral values such as justice as reasons for classifying a conception of the rule of law as a "thick" conception. When one shows a necessary connection between the rule of law and the vindication of a moral principle, it is not the conception of the rule of law that becomes thick but the *moral/normative relevance* of the rule of law. The desiderata of the rule of law and the values embodied by the rule of law itself remain the same and a moral value, such as justice, has ontological relevance to the nature of law only with respect to the role that the moral value plays in the vindication of the principles of the rule of law and does have ontological relevance to the law of law in virtue of the moral aim of vindicating justice's own freestanding value. On

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<sup>8</sup> Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) [Fuller, *Morality of Law*] at 39; Craig, "Rule of Law Framework", *ibid.* at 467; H.L.A. Hart, "Problems of Philosophy of Law" in Paul Edwards, ed., *The Encyclopedia of Philosophy*, vol. 5 (New York: Macmillan, 1967) 264 [Hart, "Philosophy of Law"] at 273-274; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2d ed. (Oxford: Oxford University Press, 2009) [Raz, *Authority of Law*] at 214-219; See also Section 2.2), note 13, above, for my discussion of Hart and Raz's general agreement with Fuller in listing the desiderata of the rule of law; Hutchinson & Monahan, *Rule of Law*, *supra* note 6 at 101; Grant Lamond, "The Rule of Law" in Andrei Marmor, ed., *The Routledge Companion to Philosophy of Law* (New York: Routledge, 2012) 495 at 495; Andrei Marmor, "The Ideal of the Rule of Law" [Marmor, "Rule of Law"] in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, 2d ed. (Chichester, U.K.: Wiley-Blackwell, 2010) 666 at 666, n. 1 and accompanying text.

<sup>9</sup> Hutchinson & Monahan, *Rule of Law*, *ibid.* at 101-102. Significantly, in Section 2.2), note 13, above, I discuss "thin" or procedural conditions proposed by Hart and Raz beyond Fuller's eight desiderata.

<sup>10</sup> Craig, "Rule of Law Framework", *supra* note 7 at 477-479.



this account, the rule of law's vindication merely becomes more *morally/normatively relevant* because we see that the desiderata and the values embodied by the rule of law can only be vindicated if robust and crucial moral values such as justice are also vindicated. On the other hand, when justice is part of a particular definition of the rule of law or is embodied by the rule of law, then the rule of law itself does indeed become "thick" and "substantive. The thickening of the moral relevance of a term and of the term itself are analytically distinct and should not be run together as ways by which to categorize conceptions of the rule of law. Therefore, the former of these kinds of reasons for classifying a conception of the rule of law as a substantive conception (namely, the necessary connection with moral values) is better used to refer to moral relevance while the purported embodiment of justice *within* the rule of law remains a proper reason for classifying the rule of law in terms of a substantive concept, if such an embodiment can be successfully argued.

If this distinction is made, we see the possibility of a more precise categorization of concepts. The taxonomic and normative possibilities for the rule of law become the following: a procedural conception of the rule of law and a substantive conception of the rule of law in terms of the rule of law's ontology and a "thin" and "thick" moral normativity within each of those two categories. Thus, the possibilities are the following: (1) a procedural conception of the rule of law with "thin moral normativity", not recognizing a necessary connection between the rule of law and other moral values but recognizing the rule of law's embodiment of the value of respect for individual autonomy, (2) a procedural conception of the rule of law with "thick moral normativity", recognizing a necessary connection between the rule of law and moral values such as justice, (3) a substantive conception of the rule of law with "thin moral normativity", perhaps recognizing less morally rich or onerous moral values, besides respect for individual autonomy, as embodied in the rule of law and (4) a substantive conception of the rule of law with "thick moral normativity", recognizing a rich or onerous moral values such justice as not merely necessarily connected with the rule of law but as embodied in the rule of law. In this paper, I am speaking of a procedural conception of the rule of law and discussing the *moral* relevance or power of the conception when I discuss "thin" and "thick" moral normativity.

Although the broad outlines of my theory are compatible with many other theories of legal ethics, the way in which I will express my generally-stated principles of Fullerian lawyering

is less so. My specific view of the best way in which to apply my Fullerian principles of lawyering is with a “thick moral normativity” within the natural law approach and thus is in line with the work of the Fullerian arguments of Nigel Simmonds. For this reason, when I fill in the normative details of my Fullerian theory of legal ethics, my particular expression of that theory (i.e. of the two general principles that I will discuss immediately in the two subsections below) will find more allies among theorists who are comfortable with “thick moral normativity” and a stronger natural law approach.

### **4.3) First Principle of Fullerian Lawyering – The Internal Morality Thesis**

#### **4.3.1) The Content and Grounding of the First Principle**

The philosophical theory of lawyering that I will propose works on two theses, both of which are Fuller’s. First, considered through Section 4.3) of this paper, is Fuller’s Internal Morality Thesis, which is the basis for my first principle of Fullerian lawyering. Because the internal morality of law and its principles of legality are necessary conditions for the existence of law, law cannot disclaim at least this incorporation of morality. Nor can lawyers and judges, when engaging in legal interpretation, disclaim to know the moral truths that are necessarily incorporated into the law by the internal morality of law, the reflection on these specific moral truths being necessary for the task of legal interpretation. Thus, when lawyers discuss cases or problems in which the vindication of the internal morality of law is a concern (e.g. in a case dealing with a prosecution for a criminal statute that was not properly promulgated), the lawyers and judge in the case cannot claim to be discussing these norms/values in a way that denies that they are moral values that are necessarily part of, and connected to, the legal system. This is the case even if the norms/values (in this case, the norm requiring proper promulgation as respect for individual autonomy) are also something else, i.e. functional conditions. When a defendant’s lawyer in such a case explains, to the client, the legal argument to be made on his/her behalf, the lawyer cannot avoid bringing morality into the discussion with the client, explicitly or implicitly, because the issue is one based on moral values that have been brought into the legal system by way of necessity through the role of the internal morality of law (i.e. the rule of law) as necessary conditions for the existence of the legal system.

A lawyer who practices his/her profession in a way that instantiates the virtues of law and lawyering should be able to recognize such principles both (1) when these values are engaged by the nature of a case (e.g. one involving a retroactive law or a law that lacks clarity) is such that rule-of-law values come to bear directly on a particular case, and (2) when there are requirements stated in the positive law for the client (i.e. the government, perhaps exclusively, in this category) to abide by the rule of law. The lawyer should recognize, in a robust way, the ethical dimension at stake to the extent that the morality is embodied by or necessarily associated with the rule of law. Furthermore, an appreciation of the fact that moral conditions are incorporated into law also means abiding by the functional and moral conditions of the rule of law. So, one cannot claim that my first principle is merely an epistemic condition of knowing that the rule of law has incorporated moral conditions into the law. My first principle of Fullerian lawyering also means abiding by the desiderata of the rule of law.

With respect to these points, theses about the analytical separation between law and morality do not raise problems for legal interpretation such as to interfere with the requirements of my first principle of Fullerian lawyering. Law cannot claim to act as an authority apart from morality when it comes to moral truths that are necessary conditions for the existence of law. Contrary to the Razian view, law cannot claim to replace moral reasons for action when these particular moral reasons are necessary conditions for the existence of law.<sup>11</sup> Law also cannot claim to bring these moral values into the legal system in a contingent way on the basis of the rule of recognition.

This means that there are no theses about analytical separation between law and morality that could take ontological precedence over the rule of law to necessitate that lawyers disclaim, or behave in a way that disclaims, the incorporation of morality into law that happens by way of the rule of law. If lawyers ought to act in a certain way given that the nature of law is a certain way, then the rule of law's ontological relationship with law makes it the case that none of the positivist theses about law and lawyering can remove the internal morality of law from law's necessary ontological furniture and thus from the features of the nature of law that

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<sup>11</sup> The Razian view is discussed above in Section 1.1), especially notes 10, 13 and accompanying text; the latter footnote citing Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) [Raz, *Between Authority*], c. 8.

determine the way that lawyering should be done and, as I will argue throughout this section, what the lawyer should know and attempt to vindicate.

#### 4.3.2) The Shape of the First Principle

Consider the way in which this first principle might be expressed such that it can be amenable to legal theorists of many kinds, including Dworkinians and inclusive positivists. The particular incorporation of morality that lawyers would not be able to disclaim knowing would be a thin kind, perhaps merely a less robust, even morally anemic in the view of some, kind of respect of individual autonomy. There would be no extension into other moral concepts. Lawyers would have to recognize the incorporation of the moral value of individual autonomy and to apply this value as is relevant to the provision of legal advice.

I would argue, in making this case on my first principle about being unable to deny the incorporation of morality into law through the rule of law, that my Fullerian position has somewhat of an ally in HLA Hart at some times. As I will summarize in the subsequent paragraphs, Jeremy Waldron (in his papers on the Hart-Fuller 50<sup>th</sup> anniversary symposium) and N.E. Simmonds argue either about Hart's equivocal reply to Fuller's internal morality argument or about how some of Hart's arguments, whether from the Hart-Fuller debate or elsewhere, are inconsistent with the assertion that the principles of legality are merely conditions of efficacy, not moral conditions.<sup>12</sup> Waldron points out Hart's agreement with Fuller, especially in works in which Hart's explicit target was not Fuller.<sup>13</sup> With respect to the Internal Morality Thesis, Fuller's procedural naturalism and Hart's inclusive positivism (in Hart's more agreeable moments on this point, as well as the theories of lawyering derived from these two conceptions of legal philosophy, Fuller's and Hart's) are potential allies against exclusive legal positivism. At least on this point of entry for morality into law, the very modest natural law thesis that is procedural naturalism has more in common with inclusive legal positivism than inclusive positivism has in common with exclusive legal positivism. Exclusive positivism, after all, denies the inclusive positivist thesis that moral conditions can be made part of the legal system and

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<sup>12</sup> Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller" (2008) 83 N.Y.U. L. Rev. 1135 [Waldron, "Hart's Equivocal Response"] at 1147-1160; Simmonds discusses Hart's response to Gustav Radbruch in N.E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) [Simmonds, *Law/Moral Idea*] at 173-176.

<sup>13</sup> Waldron, "Hart's Equivocal Response", *ibid.* at 1157, 1167.

become conditions of validity for particular legal system by way of enactment through the positive law.<sup>14</sup>

Let us take up my first reason for arguing for the compatibility of my first principle of Fullerian lawyering with a wide variety of other theories, among them inclusive positivism. This opening reason is Hart's equivocal response to Fuller. In a prominent recent paper, Jeremy Waldron catalogues Hart's equivocal responses to the central Fullerian thesis of the internal morality of law.<sup>15</sup> Readers of this paper will be well aware of cases in which Hart rejects any admissions of the moral character of the principles of legality.<sup>16</sup> Thus, one side of the equivocation is already covered. Let us then consider the side of the equivocation in which Hart leans toward recognizing the moral character of the principles of legality. Waldron cites the following examples, among others. First, there is Hart's essay in Paul Edwards' *Encyclopedia of Philosophy*. In that entry, Hart describes principles by which laws, even good laws, must abide or else the laws may cause injustice. He says:

Laws, however impeccable their content, may be of little service to human beings and may cause both injustice and misery unless they generally conform to certain requirements which may be broadly termed procedural....These procedural requirements relate to such matters as the generality of rules of law, the clarity with which they are phrased, the publicity given to them, the time of their enactment, and the manner in which they are judicially applied to particular cases. The requirements that the law, except in special circumstances, should be general (should refer to classes of persons, things, and circumstances, not to individuals or to particular actions); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality. The principles which require courts, in applying general rules to particular cases, to be without personal interest in the outcome or other bias and to hear arguments on matters of law and proofs of matters of fact from both sides of a dispute are often referred to as rules of natural justice. These two sets of principles together define the concept of the rule of law ....<sup>17</sup>

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<sup>14</sup> See generally Joseph Raz, "Authority, Law and Morality" (1985) 68 *The Monist* 295 [Raz, "Authority/Morality"]; Joseph Raz, "Legal Positivism and the Sources of Law" in Raz, *Authority of Law*, *supra* note 8 at 37; Andrei Marmor, "Exclusive Legal Positivism" [Marmor, "Exclusive Positivism"] in Jules L. Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 104 [Coleman & Shapiro, eds., "Handbook of Jurisprudence"]; Danny Priel, "Farewell to the Exclusive-Inclusive Debate" (2005) 25 *Oxford J. Legal Stud.* 675 [Priel, "Farewell Exclusive-Inclusive"].

<sup>15</sup> Waldron, "Hart's Equivocal Response", *supra* note 12.

<sup>16</sup> See e.g. H.L.A. Hart, Book Review of *The Morality of Law* by Lon L. Fuller (1965) 78 *Harv. L. Rev.* 1281 [Hart, "Book Review"], discussed above in Section 2.2), note 16 and accompanying text.

<sup>17</sup> Hart, "Philosophy of Law", *supra* note 8; quoted in Waldron, "Hart's Equivocal Response", *supra* note 12 at 1144-1145.

These principles are variations on the same principles as in Fuller's eight desiderata of legality.<sup>18</sup> Next, Waldron cites the way in which Hart makes his argument in the case of the Grudge Informer.<sup>19</sup> This example gives us an equivocation on just one of the principles of legality, namely, prospectivity. Hart opposes the strategies proposed by natural law theorists such as Gustav Radbruch and Lon Fuller, who argue that the case should be handled essentially by holding that, due to some kind of immorality (whether that of the substantive variety in the case of Radbruch<sup>20</sup> or of the procedural variety in the case of Fuller<sup>21</sup>) the Nazi informer laws, under which the wife in the case informed on the husband, should not be given the normal fidelity that is given to law and that she should thus have been punished for the wrong done to her husband. Hart says that, although it is wrongful to punish someone under a retroactive criminal statute, it would be better to do so than to act as if the informer laws did not truly have the status of law because they had done some moral wrong. He argues:

Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems.<sup>22</sup>

If retroactivity is odious here, Waldron argues, then Hart has no ground to say that it is merely a condition of efficacy when debating Fuller. N.E. Simmonds too has taken note of equivocations on the topic of the moral status of Fuller's eight desiderata, especially in dealing with Radbruch's arguments about retroactivity in the Grudge Informer Case. As Simmonds says:

The relationship between Hart's criticisms of Radbruch, and his legal positivism more generally, is considerably more complex and ambiguous than one might at first think. Hart objects to Radbruch's position on the basis that it obscures a conflict of value that arises when legal systems must consider the possibility of punishing people for wicked acts that were permitted by the enactments in force at the time. If this situation involves a conflict of value, what are the

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<sup>18</sup> Fuller, *Morality of Law*, *supra* note 8. Recall that Fuller's eight desiderata are listed above in Section 2.1), note 4 and accompanying text. Hart also adds some conditions to Fuller's eight desiderata in the passage quoted in the previous footnote, as discussed above in Section 2.2), note 13.

<sup>19</sup> Recall the facts of the Grudge Informer Case, summarized above, in the Introduction at 2-3. See especially note 3, in the Introduction; citing H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593 [Hart, "Positivism"] at 618-620.

<sup>20</sup> Gustav Radbruch, *Gesetzliches Unrecht und ibergesetzliches Recht [Statutory Lawlessness and Supra-Statutory Law]*, 1 SUDDEUTSCHE JURISTEN-ZEITUNG [SJZ] 105, 105-08 (1946) (Ger.), translated in 26 OXFORD J. LEGAL STUD. 1, 7 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006) [Radbruch].

<sup>21</sup> Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630 [Fuller, "Positivism & Fidelity"] at 648-657, 660-661.

<sup>22</sup> Hart, "Positivism", *supra* note 19 at 619; quoted in Waldron, "Hart's Equivocal Response", *supra* note 12 at 1148.

relevant values? Would we not have to say that they are the demands of retributive justice (or, perhaps sound penal policy) on the one side, and legality on the other? And does this recognition of legality as a value not conflict with the positivist insistence that law as such is not a value? <sup>23</sup>

Finally, among the examples cited by Waldron is a quote, from the Hart-Fuller debate, in which Hart briefly treats the desideratum of generality as having moral relevance. Hart says:

If we attach to a legal system the minimum meaning that it must consist of general rules-general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals-this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. It is, however, true that *one* essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of the law, not justice of the law. So there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles. <sup>24</sup>

Knowing about these equivocations is an important step in understanding the theoretical closeness, and appeal, that procedural naturalism has to the inclusive legal positivist, despite the past battles between the two most celebrated proponents of these views.

Second, however, in making my case for the compatibility of my first principle of Fullerian lawyering with other theories of law and lawyering, including lighter forms of positivism, I argue that, when the decision to subject the rules of society to law is taken, society makes a decision that honours both Fuller's functional account of the internal morality of law as well as a Hartian incorporation of morality into law through the rule of recognition. This works both as a social fact, in the choice to be governed by law, and as a necessary condition once the choice is made to govern society by law, rather than another means that does not respect personal autonomy, such as tyranny. In the following quote, Simmonds, although attacking a positivist conception of the rule of recognition, outlines a way in which a procedural naturalist could make use of the idea. He argues:

Furthermore...it is insufficient to explain how judges might be *guided* by the rule of recognition, for judges must *justify* their decisions. The mere fact that the decision is derivable from a rule of recognition accepted by the officials could not intelligibly be offered to the litigants as a reason that *justifies* the decision. For this reason, we should not think of legality as simply a matter of derivability from a basic rule of recognition. For such derivability will confer legality only if the system, of which the rule of recognition forms part, is itself a system of law. The features that qualify a system as legal in character (features provisionally identified in Fuller's eight *desiderata*) necessarily entail the provision of domains of optional conduct that are independent of the will

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<sup>23</sup> Simmonds, *Law/Moral Idea*, *supra* note 12 at 174.

<sup>24</sup> Hart, "Positivism", *supra* note 19 at 623-624 [emphasis in original]; quoted in Waldron, "Hart's Equivocal Response", *supra* note 12 at 1148-1149.

of others. It is the provision of such domains of conduct that forms the value of legality, and provides the basis for the legal judgment's justificatory force.<sup>25</sup>

On this view, there is indeed room in a Fullerian theory for social facticity to play a role as a condition for the existence of law. The key factor, however, is that the rule of recognition itself cannot, *by its facticity alone*, be a condition for the existence of law. Rather, the rule of recognition has its own conditions for proper application. These conditions include moral conditions brought into the rule of recognition itself by the rule of law in virtue of the rule of recognition's membership in the category of "law". It is hard, at first, to believe that a Hartian could do anything other than firmly reject this view. However, taking the above-stated equivocation into account, it might be reasonable to think otherwise. After all, if a Hartian is willing to accept the rule of law, in its thin moral nature, as a condition for the existence of law, then one would surely ask whether the rule of recognition would be guided in its law-recognizing role by the constraint that it can only perform this function in a system of rules that qualifies as a legal system and in a way that is consistent with the rule of law, as Simmonds notes in the quote just provided.

Additionally, if one is willing to recognize that the principles of legality are necessary for the existence of law, then it may be the case that one can also come to the conclusion that a judge, or other interpreter of the law in the relevant role, cannot make use of the rule of recognition to recognize norms which have content or formal qualities that violate the rule of law. Thus, one might argue that a judge cannot properly recognize a norm that requires the person subject to the law to perform an impossible action, or to follow a norm that is thoroughly unclear. Do we have any suggestion that Hart, even at the more Fullerian side of his equivocation, would go this far? We do indeed in Hart's discussion of the relationship between the rule of law and inclusive legal positivism. He shows a willingness to put water in the positivistic wine when moral norms are incorporated into the legal system by the rule of recognition. Importantly, the view that Hart takes here cuts against the idea that positive law must act as a Razian exclusionary reason. Hart says:

It is of course true that an important function of the rule of recognition is to promote the certainty with which the law may be ascertained.... But the exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged for the rule of recognition.... Only if the certainty-providing function of the rule of recognition is treated as

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<sup>25</sup> Simmonds, *Law/Moral Idea*, *supra* note 12 at 188 [emphasis in original].



paramount and overriding could the form of soft positivism that includes among the criteria of law conformity with moral principles or values which may be controversial be regarded as inconsistent.<sup>26</sup>

If the rule of recognition's pursuit of positivistic certainty can be toned down for the sake of a moral norm that has been brought into the system contingently and through the rule of recognition itself, it is possible that Hart, in the unwittingly Fullerian side of his equivocation, might also be willing to tone down positivistic certainty for the sake of a moral value that is necessarily built into the legal system as a condition of its existence through the rule of law.

The difference between these two views, the procedural naturalism of Lon Fuller and the inclusive legal positivism of H.L.A. Hart, is a slight one even when we put Hart at the most positivist end of his equivocation to Fuller. The two views become practically indistinguishable when Hart is on the Fullerian side of the equivocation. A Hart who recognizes the functional necessity and moral quality of the rule of law and who is willing to compromise on the clarity achieved by the rule of recognition is much closer to being an ally of Fullerian procedural naturalism than he is to being an ally of the exclusive positivism of Joseph Raz.

We have, in this, a recognition already built into the field of legal philosophy itself, of a theoretical closeness between weak positivist theories such as inclusive positivism and weak naturalist theories such as procedural naturalism. This is true all the more in the case of the philosophy of lawyering, especially given the requirements of legal ethics and the interpretive principles that I am proposing on the basis of the legal ethical guidance that can be derived from the rule of law. My principles of lawyering, generally stated, make no stronger claim of the link between law and morality, as a philosophical and interpretive matter, than I would make in legal philosophy. Additionally, the duty to take stock of the ways in which morality and law are intertwined is strong at the level of theorizing about lawyering because one is directly engaged in a professional *relationship* that affects a client's experience of the law. Thus, when thinking about the act of lawyering, Luban's arguments about the function of the professional lawyer-client relationship strengthens the impetus to bring out the fullness of the normative context. It also makes the Fullerian side of the inclusive positivist equivocation all the more persuasive.

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<sup>26</sup> H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) [Hart, *Concept of Law*] at 251-252 [footnotes omitted].

Having stated the Internal Morality Thesis of my theory of Fullerian lawyering in a way that (due to its “thin moral normativity”) shows its capacity for consistency with a wide variety of legal philosophies, I have developed my first principle in a way that is in line with Fuller’s own jurisprudential theory, which also shows a great capacity to be read in a variety of ways that are consistent with one or another of a wide variety of theories of legal philosophy. Let me now turn to the task of developing my Fullerian theory in a way that gives a more robust account of the moral principles that can be incorporated into the law by way of their relationship with the rule of law. This is a “thick moral normativity” that comes from the work of Nigel Simmonds, especially his idea that some moral values such as justice have a necessary connection with the rule of law.

In order to bring this “thick moral normativity” to bear on my first principle, I must give an account of the moral values that are incorporated into law either (1) directly through their participation in the normativity of the rule of law (as in the case of respect for human autonomy) or (2) by a relationship in which the rule of law mediates, by way of the principle of transitivity, a necessary connection between the moral concept and the rule of law (as in the case of justice). Recall that I said above:

Because the internal morality of law and its principles of legality are necessary conditions for the existence of law, law cannot disclaim at least this incorporation of morality. Nor can lawyers and judges, when engaging in legal interpretation, disclaim to know the moral truths that are necessarily incorporated into the law by the internal morality of law...<sup>27</sup>

How does this play out in the case of “thick moral normativity”? One must be more careful here. If “thick moral normativity” simply means a richer incorporation of respect for autonomy than is done under “thin moral normativity”, then officials of the legal system, such as lawyers, can be reasonably expected to know and engage with the moral value as in the case of “thin moral normativity” and nothing more is required of lawyers than would be required from “thin moral normativity”. Respect for individual autonomy is the animating value of the legal system (i.e. a value that is at the core of a necessary condition for the existence of law and thus a value that is protected and advanced, at least to some extent, in any legal system). Thus officials of the legal system can be expected to have a robust appreciation and interaction with

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<sup>27</sup> Above, in Section 4.3.1) at 84.

this normative value for the purpose of carrying out their work as officials within the legal system. But what if I mean much more than this when I discuss “thick moral normativity”?

If, to choose one of Simmonds incorporations of a richer, “thick moral normativity” is conceived of as including moral values that are necessarily connected by way of the transitivity that is facilitated by the mediating role of the rule of law, then things are different. As noted earlier, in such a case, justice achieves status as a necessary condition for law (and thus becomes necessarily connected with law) because justice is a necessary condition for the rule of law and the rule of law is a necessary condition for justice.<sup>28</sup> The requirements of my first principle of Fullerian lawyering become much more substantial under such a reality. Lawyers are then required to acknowledge and perform the service of lawyering in a way that coheres with the incorporation of the moral value of justice into law.

We should be aware of the possibility that the ability of a legal official to appreciate and interact with moral values may be reduced because of the normative separation (the transitivity or indirectness) that exists, even in my procedural naturalist view, between the law’s normativity and the moral normativity of moral concepts other than those contained directly within the rule of law itself. We might think that lawyers will be less able to appreciate and interact with ideas that become of importance to the legal analysis *by way of mediation* through the rule of law’s necessary connection to law rather than originating directly in a positive source of law or even by one of a single step of necessary connection.

A philosophical distinction will be helpful for us in understanding that the transitive relationship of necessity that exists between the law and justice does not necessarily have any effect on the ability of legal officials to appreciate and interact with justice. The distinction is between the major philosophical branches of metaphysics and epistemology. The criticism that I have summarized here posits that epistemic opacity can result from the relationship of transitivity that is the means by which justice comes to be a necessary condition for the existence of law. This means indeed that there is some metaphysical distance in the relationship of necessity between law and justice. However, that in itself does not mean that the transitively-connected moral concept (i.e. justice) is any more epistemically opaque or unclear than if it was

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<sup>28</sup> See Simmonds’ argument for the mutual necessary connection between justice and the rule of law summarized above in Section 2.3.2) at 51-58, especially 53-57. This argument is very briefly noted as a “mediated necessary connection” above in Section 4.2) at 80-81.

necessarily connected to law in one step rather than through the mediating value of the rule of law.

For example, if an information-technology expert needs to use a particular piece of hardware in order to accomplish a particular task and the hardware only runs a particular operating system, then the use of the operating system is a necessary condition for the tech expert to accomplish the particular task. There is a transitively-mediated relationship of necessity between the operating system and the ability of the tech expert to perform the task and thus, let us also say, to work in his/her institution, craft or sector of the economy or industry. There is a metaphysical or causal distance here between the tech expert and the operating system. However, the distance in terms of the necessary connections does not in any way imply an epistemic opaqueness or reduced clarity between the tech expert and the operating system. In fact, in my example, as I argue is also the case with law and justice, the tech expert ought to have relevant and substantial knowledge about the operating system given the role that s/he will be playing. This is not to say that there can never be opaqueness between things that are mediated by the transitivity-based relationship of necessity. I am merely arguing that the metaphysical fact of transitivity-based necessity does not, by itself, generate epistemic problems of opaqueness or reduced clarity for the people attempting to work with the concepts that are connected by way of transitive necessity to the system in which they work. An argument must be given in each instance about whether the epistemic accessibility, to the relevant actor, of the transitively-connected conditions.

My view is that, even with this less direct and mediated necessary connection, lawyers should still be able to readily satisfy my first principle of Fullerian lawyering when it is expressed in terms of “thick moral normativity”. What is required is the ability to reason in a sufficiently sophisticated way with ethical concepts. There is no reason to think that lawyers do not have the ability to do this already or with training, especially as it pertains to their own practice area within law. Even though moral values such as justice do not themselves inhere with the rule of law, their necessary connection with the rule of law calls for lawyers and judges to not disclaim their incorporation into law. Moreover, legal officials ought not to deny the moral truths that are incorporated into the legal system through any kind of necessary connection with law. Thus, lawyers ought to recognize that doing (moral) justice, especially of the kind that is most relevant

to the vindication of the rule of law, is a course of action that is valuable to the legal system in virtue of the legal system's membership to the conceptual category of law. This also goes for other moral values that have a necessary connection to the rule of law. That is, lawyers ought to accept (moral) justice as a legally valuable normative principle. The (admittedly onerous) task in response to this is to train our minds to be able to better handle the role that moral justice plays in understanding, advising, and acting upon legal norms. This does not necessarily mean that lawyers will need a curriculum in philosophical ethics. It does, however, mean that asking ethical questions and knowing something about ethical reasoning has an important functional and epistemic role in giving sound legal advice.

Lawyers will not always agree about what is just in a particular instance. Nonetheless, justice, because of the shape of its necessary connection with the rule of law, illuminates the law in a particular way when we are considering legal questions to which justice pertains. It is justice that helps keep us free, as Simmonds says, from the "ungrounded choice[s]" of other individuals<sup>29</sup>, including judges, because justice is a standard of orientation and expectation about the law's content towards which we expect the judge's analysis to aim. To return to my tech expert example, this is like saying that having knowledge about the operating system that is exclusively able to run the piece of hardware also tells the tech expert something about the hardware itself. What is desired is for legal officials, including judges and lawyers, to pursue the acquisition of the interpretive skills and excellences that are required to deal with justice, a moral value that will illuminate our normative system to us. This means, more generally, that skills at specific kinds of moral deliberation and interpretation contribute to excellence at legal interpretation.

To sum up, I argue for my first principle as expressed in the light of the "thick moral normativity" that Simmonds proposes. Lawyers should recognize the incorporation of (1) a robust notion of individual autonomy along with (2) the incorporation of moral principles that can be shown to have a necessary connection with the rule of law. This comes with reasonable expectations about application to particular moral principles. Even allowing for these reasonable expectations, however, lawyers are asked to treat moral principles that are incorporated in this

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<sup>29</sup> The notion of "ungrounded choice" was discussed above in Section 2.3.2) at 51-58, especially Section 2.3.2), note 77 and accompanying text, quoted from Simmonds, *Law/Moral Idea*, *supra* note 12 at 198; and Section 2.3.2), note 81 and accompanying text, quoted from *ibid*.

way as being directly relevant for the purpose of understanding the *legal* norms to the extent that the rule of law, or particular aspects of the rule of law, are at stake and can be illuminated by relevant moral principles such as justice.

#### **4.4) Second Principle of Fullerian Lawyering – The Moral Orientation Thesis**

The second principle in my theory of Fullerian lawyering is profoundly connected to the first principle's recognition of the truth that the rule of law incorporates moral normativity into the internal conditions for the existence of law. Additionally, the shape of this second principle, a principle that I will call the "Moral Orientation Thesis", will be affected by the question of whether one comes to the interpretive analysis in the first principle conceiving of the rule of law in terms of "thin moral normativity" or "thick moral normativity". Either view would generate a plausible reading of the second principle and may even justify Fuller's optimism about the contribution that the rule of law makes to the moral status of law. However, a theory with "thick moral normativity" goes much further towards providing a foundation for the moral ambitions that Fuller has for the rule of law.

My Moral Orientation Thesis is inspired by Fuller's ethically ambitious view (perhaps overambitious view) about the law tending away from evil generally on the basis of the rule of law.<sup>30</sup> Under Fuller's view, which was criticized by Luban, as summarized above<sup>31</sup>, the rule of law shapes the nature of law such that it tends away from evil. Such a thesis, without the development into a theory with "thick moral normativity", is not as attractive as it could be (although not completely without appeal) in terms of being an accurate description of the history and tendencies of legal systems. If all that is required to tend away from evil is that the law respect individual autonomy (under "thin moral normativity"), then there is great leeway for legal systems to fulfill this requirement, meet the standards of the rule of law to such an extent of "thin moral normativity", and yet instantiate great evils in other ways. If "thick moral normativity" is the standard, then we have much more robust grounds on which to criticize such

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<sup>30</sup> Above in Section 2.1), note 8 and accompanying text.

<sup>31</sup> See my summary of Luban's criticism, above, in Section 2.3.3) at 62-63, and Section 3) at 72-73.

regimes for undermining the rule of law and to thus also show that way in which the rule of law shapes the nature of law to tend away from evil.<sup>32</sup>

Nonetheless, this morally ambitious thesis of law tending away from evil is attractive as an interpretive principle for the practice of lawyering even when all that we are given from the rule of law is “thin moral normativity”. Treated as a theory of lawyering and derived after the discussion of the first premise, I argue that we can recognize this second principle as a proper interpretive attitude for a lawyer (i.e. the proper internal perspective, to use a Hartian term). At the general level, and not shaped by a theory that reflects thin or thick moral normativity in particular, the principle is that the lawyer should approach his/her task of interpreting the law with the view that the following things tend away from evil: (1) *law* (when discussing this category with its internal morality in mind), (2) *a legal system* abiding by the rule of law, and (3) the particular rules in any area of law within a legal system that abides by the rule of law (and in which the norms within the area of law abide by the rule of law). From herein, when I discuss the satisfaction of the rule of law, it should be read as referring to all of these three levels, with emphasis on one or more as is relevant to the particular topic under discussion.

Consider first an explanation in which “thin moral normativity” could be the normative shape of my second principle of Fullerian lawyering. How could moral normativity that arises out of a thin principle of respect for human autonomy properly<sup>33</sup> generate, among lawyers who are in the course of serving as legal officials, an outlook which says that the law tends away from evil? In making this first explanation, the scope of the question is very important. If the goal is to show that lawyers could properly have the view that all valid law (i.e. law that has satisfied the rule of law) tends away from evil, then that will be impossible if we are limited to “thin moral normativity”.

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<sup>32</sup> See an example of these more robust grounds in my reply to Luban’s criticism of Fuller, above, in Section 3) at 73-76. My reply is ultimately made on the basis of grounds that would fall under the heading of “thick moral normativity”.

<sup>33</sup> I conceived of the word “properly” as referring to moral propriety. As in, “is this a proper moral view to hold given (1) the value that your role is supposed to serve and (2) the factual information that you know?” The moral propriety of a view is determined at least by whether it makes sense of central moral concepts such as justice and whether moral problems have been assessed reasonably using moral principles in the applied context. Thus, one would not have a proper moral view when failing to realize, at all, the injustice that can still exist in a society even when the rule of law is achieved under “thick moral normativity”.

However, if the task is smaller, such as the more modest project that some legal ethicists have identified as the focus of legal ethics, then “thin moral normativity” may be up to the task of properly generating this view among lawyers. Take, for example, Alice Woolley’s question of “what, in a free and democratic society, the role of the lawyer should be”.<sup>34</sup> When engaging in this project, one is not taking what is undoubtedly the less attractive position that a lawyer in any legal system should take the interpretive attitude that their own legal system generally tends away from evil. As Luban showed, as summarized above<sup>35</sup>, such a theory would be implausible because of the great variety of societies that satisfy the rule of law in terms of “thin moral normativity”, including many which do not tend away from evil (including those that unjustly exclude people from the community whose autonomy the rule of law seeks to protect). Given this, “thin moral normativity” is more up to the task of explaining how a lawyer in the context mentioned by Woolley could properly come to the conclusion that, given the satisfaction of the rule of law by the legal system of a free and democratic society, the legal system belongs to a category that tends away from evil.

On to the explanation of the way in which the rule of law under “thin moral normativity” can properly generate the perspective that my second principle of Fullerian lawyering requires. The key relationship here is in the contribution that the rule of law and free democracy make to the goal of tending away from evil. I am not arguing here that, in tending away from evil, the law, as enacted in accordance with the rule of law, perfectly lines up with the good, or actively tracks the good. That too would be untenable because it would be incoherent in a situation in which political parties are elected and pursue differing agendas. Do each of their policies track the good when they create opposing laws as they have their turn in government? Instead, the second principle as conceived here is simply that, when law is created in accordance with the rule of law and in a democratic society, with the values embodied by these two systems (legality and free, or liberal, democracy) in conjunction, there should be a presumption that the laws tend away from evil or can avoid evil. This could mean actively pursuing the moral value but also

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<sup>34</sup> Alice Woolley, “If Philosophical Legal Ethics is the Answer, What is the Question?” (2010) 60 U.T.L.J. 983 at 987. See also these papers that were published as part of a special issue of the same journal: Daniel Markovits, “Three Issues in Legal Ethics” (2010) 60 U.T.L.J. 1003; W. Bradley Wendel, “Methodology and Perspective in the Theory of Lawyers’ Ethics: A Response to Professors Woolley and Markovits” (2010) 60 U.T.L.J. 1011; Tim Dare, “Philosophical Legal Ethics and Person Integrity” (2010) 60 U.T.L.J. 1021.

<sup>35</sup> Above in Section 2.3.3) at 62-63, and Section 3) at 72-73.



pursuing policies that are morally neutral. And a value that would support this within both the rule of law and democratic government is, for example, respect for the autonomy of persons. Both the rule of law and democracy hold this value in a central place within their theoretical underpinnings. The rule of law vindicates respect for autonomy for individuals as a matter of legal philosophy while democracy seeks to vindicate autonomy as a matter of political philosophy. When the systems are in place, a lawyer (i.e. an actor within the legal system who owes fidelity to the law) should give a system that is governed by the rule of law and democracy a presumption that the laws in the system created according to these two sets of values actually do tend away from evil, especially with respect to the evils that are contrary to the animating values of general morality that I just argued underlie them both.

The rule of law, when considered under a theory of “thick moral normativity”, is in a better position to properly generate the internal perspective in lawyers that the law tends away from evil. First, the ability of the rule of law to make law tend away from evil, under such a view, does not depend on a contingent association between itself and a contingent reality. This is to say, the rule of law conceived in this more robust way is not dependent on whether society contingently adopts democratic values. In fact, quite the opposite, it is possible that the rule of law, conceived of in this way, promotes democratic values. If the rule of law has a necessary connection with justice, but in particular, political justice<sup>36</sup>, then a society that has the rule of law will necessarily bring with it democratic values if democratic values are considered an essential part of political justice. Thus, if the case made just above in favour of the ability of the rule of law, conceived of in terms of “thin morality normativity”, succeeds at properly generating our desired internal perspective, then it will also be able to generate the internal perspective in the case of “thick moral normativity”. Thus, if free democracy and the rule of law can make the law tend away from evil in terms of “thin moral normativity” it can also do so in the case of “thick moral normativity”. The difference is that this argument attains its outcome by

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<sup>36</sup> See generally Rawls’s definition of “the idea of a political conception of justice” in John Rawls, *Political Liberalism*, expanded ed. (New York: Columbia University Press, 2005) at 11-15.

I recognize that much work would need to be done to prove this particular necessary connection between the rule of law and political justice. That can be the project of future work. The same can be said generally for my project of arguing for my two premises of Fullerian lawyering. I am now only making an explanation of how the two principles, especially the second principle, would work under a Fullerian account.

necessity in the case of “thick moral normativity”, rather than by contingency as in the case of “thin moral normativity”.

Beyond this initial point, the wider-ranging advantage of the rule of law under “thick moral normativity” is the relationship of necessity between the rule of law and other moral values, especially justice. Even merely with the necessary connection between the rule of law and justice<sup>37</sup>, the lawyer has a strong reason to think that law tends away from evil. If law cannot even exist (because of a mediated necessary connection) without vindicating, to the relevant extent, the moral value of justice, then law instantiates a strong *indicator* of a tendency away from evil. If there are other moral values, besides justice, that have this same kind of mediated necessary connection with the rule of law, then the indicators of law’s tendency away from evil become all the more strong. This is a richer account of the evil-avoiding tendencies of the law than Luban imagined. If this is the case, then law is morally better than Luban imagined and the lawyer, having a duty to undertake the internal perspective towards law’s legal normativity, should also appreciate the moral normativity that is brought in by way of a morally robust reading of the rule of law.

Treating the law with the recognition that it tends away from evils means two things. First, the lawyer must show sufficient deference to the positively-stated law that is created, and maintained, in accordance with the rule of law and under a democratic society. This can mean something along the lines of Bradley Wendel’s notion of respect for the law under the heading of political obligation, which entails honouring the legal entitlements of others, not manipulating the law and not unsettling the positive law by means not recognized by the legal system.<sup>38</sup> Second, interpreting the details of the positively-stated law with the recognition that law tends away from evil means reading laws to make the best moral case and justification for those particular laws insofar as they pertain to the principles of legality. Thus, the principles of legality and norms within the positive law that further the principles of legality must be read to give them robust force. This principle is a sort of Dworkinian reasoning for the rule of law.

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<sup>37</sup> Recall, of course that both of these, (1) the rule of law and (2) justice, are conceived of as functioning like principles and in terms of *degree* of achievement, rather than binary achievement or non-achievement.

<sup>38</sup> Wendel, *Fidelity*, *supra* note 3 at 88, special \* footnote.

If one is to consider the distinction drawn by Dyzenhaus between the legal analysis at the fundamental level and at the doctrinal level<sup>39</sup>, the second principle of my Fullerian theory of reasoning is meant to set up a two-stage process for the provision of legal advice.<sup>40</sup> First, the lawyer must assess whether the legal system, the law on the particular field and perhaps the individual legal sources that are relevant to the case at hand, comply with the principles of legality. This inquiry takes place at the fundamental level. If the law, conceived in terms of these various degrees of generality and specificity, abides by the principles of the rule of law, then the second step for the lawyer is to engage with legal analysis at the doctrinal level. Under the second principle of Fullerian lawyering, this doctrinal analysis will be shaped by the lawyer's duty to treat the law as tending away from evil. If one is to fill in the details and take to heart the idea of analyzing the doctrinal law in a way that tends away from evil, one would perhaps find suitable interpretive guidance in the theory of Ronald Dworkin and his approach of making the "best moral case" of and for the law that one is interpreting. As noted above,<sup>41</sup> William Simon brings Dworkin's legal philosophy into the field of legal ethics. It is at this doctrinal level of my second principle of Fullerian lawyering that I can find it particularly helpful to make use of a theory that has such a rich tie-in between the value-laden/moral nature of law and the process of doctrinal interpretation. A lawyer's engagement in a Dworkinian/Simonian interpretive process is triggered, under my theory of lawyering, by a particular legality-affirming answer to a Fullerian question at the fundamental level. If the legal system abides by the rule of law and thus tends away from evil, then let us treat it as doing so, in the general way that Dworkin wants done as an interpretive strategy and especially in terms of its coherence with justice, as Simmonds wants. Our concern with justice at the fundamental level should seep into our doctrinal interpretation, as it cannot help but doing.

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<sup>39</sup> Above, in the Introduction at 2-5.

<sup>40</sup> I, of course, do not mean to suggest that these two stages are to be treated as silos from one another. It may be that lawyers and judges, in the way that Simmonds would have it, will need to understand something about doctrine in order to fully understand the analysis at the fundamental level. I simply mean to suggest that these are two levels of analysis, mixed though they may be, that are involved once an interpreter of the law engages in legal analysis under my second principle of Fullerian lawyering.

<sup>41</sup> Above, in Section 4.1), especially note 2 and accompanying text.

This outline quickly summarizes the Fullerian interpretive principles of lawyering that I propose:

**First Principle of Fullerian Lawyering – The Internal Morality Thesis:** Because the internal morality of law and its principles of legality are necessary conditions for the existence of law, law cannot disclaim at least this incorporation of morality. Nor can lawyers and judges, when engaging in legal interpretation, disclaim to know the moral truths that are necessarily incorporated into the law by the internal morality of law, the consideration of such moral truths being necessary for the task of legal interpretation.

**Second Principle of Fullerian Lawyering – The Moral Orientation Thesis:** When the legal system and the law on a particular field abide by the rule of law, a lawyer has a duty, from the perspective of legal ethics, to treat and interpret the law as tending away from evil.

#### **Two Level Analysis of the Moral Orientation Thesis:**

**(1) Fundamental Level:** The lawyer must assess whether the legal system, the law on the particular field and perhaps the individual legal sources that are relevant to the case at hand, comply with the principles of legality.<sup>42</sup>

**(2) Doctrinal Level:** If the law on the relevant case does comply with the principles of legality, the lawyer should treat the law on the subject as if it tends away from evil. Treating the law as tending away from evil means:

*First*, the lawyer must show sufficient deference to the positively-stated law. *Second*, interpreting the details of the positively-stated law means reading them to make the best moral case and justification for law insofar as it pertains to the principles of legality.

#### **4.5) Lawyering and Legal Ontology in Practice**

Before closing this development of my two principles of Fullerian lawyering, it is important to explain that the relevance of my two principles does not end at the requirement to take specific approaches to the task of legal advice. The theory is not simply a requirement to think in a certain way while doing law. The duties that I have explicated show the normative relevance of lawyers to the legal system. How does a lawyer interact with the substance of law?

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<sup>42</sup> Note that, at the fundamental level, the principles of legality, especially when conceived of in a narrow way (under the rubric of “thin moral normativity”), may be only one set of evaluative criteria that come to bear on the question of the ideal of fidelity to law. Another one of the criteria, despite its secondary position relative to the rule of law, may indeed be the political philosophical aspect of Raz’s authority of law.

A lawyer, playing the role of either an advocate or an adviser, cannot have a “rule of recognition”-style effect over the substance of the positively-stated law.<sup>43</sup>

What a lawyer can do, however, is play a role in the use and interpretation of law within society, which is of great importance when we conceive of “creating” or “making” law in the robust sense of giving meaning to the law’s norms.<sup>44</sup> This is a substantial involvement in the process of creating law and in the process that *is* law, as Allan Hutchinson would argue. In making his case, Hutchinson criticizes the Dominant Model’s image of the law as failing to make sense of the degree to which the work of lawyers within the legal system is part of the process (namely the discursive process that involves the creation of norms and endowment of meaning) that is constitutive of law. Hutchinson argues that “The law never simply *is*, and lawyering is never completely the passive and technical involvement in that *is*...”<sup>45</sup> He also argues, speaking practically, that lawyers rarely behave as if “[T]he law is fixed, certain and determinate”.<sup>46</sup> Thus, Hutchinson argues that lawyers already know, in practice, that it is not just that the law can be

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<sup>43</sup> By this, I mean simply that lawyers’ interpretation of the law is not a condition of legal validity. A norm or interpretation does not become law simply because a lawyer has given an interpretation or made a statement about the law. Of course, I do recognize instances in which the interactions of lawyers with law can shape the application and use of law for their clients. That is the topic of the next several pages. For the purpose of the present footnote, I simply acknowledge that the lawyer’s relationship to law has substantially different implications for legal validity as compared to that of a judge.

At the same time, it will be helpful to recall this in the context of the criticism that Simmonds makes of Hart’s view about the ontological significance that the rule of law can have as a condition of legal validity. Simmonds’ criticism has been summarized above in the following notes: Section 2.3.2), note 42 and accompanying text (citing Simmonds, *Law/Moral Idea*, *supra* note 12 at 159, 170, c. 4), Section 2.3.2), note 52 (citing *ibid.* at 188, 191), Section 4.3), note 25 and accompanying text (citing *ibid.* at 188). With this argument proposing a much reduced ontological significance for the rule of recognition, which is typically focused around the work of legislatures and courts, especially, it may be possible to close the gap between the ontological implications and significance of lawyers’ and judges’ relationships to legal validity.

<sup>44</sup> I will cite Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin Law, 2006) [Hutchinson, *Legal Ethics*]. William Simon makes an argument on this point that is similar/related to the argument that I will cite from Hutchinson and which Simon calls “The Problem of Private Legislation”. This problem refers to the use of legal rights and maneuvers by private actors to establish binding social norms that the courts will enforce, or which will take some time to overturn. Such “private legislation” is often coordinated by lawyers (not necessarily in a nefarious way) for the benefit their clients. This practice affects the use and experience that people have of the law. See Simon, *Practice of Justice*, *supra* note 1 at 46-52.

<sup>45</sup> Hutchinson, *Legal Ethics*, *ibid.* at 26 [emphasis in original].

<sup>46</sup> *Ibid.*

shaped by the actions of lawyers in the sense that lawyers are actors within the legal system and thus use the various levers of the legal system to have the machine spit out an answer that serves their client. Instead, lawyers' work in shaping the law, giving meaning, etc., is the process of law and is constitutive of law.

When thinking about this robust sense of meaning-giving processes that is constitutive of law, we see that the lawyer's role has ontological significance for the legal system and its substantive norms. Such a view can add colour to the advising context, the advising context being the focus of Fuller's work and also a focus of this paper and its case study, discussed below<sup>47</sup>. Under Hutchinson's view, which I endorse, there is greater conceptual relevance (in the sense of being relevant to the concept of law) when we say that the lawyer can affect the way in which his/her client *responds to the substance* of the positive law. The same is true when we recognize that, by playing his/her role within the legal system in different ways, the lawyer can influence the way in which *the client is affected by the substance* of the positive law. In both of these cases, the lawyer is participating in the creation of the substance of the law to which their client will respond, or by which the client will be affected.<sup>48</sup>

Putting Hutchinson's approach in the context of Fullerian legal theory and Fullerian lawyering, I argue that the lawyer has the capacity to affect the client's interaction with the rule of law and with the moral values that the rule of law incorporates into the legal system. If the lawyer participates in a process that is constitutive of law, then the lawyer has the capacity to do work that engages Fuller's eight desiderata. Many philosophical theories of legal ethics (including positivist and natural law theories) are, at least under some expressions of the theories at play, conceptually consistent with the recognition of the ways in which lawyers affect the experience that the client has with substantive law. These views could also recognize that the work of lawyers can affect the client's interaction with the rule of law and its internal or related values.

The way in which the lawyer's influence plays out will be determined, in part, by the approach that the lawyer takes to law. This approach is better-structured when it is in accord

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<sup>47</sup> Below in Part IV – Applied Legal Ethics.

<sup>48</sup> This characterization is especially relevant when the lawyer works in the OLC and the recipient of his/her legal services is the executive branch of the federal government of the United States, as I explain below in the text accompanying Section 6.1), note 12, and as I summarize from Wendel's criticism of the "torture memos", below in Section 6.2) at 142, especially note 82.

with the best philosophical account of law (which I argue includes the insights of Lon Fuller). Taking Simmonds' view of the rule of law, which I endorse and which incorporates "thick moral normativity" into the law, I would argue that the lawyer (through his/her role and because of the necessary connection between the rule of law and justice) can influence the way that the legal system makes justice apply to a client's case. Moreover, "law", the rule of law and justice are not always vindicated by the positive law or by the way in which legal officials and citizens wish to make the positive law play out, including in the process of meaning-giving. The lawyer is often in a position to affect the degree of coherence of the positive law with "law", the rule of law and justice, especially as it pertains to the client's experience of these things. The lawyer can influence the client's interaction with the law, and its internal or related values, so that the client's experience either vindicates or deviates from the rule of law and its values. Therefore, it is appropriate to expect the lawyer to have more normative influence on cases than the traditional model of lawyering and its positivist proponents would want. This kind of influence is simply part of the lawyer's role. The question is not whether the lawyer will have this influence, but what the character of this influence will be.

The major positivist theories within philosophical legal ethics, through their support for the traditional model, express a view of lawyering in which the client and the positive law are the major normative orientations for the lawyer. Positivist theories of legal ethics tell the lawyer to stop short of the kind of lawyerly normative influence that I argue would be needed in many instances to vindicate the rule of law and its related values. This is problematic especially in situations in which the lawyer is the only relevantly-positioned legal official to vindicate the rule of law either at that stage in a case or perhaps even at all. On the contrary, my theory, along with the views of other philosophical legal ethicists who take a natural law perspective, proposes an approach to law and lawyering that provides the framework to encourage the lawyer to exercise the kind of normative influence that is needed to vindicate the moral values that are brought into the legal system under our respective theories. In my particular view, the encouragement of this kind of initiative on the part of lawyers figures in the purpose of my two principles of Fullerian lawyering. My principles are part of the task of practicing a particular procedural naturalist approach to lawyering that is valuable in itself. Additionally, however, my principles are meant to be jointly sufficient, in generating this approach, for the lawyer to

exercise the kind of normative moral influence that I think is necessary to vindicate the rule of law and its related values in the particular context of the client's experience of the law. As mentioned in the present section of this paper<sup>49</sup>, the lawyer, because of his/her role, can have this effect. Orienting lawyers to the true source of their normative duties *qua* lawyers (i.e. the category of "law" and the rule of law) provides a sufficient reason for lawyers to structure their dealings with the client to vindicate the values that are ontologically relevant to law and the lawyering role.

#### 4.6) Some Ethical Evaluation of Procedural Naturalist Lawyering – Is Fullerian Lawyering a Theory of Legal Ethics?

With a theory of lawyering that is based on procedural naturalism, especially of the sort that draws on Simmonds' rich view, my theory does not make the same error that Allan Hutchinson identifies in Wendel's theory of legal ethics. Hutchinson says of Wendel's Razian-inspired (at least in terms of the functionalist authority of law thesis) inclusive positivist theory of lawyering:

[I]t is not so much an account or justification of legal ethics, but a denial that lawyering is an ethical undertaking. There is no place for ethics in his political manifesto of professional lawyering. There is simply the institutional demand that lawyers make good faith efforts to interpret what the law is in any particular instance in a reasonable manner. This seems to be such a minimalist and open-ended injunction – '*be reasonable*' – as to allow lawyers do almost whatever they want in the name of responsible professional behavior and with the stamp of ethical approval....Under his scheme of legal ethics, there is little to discuss or wrestle with when it comes to acting professionally. If this engagement is a mark of ethical conduct (as I will argue it is), then Wendell has nothing to tell us. For him, the dilemmas of legal ethics can best be handled by proceeding as if they did not exist.<sup>50</sup>

Hutchinson criticizes<sup>51</sup> Wendel's view that "lawyers, when they act in a professional capacity, should be concerned only with the *legal* justice of the clients' situations".<sup>52</sup>

A related criticism of Wendel is made by Trevor Farrow. He says:

What Wendel has done is essentially both to download and upload the role of moral deliberation in the context of lawyers, clients and society. On his theory, lawyers download to their clients the

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<sup>49</sup> Namely, in Section 4.5).

<sup>50</sup> Allan C. Hutchinson, "A Loss of Faith: Law, Justice and Legal Ethics", Book Review of *Lawyers and Fidelity to Law* by W. Bradley Wendel, Int J of Legal Profession [forthcoming] [Hutchinson, "Loss of Faith"] at 5 of draft [emphasis in original].

<sup>51</sup> *Ibid.* at 12 of draft.

<sup>52</sup> Wendel, *Fidelity*, *supra* note 3 at 28 [emphasis added].



responsibility of deliberating about the morality of choices surrounding individual arrangements and exercises of power. Further, lawyers upload to judges, politicians and other public officials the responsibility to deliberate about the morality of collective choices and institutional arrangements in the public lawmaking sphere.<sup>53</sup>

Hutchinson and Farrow share at least one common reason for being dissatisfied with Wendel's theory because of their observation that it punts the ethical analysis out of the domain of lawyers. Both discuss the problem that they believe arises from Wendel's treatment of the law as if it is a determinate resource that lawyers can access.<sup>54</sup> Hutchinson and Farrow argue that moral analysis is necessarily part of the work of the lawyer because dealing with the indeterminacy of law means engaging in moral analysis in order to give meaning to the morally-apert aspects, terms, etc. within the law.<sup>55</sup> One need not subscribe to this particular explanation in order to be in agreement with the criticism of Wendel's theory that it is not truly a theory of legal *ethics* and that it undermines a necessary part of the interpretive work of a lawyer, namely moral analysis.

Alternatively, one could make the criticism of Wendel from the perspective of a natural law theorist who posits the need to engage in moral analysis not on the basis of indeterminacy but on the basis of a suggested ontological connection between law and morality.<sup>56</sup> Notably, the key point of common criticism is not that a particular kind of moral analysis is lacking from the Wendelian theory. Once developed, all of the viewpoints making the present criticism could also potentially turn to one another and argue that the other theories are lacking in that they do not demand that the lawyer engage in a particular kind of moral analysis. Rather, the common criticism is that Wendel's theory prescribes that the law abdicate moral analysis within the task of providing legal advice.

The theory of legal ethics that I offer does not suffer the same problem. I place a moral value at the centre of my legal philosophy and my theory of lawyering. Under the theory of

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<sup>53</sup> Trevor C.W. Farrow, "The Good, the Right, and the Lawyer", Book Review of *Lawyers and Fidelity to Law* by W. Bradley Wendel (2012) 15 *Legal Ethics* 163 [Farrow, "Review of Wendel"] at 169.

<sup>54</sup> Hutchinson, "Loss of Faith", *supra* note 50 at 9-11 of draft; Farrow, "Review of Wendel", *ibid.* at 169-171.

<sup>55</sup> I am in substantial agreement with this thesis even though I have not worked out the extent of the indeterminacy in light of my Fullerian analysis of law.

<sup>56</sup> As with the previous note, I will express, here too, my openness and agreement with such an idea, but will point to the need to develop the contours of my view with respect to this connection and its relationship to my Fullerian view of law.

jurisprudence that I espouse, a moral value cannot help but play such a central role. Similar to the argument raised by Simmonds against positivist theories of legal reasoning, the authority of law and reason-giving<sup>57</sup>, I argue that it is impossible to be “concerned only with the *legal* justice of the clients’ situations”.<sup>58</sup> For just as it is necessary, under Simmonds’ criticism of positivism, for a person to know whether a purported law and/or legal system abides by the rule of law in order to know whether s/he has a legal reason that s/he must include into his/her process of practical reasoning, a lawyer applying my Fullerian theory must also ask whether, and in what way, purported legal norms abide by the rule of law in order to know what it means to seek the clients’ *legal* justice as a lawyer. Furthermore, the duty of fidelity to law, and indeed *to the legal justice* that the legal system purports to provide, that is owed by the lawyer cannot be assessed under my view without answering questions about the legal system’s adherence to the internal morality of law. In terms of the validity and interpretation of legal norms, one must answer the rule of law question, and thus an ethical question<sup>59</sup>, before one can answer legal questions about the law. Consequently, under the Fullerian theory of lawyering that I propose, one cannot evade, or replace (to refer to idea championed by Raz),<sup>60</sup> ethical questions present in a dispute by making a legal move. Making legal moves implies functional and ethical support from the rule of law from start to finish.

Furthermore, on the point of Hutchinson’s criticism of amorality against Wendel, consider the way in which my Fullerian theory of lawyering satisfies the *ethical* needs of the practical and applied level of a theory of legal ethics. Hutchinson gives an account of the “[P]hases and components of ethical behavior”.<sup>61</sup> These are the elements that would be

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<sup>57</sup> See Simmonds’ argument about the priority of the rule of law over law’s authority, above, in Section 2.3.2) at 41-44.

<sup>58</sup> Wendel, *Fidelity*, *supra* note 3 at 28 [emphasis added].

<sup>59</sup> Relevant ethical questions pertaining to the rule of law can be asked at every level of moral inquiry, including meta-ethics, normative ethics and applied ethics. I hasten to note that my mention of these various levels of moral inquiry does not mean that I believe that one must answer every ethical question that could arise at every one of these levels before one can ask and answer questions about law. However, there may be questions at each of these levels of moral inquiry (i.e. questions at each of these levels that pertain to the rule of law, either directly or indirectly) that are conceptually necessarily for there to even be questions about the law. I briefly note the possibility of future research on meta-ethics and the rule of law below, in the Conclusion, at 172-173.

<sup>60</sup> Raz’s view of law as an exclusionary reason in practical reasoning is discussed, above, in Section 1.1) at 9-12.

<sup>61</sup> Hutchinson, “Loss of Faith”, *supra* note 50 at 11 of draft.

necessary for “An Ethical Account of ‘Legal Ethics’”.<sup>62</sup> He provides three elements that are not simply a list of correct answers to ethical problems, but are rather three kinds of resources on which lawyers would need to draw in deciding how to behave ethically.<sup>63</sup> These elements are (1) moral sensitivity, (2) moral judgment, and (3) moral conviction. Hutchinson describes them in the following way:

*Moral sensitivity* is the capacity to recognize that a situation has moral dimensions, that it presents a choice of possible responses, and that its resolution may have implications, large and small, for all parties involved, including oneself;

*Moral judgment* is an ethical assessment about what one ought to do and involves drawing upon a rich understanding of role-expectations, situational balance, likely consequences, and moral integrity in order to justify a particular line of action;

*Moral conviction* includes the self-discipline and perseverance to implement the decision by giving priority to the decided-upon moral course of action over other values or goals (e.g., career advancement, personal relationships, hedonistic pleasures, etc.).<sup>64</sup>

My proposal in this paper certainly does not give, nor does it attempt to give, a robust account of all three of these “phases and components” that Hutchinson provides. The task of developing a Fullerian theory in a way that deals with all three of these elements must be left for the future because it is too great an undertaking for the present paper. Thus, I do not aim to address in a deep way the issue of moral conviction. Moreover, I can claim to only briefly have dealt with the topic of moral sensitivity, as I did in light of my first principle of Fullerian lawyering, the Internal Morality Thesis, which tells lawyers that they must not deny the presence of morality within law as it has been incorporated by the rule of law.<sup>65</sup> My first principle means that lawyers must be sensitive in recognizing that legal analysis and lawyering have certain necessary moral dimensions. Most prominently, the work done in this paper is focused on developing a resource, namely the idea of lawyerly fidelity to law as structured by the moral and legal value of the rule of law (and applying this idea to the case of the “torture memos”) that can be used by lawyers in their practical and doctrinal reasoning with regard to justifying a particular line of action. Thus, the focus of this paper, in terms of the “phases and

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<sup>62</sup> *Ibid.* [italics removed].

<sup>63</sup> *Ibid.* at 11-12.

<sup>64</sup> *Ibid.* at 12 of draft [emphasis in original]. See also *ibid.* at 14 of draft.

<sup>65</sup> See the case for my first principle of Fullerian lawyering (i.e. the Internal Morality Thesis) in Section 4.3), above, and a brief synopsis of this first principle, above, at the end of Section 4.4) at 102.

components of ethical behaviour”, is on giving an ethical system that can be used for moral judgment in the role of lawyering.

Lastly, my theory also deals with an aspect of legal ethics that is of great importance to lawyers collectively for their role as a profession within society. Hutchinson makes the point that Wendel’s theory, in its unsatisfactory *ethical* normativity and stance that amounts to a re-imagined defence of the standard model of lawyering<sup>66</sup>, does not do a great deal to justify the role of lawyers within society. He argues:

[I]f lawyers are to be properly treated as ‘public actors’ as Wendel intimates, then it is essential that there is a more informed and fuller appreciation of what public goals and communal interests are being advanced by lawyers in their professional practice. Without more, there is no justification for why the public interest should be thought to be exhausted or fulfilled by lawyers’ facilitation of private interests.<sup>67</sup>

Here too, my Fullerian view does not leave us ethically wanting in the same way that Hutchinson says Wendel does.<sup>68</sup> Lawyers, under my theory, are to perform their role and show fidelity to law because of the coherence of their legal system with the rule of law. This means that the professional work of lawyers is aimed, in substantial ways, at helping the legal system to vindicate (1) the moral values, namely freedom and independence from the control of others, that are embodied in the rule of law, and (2) justice, to the extent that the vindication of justice is a necessary condition for the vindication of the rule of law, the rule of law being conceived of in term of “thick moral normativity”. The lawyer’s profession, properly conceived, is oriented towards those public goods and communal interests. These interests are vitally important to society, and indeed, these values are the cornerstones of livable and liberal community with other people. This certainly may not be the whole of the explanation of how lawyers can be conceived of as public actors. But it gives us a strong foundation of ethical norms on which to ground the role of lawyers as public actors, whereas Wendel’s theory was left wanting for *ethical* normativity.

One should be aware, in considering this argument, that the entitlement views of Wendel and Dare (i.e. the view that the lawyer should pursue the client’s legal entitlements)

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<sup>66</sup> See Hutchinson reference Wendel’s closeness to the Standard Conception of lawyering, Hutchinson, “Loss of Faith’, *supra* note 50 at 3, 4, 6, 14, 15 of draft.

<sup>67</sup> *Ibid.* at 15 of draft [footnote omitted].

<sup>68</sup> Here, I will offer an account of the way in which my theory explains how lawyers can be conceived of as public actors. I will not offer an account of how lawyers can be conceived of as public actors “[B]y lawyers’ facilitation of private interests” through the standard model of lawyering, *ibid.* [emphasis added].

have attempted to rein in the duty to zealously pursue the client's cause even to such a point that the legal result leads to injustice for others. Wendel and Dare have distinguished between various kinds of zeal. Recall "hyper-zeal" and "mere-zeal" as proposed by Tim Dare.<sup>69</sup> Thus, although the lawyer has a duty to protect his/her client's autonomy, the lawyer ought not, under Dare's expression of the Dominant Model, pursue whatever the law can be made to give to the client. The lawyer should keep to the pursuit of the client's legal entitlements and not provide a type of lawyering that will lead to *legal* injustice for others. However, and problematically from a moral perspective, the lawyer does have a duty to vigorously pursue the client's *legal entitlements* basically without limit to zealousness. Even with the duty of zealousness being limited to the client's legal entitlements, the ability of the Dominant Model to advise lawyers, in their role as lawyers, to evade moral injustice is, as Hutchinson argues<sup>70</sup>, limited to the degree to which the client's *legal entitlements* happen to align with moral justice or do not lead to moral injustice. To put things differently in a way that takes stock of Simon, Wendel and Dare's accounts of the Dominant Model, and Hutchinson's criticism of the revised Dominant Model, one could say, using Simon's language<sup>71</sup>, that the Dominant View (in the terminology that Simon uses in the chapter just cited), asserts that the client has a right to have the lawyer pursue his/her legal justice even when such lawyering leads to extra-legal (or moral) injustice for others.

My theory of legal ethics does not have this kind of dissonance between the zealousness that lawyers are permitted (or even encouraged to practice) and goal of pursuing ethical justice. That is to say, lawyers are not permitted or encouraged, under my view, to pursue their clients'

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<sup>69</sup> For summaries of the relevant arguments, see above, in Section 1.2) at 16-18, for Dare's work, and above, in Section 1.3) at 23-24, for Wendel's contribution.

<sup>70</sup> Hutchinson, "Loss of Faith", *supra* note 50 at 12-14 of draft.

Within his criticism of Wendel, Hutchinson says, at 12 of draft:

"When the going gets tough, Wendel has nothing to say other than 'show fidelity to law'. He concedes that 'there is nothing wrong with having a moral dialogue with clients about whether to exercise the client's legal entitlements'. But, apart from the fact that it is unclear what the Wendelian lawyer would say qua lawyer in such a dialogue, such concessions are unhelpful if moral considerations are simply not part of the lawyer's discursive universe: 'lawyers, when they act in a professional capacity, should be concerned only with the legal justice of the clients' situation'" [footnotes omitted].

<sup>71</sup> Simon, *Practice of Justice*, *supra* note 1, c. 2 for the phrase "right to injustice".

positively-granted legal entitlements without regard to the need to tailor this pursuit to align with the demands of moral justice.

## Part IV – Applied Legal Ethics

## **5) Facts and Law: “The Torture” Memos**

I do not intend, in this paper, to undertake a detailed exposition of the events surrounding the “torture memos”. Nor will I provide a detailed analysis of the contents of the “torture memos” and the overwhelming case that can be made, and indeed has been made, to show that the legal reasoning in these memos is flawed. I will give a brief summary of the relevant facts of this case study as well as the criticisms that have been made in some of the numerous academic articles, cited throughout sections 5) and 6) of the present paper<sup>1</sup>, that have taken on the task of explaining (1) the ways in which the “torture memos” give an incorrect account of the law on torture and (2) the ways in which the authors of the memos breached the basic and codified ethics of the legal profession in authoring these flawed memos. Finally, I will present my own Fullerian criticism of these memos.

The documents dubbed the “torture memos” were produced by the United States Justice Department’s Office of Legal Counsel (the OLC) in the early stages of the Bush Administration’s “War on Terror” following the attacks of September 11<sup>th</sup>, 2001. The Office of Legal Counsel has the delegated role of the Attorney General to provide legal opinions to the executive branch of the government of the United States.<sup>2</sup> Several “torture memos” exist and have been drafted by various authors on the numerous questions posed to them by the Bush administration.<sup>3</sup> The ones that have received the most attention were written by John Yoo, the then Deputy Assistant Attorney General under the direction of then Assistant Attorney General Jay Bybee.<sup>4</sup> When I refer to “the authors of the ‘torture memos’” or “the OLC lawyers” let it be

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<sup>1</sup> See also several other pieces by authors who have been critical of the “torture memos” below in Section 6.1), note 2.

<sup>2</sup> See 28 U.S.C. § 511 (2000) “The Attorney General shall give his advice and opinion on questions of law when required by the President”; 28 U.S.C. § 510 (2000) “The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General”; 28 C.F.R. §0.25(a) (2005), which spells out one of the duties of the OLC to include “Preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet”.

<sup>3</sup> See the memos as collected in Karen J. Greenberg & Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) [Greenberg, *Torture Papers*].

<sup>4</sup> See especially Memo 6, January 22, 2002, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Hayes II, General Counsel of the Department of Defence, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* [Memo 6, *Application of Treaties*] in Greenberg, *Torture*



understood that I am also speaking about lawyers other than Yoo and Bybee, but that these two memos and authors are my central examples.

In their various anti-terrorism efforts, including the war in Afghanistan, the United States captured individuals who were alleged to have been involved with terrorist activities, particularly the al-Qaeda terrorist network. Wanting to extract information from these captured individuals, the Bush Administration sought to use various interrogation techniques, including: head slaps, forced nudity, dousing detainees with water and keeping them in a cold room, sleep deprivation, the use of insects to exploit fears, and waterboarding, among others.<sup>5</sup> Additionally, the administration wanted to provide some assurance to the CIA operatives carrying out the interrogations that they would not be prosecuted for the methods used and that superiors would not be prosecuted for ordering the use of those methods. Notably, there have been allegations that the Bush administration, rather than earnestly seeking the legal advice, sought it more for cover in the same way that certain corporate executives sometimes make use of lawyers for the purpose of claiming cover under a legal opinion that purported to tell them that their course of action was legal.<sup>6</sup> Finally, some of the “torture memos” were said to have been written after the interrogation methods were already in use, turning the memos into more of an exercise in retroactive justification-seeking than legal opinions sought for the genuine purpose of assuring that the administration would carry out interrogations in accordance with the law.<sup>7</sup>

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*Papers, ibid.* at 81-117; Memo 14, August 1, 2002, Memorandum for Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* [Memo 14, *Standards of Conduct*] in Greenberg, *Torture Papers, ibid.* at 172-217.

<sup>5</sup> Mark Mazzetti & Scott Shane, “Interrogation Memos Detail Harsh Tactics by the C.I.A.” *The New York Times* (16 April 2009), A1 April 17 2009, online: The New York Times Company <<http://www.nytimes.com/2009/04/17/us/politics/17detain.html?pagewanted=all>> [Mazzetti & Shane, “Harsh Tactics”]; Brian Ross & Richard Esposito, “CIA’s Harsh Interrogation Techniques Described” *ABC News* (18 November 2005), online: ABC News Internet Ventures <<http://abcnews.go.com/Blotter/Investigation/story?id=1322866#.T6jFJetYtul>> [Ross & Esposito, “Techniques Described”].

<sup>6</sup> David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) [Luban, *Legal Ethics*] at 200-201; W. Bradley Wendel, “Legal Ethics and the Separation of Law and Morals” (2005) 91 *Cornell L. Rev.* 67 [Wendel, “Legal Ethics & Separation”] at 121, n. 200.

<sup>7</sup> See George C. Harris, “The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11” (2005) 1 *J. Nat’l Sec. L. & Pol’y* 409 [Harris, “Rule of Law”] at 443-445. Harris provides a detailed argument that significant portions of the legal reasoning in the “torture memos” were done as an after the fact justification. Harris’ argument is given through the framework of the guidelines, especially the aspect relating to the problem of “lock-in”, for OLC lawyering

In an interview with PBS' *Frontline*, Yoo, for his part, claimed that his advice was given in a fully-proper manner. He said:

At the Justice Department, I think it's very important not to put in an opinion interpreting a law on what you think the right thing to do is, because I think you don't want to bias the legal advice with these other considerations. Otherwise, I think people will question the validity of the legal advice. They'll say, 'Well, the reason they reached that result is that they had certain moral views or certain policy goals they wanted to achieve.'

And actually I think at the Justice Department and this office, there's a long tradition of keeping the law and policy separate. The department is there to interpret the law so that people who make policy know the rules of the game, but you're not telling them what plays to call, essentially. ...

I don't feel like lawyers are put on the job to provide moral answers to people when they have to choose what policies to pursue. For example, it's not the Justice Department's job to say: 'Here are the things you should do. We have conducted this examination of interrogation techniques worldwide, and these are the 10 that seem to work best. And so go ahead and do those.'<sup>8</sup>

Unfortunately, the authors of the "torture memos" did bias the legal advice in a myriad of ways.<sup>9</sup> I will cite two key examples of unbalanced and faulty legal analysis from perhaps the most prominent memorandum, Memo 14, dated August 1, 2002.<sup>10</sup> This memo was signed by Jay Bybee, then the Assistant Attorney General, but is known to have been written largely by

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provided by Harold Koh. See also Harold Hongju Koh, "Protecting the Office of Legal Counsel from Itself" (1993) 15 *Cardozo L. Rev.* 513 [Koh, "OLC"] at 515-516.

<sup>8</sup> "Frontline Interview with John Yoo" *PBS* (18 October 2005), online: WGBH Educational Foundation <<http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>> ["Frontline Interview"].

<sup>9</sup> Trevor Farrow says generally of the analysis within the memos, "[T]he advice improperly tipped the scale [in favour of security and away from the protection of human rights] in terms of any sense of professional, balanced views of how domestic and international law understood and prohibited torture. The opinions contained in the memos, put simply, could not be sustained on a fair and balanced reading of the law", in Trevor C.W. Farrow, "Post-9/11 Lawyers" in David L. Blaikie, Thomas A. Cromwell and Darrel Pink, eds., *Why Good Lawyers Matter* (Toronto: Irwin Law, 2012) 167 [Farrow, "Post-9/11 Lawyers"] at 177.

<sup>10</sup> Memo 14, *Standards of Conduct*, *supra* note 4.

Note also a memo written by Yoo to Alberto Gonzales on August 1<sup>st</sup>, 2002 around issues related to questions discussed in the Bybee Memo of August 1<sup>st</sup>: see Memo 15, August 1, 2002, Memorandum addressed Alberto R. Gonzales, Counsel to the President [This is not the title of Memo 15. Memo 15 is untitled], in Greenberg, *Torture Papers*, *supra* note 3 at 218. I do not discuss Memo 15 in this paper, but it is useful to consider for the purpose of having a fuller understanding of the "torture memos" and the specific legal advice given on various issues.

John Yoo.<sup>11</sup> These two examples are some of the most problematic interpretations of the law on torture. They are (1) the author's reading of the term "severe pain" within the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>12</sup> and (2) the suggestion that the administration and the agents carrying out the torture might use the defence of necessity to avoid criminal prosecution. I have chosen these two examples for several reasons. These examples are particularly fanciful accounts of the law. The conclusions reached in the analysis of these issues point towards the moral ills of allowing torture. Finally, the examples have also been chosen by philosophical legal ethicists such as David Luban and Bradley Wendel.<sup>13</sup> Since my paper aims primarily at dealing with the case study of the "torture memos" as an opportunity to explore issues and develop theories in the philosophy of legal ethics, it will be simpler to keep the details of our case study the same rather than focusing on a different part of the story that would require additional factual and legal unpacking that has not already been done in the field of philosophical legal ethics.

For now, let us merely consider the ways in which the law was incorrectly interpreted in these two key examples. First, take the issue of the authors' reading of "severe pain" in the *Convention Against Torture* (herein "CAT"). Article 1(1) of *CAT* defines torture in the following way:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>14</sup>

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<sup>11</sup> Luban, *Legal Ethics*, *supra* note 6 at 162; Kathleen Clark, "Ethical Issues Raised by the OLC Torture Memorandum" (2005) 1 J. Nat'l Sec. L. & Pol'y 455 [Clark, "Ethical Issues"] at 457, n. 15, in which Clark cites sources that indicate Yoo's participation in the authorship to the August 1<sup>st</sup> Bybee Memo: Tony Locy & Joan Biskupic. "Interrogation memo to be replaced" *USA Today* (22 June 2004), online: USA Today <[http://usatoday30.usatoday.com/news/washington/2004-06-22-justice-usat\\_x.htm](http://usatoday30.usatoday.com/news/washington/2004-06-22-justice-usat_x.htm)>. Clark's citation details are different only because she is citing to the printed source.

<sup>12</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [*Torture Convention*], art. 1.

<sup>13</sup> Luban, *Legal Ethics*, *supra* note 6 at 167-168, 177-180 for "severe pain" and 167, 177 for the defence of necessity; Wendel, "Legal Ethics & Separation", *supra* note 6 at 81-82 for "severe pain" and 82-84 for the defence of necessity.

<sup>14</sup> *Torture Convention*, *supra* note 12, art. 1(1).

The United States Senate ratified the CAT in 1994. Congress implemented provisions of the convention that define torture in a similar way and provide criminal sanctions for the breach of the norm against torture.<sup>15</sup> The OLC lawyers, within a memo that was written for the purpose of providing advice about the criminal standards pertaining to torture and the limits to which interrogators could go, looked to Medicare statutes to define “severe pain”.<sup>16</sup> These Medicare Statutes contained a definition of the term “medical emergency”, which then also mentioned the term “severe pain”. The Medicare statute defined a “medical emergency” as:

[M]anifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson . . . could reasonably expect the absence of immediate medical attention to result in...(ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.<sup>17</sup>

Various authors, on whose analysis I rely, have commented about how Yoo’s interpretation reads this definition outside of its purpose, thus misconstruing what the Medicare statute is doing, namely outlining conditions for *providing medical assistance* (to patients), not to drawing a threshold of pain that the state may inflict (on prisoners).<sup>18</sup> With the statute’s purpose in mind, we see that, rather than defining “severe pain” through the clause that speaks to organ failure, the elements in this section of the Medicare statute define “medical emergency” such as can be used to assess the need for medical treatment. Yoo himself makes some recognition of the fact that he is using the definition outside of its purpose. In the August 1<sup>st</sup> memorandum, he writes:

Although these statutes address a substantially different subject from [18 USC § 2340 (2000), *supra* note 15], they [the Medicare statutes] are nonetheless helpful for understanding what constitutes severe physical pain. They treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment.<sup>19</sup>

Despite admitting the “substantially different subject[s]” of the Medicare statute and the criminal prohibition on torture, Yoo, in a conclusory fashion, states that the Medicare statutes are helpful (i.e. have some transferrable meaning) for the purpose of understanding the

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<sup>15</sup> 18 USC § 2340 (2000).

<sup>16</sup> Memo 14, *Standards of Conduct*, *supra* note 4 at 176, Yoo cites 8 U.S.C. § 1369 (2000); 42 U.S.C § 1395w-22 (2000); id. § 1395x (2000); id. § 1395dd (2000); id. § 1396b (2000); id. § 1396u-2 (2000).

<sup>17</sup> 42 U.S.C. § 1395w-22(d) (3) (B) (2000); see the citation in Memo 14, *Standards of Conduct*, *ibid*.

<sup>18</sup> Luban, *Legal Ethics*, *supra* note 6 at 178-179; Wendel, “Legal Ethics & Separation”, *supra* note 6 at 80-82.

<sup>19</sup> Memo 14, *Standards of Conduct*, *supra* note 4 at 176.

meaning of “severe pain” in the statutes dealing with the subject. But given Yoo’s admission of the substantially different subject matter, and the differing purposes of the statutes, it is clear that he owes quite a bit more of an explanation here. Why can we draw on the same term found in such a different statute (i.e. the Medicare Statute)? How does this comparison help the reader understand what “severe pain” means in the context of torture. And, perhaps most importantly, what are the limits and potential pitfalls of this comparison of terms? Yoo does not provide answers to any of these questions.

Second in our examples of problematic and incomplete reasoning in the “torture memos” is the claim that the administration, as well as those carrying out the acts of torture, might be able to rely on the defence of necessity to avoid criminal guilt.<sup>20</sup> Legal ethicists have pointed out that the OLC authors’ particular discussion of the defence of necessity flies in the face of prohibitions on torture.<sup>21</sup> It goes specifically against norms of international law because in Article 2(2), the CAT clearly states, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.<sup>22</sup> This non-derogation provision is unequivocal and contemplates scenarios that are much harsher and more imminent than what the US government was facing while it was engaging in the torture of detainees at Guantánamo Bay. Additionally, although the non-derogation provision had not been implemented into US law, there are various legal sources that would lean strongly against the view that derogation was possible under US domestic law.<sup>23</sup> Thus, the case in favour of the defence of necessity is very weak indeed.

In sum, despite the protestations of Yoo and others to the contrary, the OLC “torture memos” are critically mistaken in their assessment of the law. The interpretations fail to account

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<sup>20</sup> Memo 14, *Standards of Conduct*, *ibid.* at 207-209; see also the rest of Yoo’s discussion of other defences at 209-213.

<sup>21</sup> Luban, *Legal Ethics*, *supra* note 6 at 179; Wendel, “Legal Ethics & Separation”, *supra* note 6 at 82-84.

<sup>22</sup> *Torture Convention*, *supra* note 12, art. 2(2).

<sup>23</sup> Luban, *Legal Ethics*, *supra* note 6 at 179, n. 60; citing a report given by the United States government to the UN Committee Against Torture on October 15, 1999, available at [http://www.state.gov/www/global/human\\_rights/torture\\_intro.html](http://www.state.gov/www/global/human_rights/torture_intro.html), and the Supreme Court case of *United States v. Oakland Cannabis Buyers’ Coop* 532 U.S. 483, 490 (2001), on the more general topic of the availability of the defence of necessity in relation to federal crimes in the United States.

for basic points of law. The authors read terms incorrectly and/or out of context to reach their troubling conclusions.

## **6) Legal Ethics and the “Torture Memos”**

The “torture memos” have become a central, if not *the* central, case study in contemporary legal ethics. Of importance to understanding the place of this argument in relation to the broader context of reasoned arguments against torture itself is that the arguments in legal ethics do not purport, as a primary focus, to provide reasons for opposing torture. Rather, legal ethicists concentrate on demonstrating flaws in the legal advice given by the OLC lawyers in this case. Thus, I will consider arguments with limited scope in relation to the issue of torture (though this is not to say that legal ethicists’ arguments about the “torture memos” do not take into account criticisms of torture itself). There are two groups of authors whose work I will cover. These are (1) doctrinal legal ethicists and (2) philosophical legal ethicists. The former deal directly with the codified and positive norms that relate to the legal profession. The latter, to modify a phrase from David Dyzenhaus’ definition of legal reasoning at the fundamental level, confront the question of the ideal of fidelity to law and lawyering itself, since they are faced with questions about what legality and the role of the lawyer, in relation to the concept of law and the values of legality (the desiderata of the rule of law), require.<sup>1</sup>

### **6.1) Doctrinal Legal Ethics**

The authors of the “torture memos” have faced an armada of scholarly opponents who have criticized them severely for their legal analysis<sup>2</sup>. The critiques from the perspective of doctrinal legal ethics are generally expositions of either (1) the badly mistaken *substantive* legal

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<sup>1</sup> David Dyzenhaus, “The Grudge Informer Case Revisited” (2008) 83 N.Y.U. L. Rev. 1000 [Dyzenhaus, “Grudge Informer”] at 1002; cited above, in the Introduction, note 6 and accompanying text.

<sup>2</sup> In addition to the authors and pieces cited frequently in this paper, consider several papers in Karen J. Greenberg, ed., *The Torture Debate in America* (New York: Cambridge University Press, 2006) [Greenberg, *Torture Debate*], including “If Afghanistan Has Failed, Then Afghanistan Is Dead: ‘Failed States’ and the Inappropriate Substitution of Legal Conclusion for Political Description” 214 by David D. Caron [Caron, “Failed States”], “Is Defiance of Law a Proof of Success: Magical Thinking in the War on Terror” 118 by Stephen Holmes, “Liberalism, Torture, and the Ticking Bomb” 35 by David Luban, also cited *infra* note 33 as published in another source, and “Renouncing Torture” 247 by Michael C. Dorf; Robert K. Vischer, “Legal Advice as a Moral Perspective” (2006) 19 Geo. J. Legal Ethics” 225; Jeremy Waldron, “Torture, Suicide and Determinatio” (2010) 55 Am. J. Juris. 1; Jesselyn Radack, “Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism” (2006) 77 U. Colo. L. Rev. 1. Other scholars have also remarked on the vast criticism that the “torture memos” have received; see e.g. Trevor C.W. Farrow, “Post-9/11 Lawyers” in David L. Blaikie, Thomas A. Cromwell and Darrel Pink, eds., *Why Good Lawyers Matter* (Toronto: Irwin Law, 2012) 167 [Farrow, “Post-9/11 Lawyers”] at 177, nn. 30, 31 and accompanying text.

analysis contained within the “torture memos” or (2) an account of the defects of the *approaches* that were taken by the authors of the memos. The first kind of exposition involves consulting with the relevant legal sources such as international law (including treaties and customary international law), and US domestic law and regulations (including the United States Constitution, statutory law, government regulations and case law). The second kind of exposition requires one to look into (i) the proper role of OLC lawyers, (ii) how that role is to determine the kind of advice provided by the OLC, (iii) the relevant professional codes of various regulatory bodies and, finally, (iv) how that role and process of advising was compromised by political influence, institutional pressure and groupthink, as well as the OLC lawyers’ own ideological biases. I have already given a sampling of what has been described, to say the least, as the problematic legal analysis.<sup>3</sup> Thus, I will focus here on the defects of the approaches that were taken by the authors of the memos.

Defects in approach can be divided into two categories. Those two are (i) defects that the OLC lawyers took with them *going into* the interpretation of the law and (ii) defects *in the interpretation itself* (including specific interpretive stances such as an overreliance on textual interpretation). Consider the former, defects going into the interpretation. A defect going into the interpretation would have been created by political and contextual pressures. Simply, the authors of the “torture memos” would have felt impelled to reach a particular conclusion when writing their opinion. This pressure has been noted to have come from Vice-President Dick Cheney and his counsel (and future Chief of Staff) David Addington.<sup>4</sup> This includes the well-documented insistence on legal interpretations that were “forward-leaning” in the way that they dealt with laws pertaining to the war on terror. Additional impetus may have come from the fact that many of the interrogation tactics to which Yoo’s memos gave the green light were already being put into practice before he wrote the memo, putting some pressure on him to protect government officials and CIA agents retroactively.<sup>5</sup>

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<sup>3</sup> Above in Section 5).

<sup>4</sup> David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) [Luban, *Legal Ethics*] at 173.

<sup>5</sup> See George C. Harris, “The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11” (2005) 1 J. Nat'l Sec. L. & Pol'y 409 [Harris, “Rule of Law”]; Harold Hongju Koh, “Protecting the Office of Legal Counsel from Itself” (1993) 15 *Cardozo L. Rev.* 513



As another example of the defects going into the interpretation, scholars have cited Yoo's prior scholarly and intellectual commitments from his own work. This point is perhaps less problematic for Yoo than the other issues because it is difficult to imagine anyone doing such highly specialized legal work as Yoo was doing in the OLC without coming into it with some preconceived notions developed properly after years of study. Yoo, as other lawyers in any field, would have picked up these commitments from his own work in the field and from mentors in the legal profession, such as the conservative Federalist Society or federal judge Laurence H. Silberman, of the US Court of Appeals for the District of Columbia, for whom Yoo clerked. Coming into the interpretation with an opinion already formed is not in itself problematic and may even be inevitable. Rather, what is troubling is that Yoo presented his views as a straightforward account of the law without admitting that his understanding was indeed out of the mainstream and even highly idiosyncratic.<sup>6</sup> All of these elements can be seen to have biased Yoo's approach going into the writing of the memos and distorted the substance of the advice.

In the case of defects within the actual interpretation itself, I have already cited examples of words and terms that the authors of the memos interpreted out of their context. This includes, in particular, terms such as "severe pain", which Yoo used to draw the line up to which interrogators may legally go. Yoo's misinterpretation of the term "severe pain" was discussed earlier.<sup>7</sup> Later in this paper<sup>8</sup>, I will present arguments from legal philosophers David Luban and Jeremy Waldron that Yoo's *approach* to defining "torture" was also itself flawed. This flaw would also be present in Yoo effort to define "severe pain". Yoo attempted to set out a bright line by which the interrogators could measure their actions and be assured that they were not crossing into illegal activities such as cruel and degrading treatment and, particularly into the zone of illegality which was reserved for torture. Both Luban and Waldron argue that this

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[Koh, "OLC"]. These sources and their relevance to this point are discussed in more detail above in Section 5), note 7 and accompanying text.

<sup>6</sup> For Yoo's own interpretation of the nature of his work at the OLC, see "Frontline Interview with John Yoo" PBS (18 October 2005), online: WGBH Educational Foundation <<http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>> ["Frontline Interview"]; quoted above in Section 5), note 8 and accompanying text. For Luban's criticism of Yoo on this point in relation to the "torture memos", see Luban, *Legal Ethics*, *supra* note 4 at 164, n. 5 and accompanying text.

<sup>7</sup> Above, in Section 5) at 117-119.

<sup>8</sup> See my summary of Luban's argument, below, in Section 6.2) at 130-132; Waldron's argument, below, in Section 6.2) at 132-137, especially 136-137; as well as Wendel's favourable citation of Waldron's argument in Section 6.2), note 68 and accompanying text, below.

*approach* is itself flawed, not merely the result that it produced in terms of the flaw substance of the advice.

One of the primary discussions that legal ethicists have around the “torture memos” is the question of what the proper role of the OLC is within the United States Justice Department. Specifically, to what extent should the OLC take on their role from the perspective of advocacy vs. the perspective of providing legal advice? Of course, as mentioned above, OLC lawyer John Yoo, who has been accused of taking too strong of a posture of advocacy in writing the “torture memos”, would himself reject the characterization of his work as advocacy rather than objective advice on the law.<sup>9</sup> However, Yoo’s scholarly critics argue that his analysis in the memos is characteristic of a posture of advocacy rather than advising.<sup>10</sup> They point out that a lawyer acting in an advisory role, rather than in one of advocacy, would not perform the kind of interpretive missteps, and flawed analysis catalogued above.<sup>11</sup> Legal ethicists argue further that advocacy is an inappropriate interpretive posture in the context of the kind of advisory work that Yoo was doing in the OLC. This is because the client’s interests are not the same in an advisory lawyering context as in the advocacy lawyering context and the checking mechanisms of the adversarial system are missing. This would be true of any case in which lawyers act as advocate when they should be acting as advisors, but is compounded in the present case study by the fact that the OLC, having been delegated the Attorney General’s power to interpret law on behalf of the executive branch<sup>12</sup>, will often have its opinions acted on by the state. This is different from a client whose lawyer may provide him/her with advice that is more along the lines of advocacy but who may be checked by the court system into which the client will find himself/herself, at least if s/he is contemplating litigation.<sup>13</sup>

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<sup>9</sup> “Frontline Interview”, *supra* note 6; quoted above in Section 5), note 8 and accompanying text.

<sup>10</sup> Luban, *Legal Ethics*, *supra* note 4 at 197-204; Marjorie Cohn, “Advising Clients to Commit War Crimes with Impunity: An Unethical Practice” (2011) 10 *Seattle Journal for Social Justice* 249 at 258, 260; Kathleen Clark, “Ethical Issues Raised by the OLC Torture Memorandum” (2005) 1 *J. Nat’l Sec. L. & Pol’y* 455 [Clark, “Ethical Issues”] at 465-469; Harris, “Rule of Law”, *supra* note 5 at 431-435.

<sup>11</sup> Above in Section 5).

<sup>12</sup> 28 U.S.C. § 511 (2000); 28 U.S.C. § 510 (2000); 28 C.F.R. §0.25(a) (2005), all three legal provisions quoted above in Section 5), note 2. See also the discussion of this topic in Luban, *Legal Ethics*, *supra* note 4 at 203.

<sup>13</sup> I am thankful to Alasdair Robertson for pointing out a similar issue in the case of legal counsel that is provided to large private organizations. We might recognize this problem as the “problem of private legislation”, discussed above in Section 4.5), note 44. Although it is not the state that will be acting on the

Indeed, David Luban, citing journalism professor Mark Danner, raises the possibility of a causal connection between the OLC “torture memos” and the prisoner abuse in Abu Ghraib prison in Iraq. Luban argues:

Compelling evidence suggests that the migration [of detainee mistreatment and interrogation techniques] resulted when the Guantánamo commander, General Geoffrey Miller, was sent to Iraq to ‘Gitmoize’ intelligence operations there (although Miller denies it). If so, the implications are enormous: it would mean that Abu Ghraib does not represent merely the spontaneous crimes of low-level sadists, but rather the unauthorized spillover of techniques deliberately exported from Guantánamo to Iraq as a high-level policy decision. That would imply a direct causal pathway connecting the advice of the torture lawyers to the Abu Ghraib abuses via General Miller. (A former State Department official traces the policy back to Cheney’s then general counsel David Addington).<sup>14</sup>

Luban, in a portion of his work dealing with doctrinal legal ethics, cites the fact that, in 2004, 19 former OLC lawyers drafted a document called the *Guidelines for the President’s Legal Advisors*<sup>15</sup>, outlining guiding principles for lawyers in that same position.<sup>16</sup> They affirmed the standard view of the role of an OLC lawyer as an independent legal advisor, rather than as an advocate.<sup>17</sup> Provocatively, Luban asserts, almost in passing, that the Bush administration OLC lawyers do not agree with the 19 OLC lawyers’ affirmation of the standard view of the OLC lawyer because these Bush administration lawyers would not sign this document. Given the case just presented and the mountains of well-reasoned criticism made elsewhere<sup>18</sup>, one cannot help but conclude that Luban’s needling remark is well-founded.

Related to Yoo’s failure to describe his position as highly idiosyncratic, a major issue with the memos is the lack of disclosure of differing opinions on the law. This is especially so given that these differing opinions were not themselves also highly specific to their authors, as

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opinion (as in the case with the OLC), it is true that a large private institution that takes hyper-zealous advice from their attorneys and acts on it can make a great deal of things happen on the basis of that advice before the issue ever comes before a court. Thus, one should also take note of the way in which the advice of attorneys to private clients can also have, at a practical level (and perhaps even at the *de jure* level, in the case of legal defences made on the basis of having received advice from counsel), a role or influence (and perhaps thus also should have accordant duties) comparable to those of the quasi-judicial role of the OLC.

<sup>14</sup> Luban, *Legal Ethics*, *supra* note 4 at 183 [footnotes omitted].

<sup>15</sup> “Guidelines for the President’s Legal Advisors” (2006) 81 Ind. L.J. 1345 [“Guidelines for Advisors”].

<sup>16</sup> Luban, *Legal Ethics*, *supra* note 4 at 204.

<sup>17</sup> “Guidelines for Advisors”, *supra* note 15 at 1349. This document did not explicitly revisit the criticisms made of the “torture memos”, but the authors of the “Guidelines for Advisors” do note at 1348, that the “Guidelines for Advisors” were written with an eye towards preventing the recurrences of such situations in the future.

<sup>18</sup> A sampling is listed above at note 2.

Yoo's was, but were rather the view that the mainstream of lawyers had on the law in this field. A key example of this is Yoo's failure to engage with mainstream views about the applicability of the protections of the *Geneva Conventions* to detainees. Yoo failed to discuss the arguments for the view that *all* detainees are legally entitled to the protections of the *Geneva Conventions*.<sup>19</sup> Scholars also criticize Yoo because he did not attend to arguments made by State Department legal adviser William H. Taft IV, who, after seeing Yoo's January 9<sup>th</sup> draft version of the memo<sup>20</sup>, wrote a memo to Yoo<sup>21</sup> specifically criticizing Yoo's draft argument<sup>22</sup> that detainees who were members of the Taliban were not legally entitled to the protections found within the *Geneva*

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<sup>19</sup> Harris, "Rule of Law", *supra* note 5 at 435-436. Harris criticizes Yoo for failing, in his January 22<sup>nd</sup> memo, Memo 6, January 22, 2002, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Hayes II, General Counsel of the Department of Defence, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* in Karen J. Greenberg & Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) [Memo 6, *Application of Treaties*] [Greenberg, *Torture Papers*] at 81-117, to discuss the position held by the International Committee of the Red Cross, which held a view contrary to that of Yoo.

<sup>20</sup> See the draft version: Memo 4, January 9, 2002, Memorandum for William J. Hayes II, General Counsel of the Department of Defence, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* [Memo 4, *Draft Application of Treaties*] in Greenberg, *Torture Papers, ibid.* at 38-79. Memo 4 is the draft version of Memo 6, *Application of Treaties, ibid.*

<sup>21</sup> Memorandum from William H. Taft IV, Legal Adviser to the Department of State, to John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, "Your Draft Memorandum of January 9" *Torturing Democracy* (11 January 2002), online: National Security Archive, George Washington University Gelman Library <<http://www.torturingdemocracy.org/documents/20020111.pdf>> [Taft, "Your Draft Memorandum"]. Attached to this Memorandum was a draft of Taft's official reply to Memo 4.

<sup>22</sup> See the argument that Taft criticized in Memo 4, *Draft Application of Treaties, supra* note 20 at 53. This argument of Yoo's also made its way into the final version of Yoo's memo in Memo 6, *Application of Treaties, supra* note 19 at 95.

*Conventions* because of the idea that Afghanistan was a “failed state”.<sup>23</sup> In his extensive reply to Yoo, Taft called Yoo’s factual assumptions and legal analysis “seriously flawed”.<sup>24</sup>

In an advocacy role, Yoo’s peculiar view would have been checked by opposing lawyers in the adversarial process, making it *less* of a concern that he did not disclose opposing views. However, in relation to the quasi-judicial role of the OLC, legal ethicists have pointed out that there is not the same opportunity to check a one-sided legal opinion that has intentionally omitted consideration of important differing opinions.<sup>25</sup> This becomes a problem given the ability of the OLC to determine the interpretation that the executive branch takes on the law.<sup>26</sup>

As has been done by other authors before<sup>27</sup>, I suggest that we compare this failure in the memos just discussed to the preferable performance by the OLC on the issue of the availability of *habeas corpus* to detained “enemy combatants”. Despite the fact that the Supreme Court rejected the kind of advice that was given on this topic in the “torture memos”<sup>28</sup>,

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<sup>23</sup> Scholarly criticisms of Yoo’s failure to address the mainstream views on this topic, including the feedback received from Taft can be found in Harris, “Rule of Law”, *supra* note 5 at 437-439. Harris, at 437-438, tracks the history of Yoo’s January 9<sup>th</sup> memo, Taft’s reply to the memo and the internal debate that took place over the advice within and topic of the topic of Yoo’s memo at various levels within the executive branch with the State Department, including Secretary of State Colin Powell, taking a particularly strong stand against Yoo’s advice. The history of the January 9<sup>th</sup> memo is also tracked in Caron, “Failed States”, *supra* note 2, in Greenberg, *Torture Debate*, *supra* note 2, at 219-220.

Luban, *Legal Ethics*, *supra* note 4 at 199-200, especially n. 118. Luban is critical of Yoo’s failure to address Taft’s criticism over the issue of the application of the Geneva Conventions to the United States in its treatment of captured members of the Taliban.

<sup>24</sup> Taft’s criticism of Yoo’s memo as “seriously flawed”, can be found in Taft, “Your Draft Memorandum”, *supra* note 21 at 1; Jane Mayer, “Outsourcing Torture: The Secret History of America’s ‘Extraordinary Rendition’ Program” *The New Yorker* (14 February 2005), online: Condé Nast Publications Inc. <[http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6)>; citing the criticism made in the draft memo.

<sup>25</sup> Notably, in Section 6.2) at 141-143, below, especially notes 80, 82 and accompanying text, where I summarize the analysis that the philosophical legal ethicist Bradley Wendel provides of the OLC “torture memos”. Wendel’s criticism is of Yoo’s failure to act properly in the OLC’s advising context.

<sup>26</sup> See below, in Section 6.2), note 82 and accompanying text.

<sup>27</sup> Clark, “Ethical Issues”, *supra* note 10 at 456; Ross L. Weiner, “The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield” (2009) 77 *Geo. Wash. L. Rev.* 524 at 533-536.

<sup>28</sup> See *Rasul v. Bush*, 542 U.S. 466 (2004) [*Rasul*], in which the US Supreme Court ruled that US federal courts have jurisdiction to rule on the legality of detentions (i.e. to hear *habeas corpus* submissions) coming from detainees held at Guantánamo Bay.

the advice on this topic more actively engaged with the opposing views and provides a balanced assessment in terms of the merits of various arguments and their probability of success.<sup>29</sup>

Finally, and of relevance to the philosophical analysis in my paper as well as Yoo's failure to cite contrary legal opinions, the authors of the "torture memos" did not properly include moral analysis in the memos. Scholars have mentioned, citing relevant professional regulatory codes, that lawyers are permitted to provide additional advice to clients beyond the law. This advice may be moral, economic, social, and political.<sup>30</sup> Yoo did not abide by the appropriate way in which to have given such extra-legal advice under the positively-stated permission to do so. Although we saw above that Yoo claimed to have given purely legal advice<sup>31</sup>, it is clear from the case made by legal ethicists<sup>32</sup> that his personal theoretical, including moral, commitments distorted the legal advice that he provided. Thus, in a sense, Yoo did give moral advice to the clients, but it was hidden behind a purported presentation of the law in its pure positive form. In addition to his hidden ideological nature of the advice, however, is the problem again of leaving out contrary moral advice from consideration. There are powerful moral, political, and even military arguments against the use of torture.<sup>33</sup> With my jurisprudential stance in this paper, I welcome the inclusion of moral and other considerations into legal advice. However, such advice must be comprehensive and forthcoming, especially in the advising context. Given the

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<sup>29</sup> Memo 3, December 28, 2001, Memorandum for William J. Haynes II, General Counsel, Dept. of Defense, from Patrick F. Philbin & John C. Yoo, Deputy Asst. Attorneys General, *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba* [Memo 3, *Habeas Jurisdiction*] in Greenberg, *Torture Papers*, *supra* note 19 at 29, 33-34.

<sup>30</sup> A leading regulatory source that scholars often cite is the American Bar Association, *Model Rules of Professional Conduct*, online: American Bar Association <[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html)> [ABA, *Model Rules*], r. 2.1. See some of the scholarly attention to this point discussed above in Section 4.1), note 1 and accompanying text, as well as below in Section 7.2), note 56 and accompanying text.

<sup>31</sup> "Frontline Interview", *supra* note 6; quoted above in Section 5), note 8 and accompanying text.

<sup>32</sup> Discussed in Section 5), note 9 and accompanying text, above; Section 6.1), the present section at 123, above; Section 6.2) at 143, especially note 83 and accompanying text, below; Section 7.2), especially note 50 and accompanying text, below.

<sup>33</sup> David Luban, "Liberalism, Torture, and the Ticking Bomb" (2005) 91 Va. L. Rev. 1425; W. Bradley Wendel, "Legal Ethics and the Separation of Law and Morals" (2005) 91 Cornell L. Rev. 67 [Wendel, "Legal Ethics & Separation"] at 121-126; Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 Colum. L. Rev. 1681 [Waldron, "Torture & Positive Law"]; Douglas P. Lackey, *The Ethics of War and Peace* (Upper Saddle River, NJ: Prentice Hall, 1989) at 79-80; Jeff McMahan, "Torture in Principle and in Practice" (2008) 22 Public Affairs Quarterly 111.

importance that deliberation plays in moral reasoning, it is irresponsible for a lawyer in Yoo's role to have omitted mention of the moral arguments against torture and mistreatment of detainees, especially when such moral positions are made part of the positive law in major international treaties and American domestic law, including in the form of statutes and case law/legal history.<sup>34</sup>

## 6.2) Philosophical Legal Ethics

The theorists under consideration in this section of the paper are in agreement about the question of (1) whether the use of torture should be permitted and (2) whether it was justifiable, according to the norms of the legal profession, to offer the kind of advice provided in the "torture memos". The answers given by the theorists about to be considered resoundingly affirm that the chorus of criticism in the previous section is correct. In their views, torture is neither morally permissible, nor legally permitted, and the lawyers who advised clients that the interrogation practices used on detainees held in locations such as Guantánamo Bay<sup>35</sup> were not prohibited by law – although such interrogation practices, in fact, were legally prohibited – violated their ethical duties as lawyers or did not live up to the standards of their office.<sup>36</sup>

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<sup>34</sup> For sources making moral arguments, *ibid.* For codification in law, see especially Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [*Torture Convention*]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Geneva Convention, *Civilian Persons*]; *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [Geneva Convention, *Prisoners of War*].

For a one of the definitive scholarly accounts of the case law and history relating, in particular, to waterboarding, see Evan Wallach, "Drop by Drop: Forgetting the History of Water Torture in U.S. Courts" (2007) 45 Colum. J. Transnat'l L. 468 [Wallach, "Water Torture in U.S. Courts"]; see also M. Katherine B. Darmer, "Waterboarding and the Legacy of the Bybee-Yoo 'Torture and Power' Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist" (2009) 12 Chapman L. Rev. 639; Eric Weiner, "Waterboarding: A Tortured History" *National Public Radio* (3 November 2007), online: National Public Radio <<http://www.npr.org/templates/story/story.php?storyId=15886834>>.

<sup>35</sup> Above, in Section 5), note 5 and accompanying text, see my summary and citation of the interrogation practices used.

<sup>36</sup> Luban's doctrinal criticisms have been discussed in sections 5), 6.1), above. For Wendel's views on the doctrinal issues, see Wendel, "Legal Ethics & Separation", *supra* note 33 at 67-85. Finally, Waldron's criticisms in this front can be found in Waldron, "Torture & Positive Law", *supra* note 33 at 1703-1713, with 1708 being especially noteworthy.



Philosophical legal ethicists recognize that the primary case against torture itself comes from morality. Arguments against the “torture memos” should be read within the limited scope of criticizing the OLC, although philosophical legal ethicists do take account of criticisms against torture itself while criticizing the OLC lawyers. The most prominent analyses of the “torture memos” within philosophical legal ethics have been given by David Luban and Bradley Wendel. Jeremy Waldron’s work in legal philosophy is also highly relevant. In considering the present and subsequent sections of this paper (Section 7), that this analysis should be seen under the fundamental/doctrinal rubric offered by David Dyzenhaus summarized above.<sup>37</sup> Especially because of the OLC’s quasi-judicial role, we must consider the view that the authors of the “torture memos” have, or should have had, about the nature of law, at the fundamental level, and, given answers at the fundamental level, how they then interpreted, or should have interpreted, the substantive law on the matter at the doctrinal level. As Dyzenhaus said about the judges in the Grudge Informer Case, we must regard the authors of the “torture memos” as “[B]eing under a duty to find an answer that coheres with the animating principles of that level—respectively, the fundamental principles of legality and the principles of the substantive body of law”.<sup>38</sup> The subsequent analysis in this paper will show the ways in which the authors of the memos failed in their interpretive task at both levels of analysis, thus not providing legal advice in a way that “coheres with the animating principles” of law at either level of legal analysis.

Take the work of David Luban. I discussed some of his criticisms of the “torture memos” with respect to the facts and law of the case, as well as doctrinal legal ethics.<sup>39</sup> He skewers the legal reasoning in the “torture memos” as being everything from “debatable” to “loony” and having the “mad logic of the Queen of Hearts’ arguments with Alice”.<sup>40</sup> Luban has clearly identified several ways in which the OLC lawyers were badly mistaken in their legal analysis and the unethical way in which the lawyers approached their work. However, beyond that, Luban makes a philosophical criticism that shows the way in which the arguments in the “torture memos” undermine the value of legality itself. The point is that playing with technicalities and bright lines to avoid the purpose of law has different jurisprudential (i.e. philosophical)

<sup>37</sup> Above, in the Introduction at 2-5.

<sup>38</sup> Quoted above, in the Introduction, note 8 and accompanying text; quoted from Dyzenhaus, “Grudge Informer”, *supra* note 1 at 1010.

<sup>39</sup> Above in sections 5), 6.1).

<sup>40</sup> Luban, *Legal Ethics*, *supra* note 4 at 177.



consequences depending on the norm and area of law with which the lawyer is dealing. Attempting to use loopholes in one's analysis in certain fields will be expected and unproblematic, or certainly *less* philosophically problematic. In other cases, because of the role of the particular norms in the legal system,<sup>41</sup> it will actively undermine the rule of law and the legal system's ability to produce the moral values linked to, and expressed by, legality. Luban argues:

It is one thing for boy-wonder lawyers to loophole tax laws and write opinions legitimizing financial shenanigans. It is another thing entirely to loophole laws against torture and cruelty. Lawyers should approach laws defending basic human dignity with fear and trembling.

To be sure, honest opinion-writing will only get you so far. Law can be cruel, and then an honest legal opinion will reflect its cruelty. In the centuries when the evidence law required torture, no lawyer could honestly have advised that the law prohibited it. Honest opinion-writing by no means guarantees that lawyers will be on the side of human dignity.

The fact remains, however, that rule-of-law societies generally prohibit torture and [cruel, inhumane or degrading treatment or punishment which does not amount to torture], practices that fit more comfortably with despotism and absolutism. For that reason, lawyers in rule-of-law societies will seldom find it easy to craft an honest legal argument for cruelty.<sup>42</sup>

Here, Luban takes the view of a relatively strong relationship between the rule of law and morality by arguing that practices such as torture are more consistent with despotism rather than the rule of law and that rule of law societies will generally prohibit such practices. Luban also identifies the issue that is at stake for philosophical legal ethics in the case study of the "torture memos". He argues:

Torture is among the most fundamental affronts to human dignity, and hardly anything lawyers might do assaults human dignity more drastically than providing legal cover for torture and degradation...The most basic question, then, is whether the torture lawyers were simply doing what lawyers are supposed to do. If so, then so much for the idea that the lawyer's role has any inherent connection with human dignity.<sup>43</sup>

Luban, of course, thinks that the OLC lawyers were not, in fact, doing what they were supposed to be doing. However, even beyond the question of whether, *doctrinally*, the authors of the memos were doing what they supposed to be doing, there is a strong jurisprudential

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<sup>41</sup> See my summary of Waldron's argument about the special importance of some legal norms as "legal archetypes" just below, in the current section at 132-136, and, particularly, note 61 and accompanying text, with respect to the archetypal status of the prohibition on torture.

<sup>42</sup> Luban, *Legal Ethics*, *supra* note 4 at 205 [footnote omitted]. The portion of the quote that is in brackets is the full form of the terminology that is summarized by the acronym "CID". Luban defines this in *ibid.* at 190.

<sup>43</sup> *Ibid.* at 163 [footnote omitted].

argument provided by Jeremy Waldron that they were not engaging in an appropriate *kind of analysis* for lawyers in their position within the OLC. This argument plays into Luban's case that attempting to evade the prohibitions on torture is not equivalent to trying to avoid just any legal rule. This is especially so when Waldron's arguments are understood within the frame of Luban's imaginative reading of Lon Fuller's idea of the internal morality of law.<sup>44</sup>

Look first at the way in which Waldron's argument buttresses Luban's view that the prohibition on torture is not to be considered on the same level as other kinds of legal norms, e.g. a particular tax rule. In his paper, *Torture and Positive Law: Jurisprudence for the White House*<sup>45</sup>, Waldon develops the idea of a legal archetype to describe specific kinds of legal norms. Waldron draws on the concept of an archetype from literary analysis to develop this rich idea. He writes:

When I use the term 'archetype,' I mean a particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law. Like a Dworkinian principle, the archetype performs a background function in a given legal system. But archetypes differ from Dworkinian principles and policies in that they also operate as foreground provisions. They work in the foreground as rules or precedents, but in doing so, they sum up the spirit of a whole body of law that goes beyond what they might be thought to require on their own terms. The idea of an archetype, then, is the idea of a rule or positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but operates also in a way that expresses or epitomizes the spirit of a whole structured area of doctrine, and does so vividly, effectively, and publicly, establishing the significance of that area for the entire legal enterprise.<sup>46</sup>

As examples of legal archetypes or the embodiment of legal archetypes, Waldron cites rights such as *habeas corpus*<sup>47</sup> and the right to bear arms in the Second Amendment to the US Constitution<sup>48</sup>, as well as case law pertaining to constitutional rights, such as *Brown v. Board of*

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<sup>44</sup> Luban's reading is summarized above in sections 2.3.3) & 3).

<sup>45</sup> Waldron, "Torture & Positive Law", *supra* note 33.

<sup>46</sup> *Ibid.* at 1723.

<sup>47</sup> *Ibid.* at 1724. The positive law groundings of *habeas corpus* are strewn throughout US law. For the purpose of this citation, consider the constitutional grounding of *habeas corpus* in US Const. art. I, § 9, cl. 2 [US Const]; see also the following examples of the recent case law on *habeas corpus* in the context of the war on terror and Guantánamo Bay: *Rasul*, *supra* note 28 and *Boumediene v. Bush*, 553 U.S. 723, 771 (2008), in which the US Supreme Court ruled on *habeas corpus* submissions from detainees held at Guantánamo Bay. These cases have become landmark decisions in the US Supreme Court's jurisprudence about what is known as the "great writ".

<sup>48</sup> Waldron, "Torture & Positive Law", *ibid.* at 1724-1725; See U.S. Const., *ibid.*, amend. II.

*Education*<sup>49</sup>. He says that *Brown's* archetypal power is “staggering” and that it became “...an icon of the law’s commitment to demolish the structures of de jure (and perhaps also de facto) segregation and to pursue and discredit forms of discrimination and badges of inferiority wherever they crop up in American law or public administration”.<sup>50</sup> In additions to cases such as *Brown*, Waldron says that one could also add cases such as *Donoghue v. Stevenson*<sup>51</sup> for its statement of the neighbor principle in the English law of negligence and a myriad of other cases, statutes, and other legal norms from a variety of positive-law categories.

There is no cut and dry way to identify a legal archetype, according to Waldron. As support for this view, he cites the Dworkinian argument against positivism<sup>52</sup>, which states that legal principles cannot be identified by a litmus test found in the rule of recognition. Dworkin says that the origin of legal principles:

[L]ies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained.... True, if we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify that principle.... Unless we could find some such institutional support, we would probably fail to make out our case, and the more support we found, the more weight we could claim for the principle. Yet we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude. We argue for particular principles by grappling with a whole lot of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards.<sup>53</sup>

Although it is not possible to identify a legal archetype through a simple rule of recognition, positivists may indeed be pleased that the existence of a legal archetype is dependent on social facts, albeit social facts that develop in a way that is akin to the way that Dworkinian principles do. Waldron says:

The spirit of a cluster of laws [as embodied in archetypes] is not something given; it emerges from the way in which, over time, we treat the laws we have concocted. We begin to see that the norms and precedents we have established hang together in a certain way. We begin to see that together the provisions embody a certain principle, our seeing them in that way becomes a

<sup>49</sup> Waldron, “Torture & Positive Law”, *ibid.* at 1725; See *Brown v. Board of Education* 347 U.S. 483 (1954).

<sup>50</sup> Waldron, “Torture & Positive Law”, *ibid.* at 1725 [footnote omitted].

<sup>51</sup> *Ibid.* at 1726; *M’Alister (or Donoghue) v. Stevenson* [1932] AC 562 (HL).

<sup>52</sup> Waldron, “Torture & Positive Law”, *ibid.* at 1729, n. 214 and accompanying text.

<sup>53</sup> Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) [R. Dworkin, *Rights Seriously*] at 40.

shared and settled background feature of the legal landscape, and we begin to construct legal arguments that turn on their coherence and their embodiment of that principle.<sup>54</sup>

Therefore, just as the identification and application of principles are interpretive exercises, so too are the identification and application of legal archetypes.

Waldron states a limitation of his argument that is similar to a criticism often levelled against the Internal Morality Thesis that Fuller expounds through his eight principles of legality.

Waldron says:

From a normative point of view, archetypes might be good or bad; they may be archetypal of good law or bad law. *Lochner v. New York* is or was archetypal of a certain approach to economic regulation which married the freedom-of-contract provisions of the U.S. Constitution to the dogmas of laissez-faire economics, and that archetype was discredited when the general legal doctrine was discredited. Indeed, the shock to the system of disrupting or undermining an archetype may well be part of an effective strategy for necessary legal reform. An archetype is only as important as the spirit of the area of surrounding law that it epitomizes. And it is up to us to make that estimation.<sup>55</sup>

I will not disagree with Waldron on this matter. He is correct to point out essentially that the importance of a legal norm to a whole cluster of norms does not ensure that the norm is good. And in the same way, the rule of law does not become morally important (in a way that accords with the good) just because of its functional importance to the legal system. One could not defend the moral status of the rule of law simply on the basis that it is a necessary condition for the existence of law. The arguments that I summarized earlier, from the work of several legal philosophers, in defence of the moral relevance of the rule of law and its moral effects on a legal system<sup>56</sup>, were *moral* arguments dealing directly with the relevant *moral* norms concerned, rather than merely with the functional importance that the rule of law has to law. Notice also how this point relates to Luban's argument summarized above that honest legal interpretation does not provide reassurance that the law that is being interpreted and applied tends away from evil and towards the good.<sup>57</sup> A lawyer's honest legal interpretation *can* reflect law's (and/or society's) cruelty or humaneness, its indifference or compassion. In the same way, every legal archetype must have its ethical status assessed in relation to its moral attributes rather than on its importance to the legal system or a cluster of norms.

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<sup>54</sup> Waldron, "Torture & Positive Law", *supra* note 33 at 1722 [emphasis in original].

<sup>55</sup> *Ibid.* at 1749 [footnotes omitted].

<sup>56</sup> Above in sections 2.3), 3), especially Simmonds in Section 2.3.2).

<sup>57</sup> See note 42 and accompanying text, above.

Notably, for the purpose of this paper, Waldron argues that the prohibition on torture is a legal archetype. Thus, the relevant questions to ask are the following, taken in the same order with which Waldron presented them. First, if the prohibition against torture is an archetype, of what is it an archetype? <sup>58</sup> That is, which values does it prominently embody? Second, is the prohibition on torture indeed an archetype? <sup>59</sup> In the case of the first question, recall that Waldron said that archetypes emerge from the way that we treat our laws and the norms that the laws embody. <sup>60</sup> Thus, to answer the question fully, one would, of course, need to canvass an entire network of norms in order to assess what underlying and unifying norms emerge as archetypes. For now, in this summary portion of my paper, let us simply accept Waldron's account of the values that the purported archetype against torture embodies. Waldron says that:

The rule against torture is archetypal of a certain policy having to do with the relation between law and force, and the force with which law rules....Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror [as in the gunman scenario], or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by non-brutal methods which respect rather than mutilate the dignity and agency of those who are its subjects....People may fear and be deterred by legal sanctions...but even when this happens, they will not be herded like cattle or like broken horses....Instead, there will be an enduring connection between the spirit of law and respect for human dignity... <sup>61</sup>

Given Waldron's account of the system of norms of which the prohibition against torture would be archetypal, he asks the question of whether the prohibition is indeed a legal archetype. Recall that we are able to identify a legal archetype by the way that we use it in our legal system. Thus, one would need to survey the legal system, including statutes, important cases and other sources in order to identify whether a particular legal norm such as the prohibition against torture is archetypal. Waldron does precisely this in his piece. He identifies several areas in which the courts use the prohibition against torture as a conceptual benchmark in their reasoning and rhetoric, as would be done in the case of a legal archetype. I will not explain them in detail, but the examples include cases dealing with the eighth amendment to the United States Constitution (dealing with the constitutional prohibition on cruel and unusual punishment), the law on procedural due process (dealing especially with criminal cases) and

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<sup>58</sup> Waldron, "Torture & Positive Law", *supra* note 33 at 1726-1728.

<sup>59</sup> *Ibid.* at 1728-1734.

<sup>60</sup> See note 54 and accompanying text, above.

<sup>61</sup> Waldron, "Torture & Positive Law", *supra* note 33 at 1726-1727.

substantive due process (also dealing with the criminal law).<sup>62</sup> If Waldron is correct in his survey of the suggested archetype that is the prohibition against torture, and if an archetype can be said to exist when a norm summarizes or underwrites the spirit of a whole area of law, then he has shown the prohibition against torture to be a legal archetype.

With an understanding of the broad outlines of Waldron's theory of legal archetypes and of his application of that theory in arguing for the special status of the prohibition on torture (an argument for which, as is clear from the quote above<sup>63</sup>, Luban would have sympathy) let us consider Waldron's argument that the authors of the "torture memos" treated the prohibition against torture without reverence for its proper place in the legal system as a legal archetype. One example of this failure is seen in Yoo's treatment of the prohibition against torture as if it were proper for him to interpret this law in such a way that the client is in a position to know how to do anything just short of breaking the prohibition. Thus, Yoo attempts to draw a bright line that defines the difference between torture and interrogations tactics that do not rise to the level of torture. Waldron argues that such an approach is inappropriate for norms like torture. He compares such an approach to the professor who says "I have an interest in flirting with my students and I need to know exactly how far I can go without falling foul of the sexual harassment rules".<sup>64</sup> In response to this, Waldron says, "*There are some scales one really should not be on, and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go*".<sup>65</sup> I cite this issue of an effort to make a misplaced bright-line interpretations because, of all of the other ways examined by Waldron in which one can undermine the prohibition on torture (including the arguments of Alan Dershowitz, a lawyer and law professor)<sup>66</sup>, this misplaced bright-line interpretation is one that can readily be undertaken as part of the core advising activities of the lawyer. It is evidence of an approach to legal interpretation that deeply misunderstands the meta-issues of legal interpretation, including the relationships between norms in the legal

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<sup>62</sup> *Ibid.* at 1730-1734 (Eighth Amendment cases at 1730, Procedural Due Process at 1731, Substantive Due Process at 1733).

<sup>63</sup> Above at note 42 and accompanying text.

<sup>64</sup> Waldron, "Torture & Positive Law", *supra* note 33 at 1701.

<sup>65</sup> *Ibid.* [emphasis in original].

<sup>66</sup> Alan M. Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* (Boston: Little, Brown & Company, 2002) at 470-477; Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) at 132-163.

system and the weight that an individual norm can carry beyond its own immediate purpose and function.

In short, both Luban and Waldron object to the “torture memos” on the ground of philosophical legal ethics because, in addition to the doctrinal criticisms presented above<sup>67</sup> (and to which Luban and Waldron would agree), the authors of the “torture memos” deeply distorted the treatment that should be given to specific kinds of norms that are especially conceptually and doctrinally relevant, i.e. legal archetypes.

Having looked at the work of Luban and Waldron, whose reasoning focused on the importance of the prohibition against torture within the legal system, an argument that is Dworkinian in some respects, let us consider the work of Bradley Wendel, who makes arguments, which are clearly positivist, against the authors of the “torture memos”. Note that I do not argue that Wendel would reject the arguments of Luban and Waldron summarized above in the present section of my paper. In fact, in his paper, *Legal Ethics and the Separation of Law and Morals*, Wendel cites and uses Waldron’s argument about norms that are not proper candidates for a bright-line definitional approach.<sup>68</sup>

Additionally, at the level of doctrinal legal ethics, Wendel makes the arguments endorsed by many legal ethicists about the pressure to be “forward-leaning” and the fact that the memos do no mention opposing positions, were more akin to advocacy rather than advising, and did not take sufficient input from the other widely-adopted points of view on the matter.<sup>69</sup> That said, Wendel’s critique is rooted firmly in even broader notions of law and lawyering. This is evidenced when Wendel says, “Although it is possible to criticize the OLC lawyers on a theory of government-lawyers’ ethics, I believe the critique of the torture memos is general, and applies

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<sup>67</sup> Above in Section 6.1).

<sup>68</sup> Wendel, “Legal Ethics & Separation”, *supra* note 33 at 119.

<sup>69</sup> As an example of Wendel’s agreement with these critiques, take the following quote and the discussion surrounding it in *ibid.* at 70:

“What accounts for the poor quality of legal reasoning displayed by the [OLC torture] memos?... [T]he explanation is that the process of providing legal advice was so badly flawed, and the lawyers working on the memos were so fixated on working around legal restrictions on the administration’s actions, that the legal analysis became hopelessly distorted. For example, the drafting process included only proponents of broad executive power and unilateralism in foreign policy...administration lawyers faced considerable pressure to think in a ‘forward-leaning’ way, on the assumption that the September 11th attacks had created a kind of normative watershed”.

to all lawyers, public and private. The reason is that the grounds for the criticism are furnished by the law itself, not by considerations specific to any particular lawyering role”.<sup>70</sup>

Wendel’s argument, being positivist in nature, will refer to social facts, the rule of recognition, and the thesis that there are no necessary connections between law and morality. In his book, *Lawyers and Fidelity to Law*, another source in which Wendel deals with the topic of the “torture memos”, he says:

The position defended in this book [and also in Wendel’s paper, *Legal Ethics and the Separation of Law and Morals*] is that the most relevant critical standard for evaluating the *legal* ethics of the torture memos is not the horribleness of torture from the point of view of ordinary morality. The objection to the advice given by lawyers for the Bush administration is not that it is bad moral advice; rather, it is bad legal advice.<sup>71</sup>

From this statement, one would easily conclude that Wendel means to say that what is wrong with the “torture memos” from the perspective of legal ethics is that their authors get the law wrong. That is true from the perspective of doctrinal legal ethics. However, Wendel means to go further than that. Getting the law (i.e. the “primary rules” of the legal system, to use Hartian terminology about doctrinal law<sup>72</sup>) wrong, in the way that Wendel argues the OLC lawyers got it wrong, means something very specific to a positivist theory of law and to the specific kind of inclusive positivist philosophical legal ethics that Wendel endorses.<sup>73</sup>

As explained above<sup>74</sup>, the approach that Wendel brings to the philosophy of legal ethics is a mix of (1) Razian authority and reason-giving and (2) Hartian inclusive legal positivism. To reiterate the first item, Wendel, like Raz, believes that a necessary condition of law is that law exercise authority over in the relevant practical reasoning deliberations of a society. This argument on authority is designed to show how law deals with a problem in political philosophy. Raz argues that, for something to be law, it must play the particular role that he posits for the

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<sup>70</sup> *Ibid.* at 115.

<sup>71</sup> W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010) [Wendel, *Fidelity*] at 181 [emphasis in original]. Among the two pieces by Wendel just noted, I primarily cite Wendel, “Legal Ethics & Separation”, *ibid.*, throughout the remainder of Section 6) in summarizing Wendel’s argument on this point.

<sup>72</sup> H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) [Hart, *Concept of Law*] at 81.

<sup>73</sup> This is, of course, not to imply that natural law theories of law would not also make something specific of a lawyer getting the law wrong.

<sup>74</sup> The first item, Wendel’s reading of Raz, and agreement with Raz, on the authority of law, is discussed above, in Section 1.1); the second item, Wendel’s agreement with Hart, is discussed in Section 1.3).



category of law in resolving societal disputes between differing viewpoints.<sup>75</sup> These disputes inevitably crop up given viewpoint diversity, especially about “the good life”.

In order for a norm to have the status of law, it must be possible to identify its normative force in a way that is independent of the underlying substantive reasons that a party might have for taking the course of action that is recommended by the legal norm.<sup>76</sup> Consequently, the authoritativeness of a *legal* reason for practical action comes from outside of a dispute between viewpoints, rather than from within. The law cannot simply give another reason which factors into a person’s practical reasoning. It must replace the underlying substantive reasons (i.e. the substance of the underlying debate and motivations for the various sides of the dispute), as reasons for action. Put differently, and in a way that is often left unstated in the philosophical debate, an authoritative reason *should not prove* any of the disputing viewpoints right in the grand scheme of things. If it does so, the purported legal reason implicates itself again with the underlying *substantive* reasons that would justify the substantive positions in the dispute. The law is identified solely by its pedigree, in that law is the system in which the various viewpoints have an opportunity to be heard and which is given binding force in determining the shared norms of society.<sup>77</sup> Law gains this normative force essentially because it is a special process of primary rule creation (i.e. a special process for creating the doctrinal norms that govern society).

While following Raz up to this point, Wendel departs from the theory on the question of whether law, in this process of reason-giving, can incorporate morality, by way of the rule of recognition, into the legal system, and, specifically, as a condition for the validity of law within the particular legal system. Unlike Raz, Wendel is an inclusive legal positivist and believes that this is possible. Wendel’s *inclusive* legal positivism is relevant because it makes him a candidate for being more of an intellectual ally to the Fullerian than an intellectual opponent.

If Wendel is going to give a theory of lawyering that is based on a Razian view of the function of law, then Wendel may also run into a particular problem in the case of lawyering. How, one might ask, does a Razian deal with lawyers who claim that they are making novel

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<sup>75</sup> See Joseph Raz, “Authority, Law and Morality” (1985) 68 *The Monist* 295 [Raz, “Authority/Morality”] at 300-305.

<sup>76</sup> See e.g. in *ibid.* at 297, 300-305.

<sup>77</sup> *Ibid.* at 296.

arguments about the law? What does it mean to say that the law is an exclusionary reason for a citizen or government when lawyers are actively presenting legal arguments about exactly what the law says? If a lawyer is faced with a regime of law on a particular subject, in which particular norms are interpreted in an almost uniform, or consistent, way by other lawyers in the field, but which an individual lawyer believes can be changed, or advanced, by presenting creative arguments, must this potentially innovative lawyer proceed only with caution and toe the most widely adopted line, or current interpretive framework, for fear of upsetting the ability of law to act as an exclusionary reason? Wendel addresses the question in his critique of Yoo and points out that Yoo goes well beyond the scope of offering novel arguments. Wendel says:

It is true that lawyers should not be hyper-cautious, but one can lean only so far forward without rejecting the ideal of a 'government of laws, not of men.' As David Luban has argued, the legal reasoning in the torture memos suggests that the lawyers regarded the law only as a fig leaf, or as a way of providing cover for administration officials who had already made up their minds about what they wanted to do. Moreover, if my claim about the authority of law is correct, the forward-leaning attitude toward the law becomes a forward-leaning attitude toward morality, because the law is legitimate only insofar as it enables citizens to settle on a provisional collective position with respect to some contested moral issue.<sup>78</sup>

Thus, Wendel argues here that Yoo's mistake as a lawyer is evidenced by the content of what he said. The content of what Yoo said was evidence of a kind of practice of law that is inconsistent with the Razian functions of law for which Wendel argues. When a lawyer practices in such a way that s/he treats the law as an obstacle or reintroduces the moral conflict that was supposed to be answered in a provisional way by the positive law, or when the lawyer plans around the law (the key normative source of the legal system and, for a positivist, the only normative source of the legal system) rather than being guided by the law and the legal entitlements of the various parties, then the lawyer, under Wendel's view, undermines the basic conceptual underpinnings of the system in which s/he is meant to function. In Wendel's view, then, Yoo's advice was not a mere attempt to provide a novel argument to advance the law. The attempt, rather, was to manoeuvre around the legal entitlements of the detainees at Guantánamo Bay, thus sidestepping the provisional settlement rather than earnestly seeking to change the provisional settlement *via* a novel argument in the appropriate context.<sup>79</sup>

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<sup>78</sup> Wendel, "Legal Ethics & Separation", *supra* note 33 at 120.

<sup>79</sup> On a point related to Wendel's criticism of the way in which the OLC lawyers manoeuvred around the law in the "torture memos", as just summarized, see Farrow, "Post-9/11 Lawyers", *supra* note 2 at 179, in which Farrow argues that the OLC lawyers' work cannot even be seen as an example of zealous advocacy,

For the purpose of telling us how we might distinguish between novel arguments to advance the law and attempts to sidestep the law, Wendel discusses various contexts in which such efforts might be made and the procedural, practical or technical features of each that would shape the question of how to properly perform the lawyerly task of advancing the law through novel arguments. Wendel says:

My argument is not that a lawyer must always offer the most conservative legal advice or, metaphorically, handle the law with kid gloves. There are many mechanisms within the law for pushing the boundaries or seeking change. In the context of litigation, lawyers are permitted to take aggressive stances toward the law, subject to the requirements that the position not be frivolous, that any contrary authority be disclosed, and that the lawyer make no misstatements of law or fact. Some measure of aggressiveness is permissible in litigation because of the checking mechanisms built into the adversary system... In transactional representation, however, these checks and balances are absent, and the lawyer in effect assumes the role of judge and legislator with respect to her client's legal entitlements.<sup>80</sup>

As Fuller would do also<sup>81</sup>, Wendel distinguishes between the various modes of lawyering and sets out the differences between the litigation and transactional contexts. The key

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zealous advocacy being an interpretive stance that several scholars have argued is inappropriate for lawyers within the advisory role of the OLC; see also my summary of the criticisms that have been made of Yoo for inappropriately taking an advocacy stance while writing the "torture memos", when he should have taken an advising posture, above in Section 6.1) at 124-129; and immediately below, in the current section at 141-143, especially notes 80, 82 and accompanying text. Rather than merely criticizing the OLC lawyers for taking a particular posture in the wrong context, Farrow, arguing otherwise in *ibid.*, says, "If the lawyers did in fact engage in a balanced review of the law, and further, if they did not exhibit what appears to have been a strong preference for the underlying conclusion that their memos sought to justify and that drove their findings, then the lawyering exercise that resulted in the production of the Torture Memos could potentially be seen as an exercise of traditional zealous advocacy. And, particularly given the result, there would be reason to criticize that process... However, that is not what happened. It is clear that [the relevant OLC lawyers'] reading of the law was not balanced (or fair)... It appears that the authors of those memos not only reached the edges of the zone of zealous advocacy, they in fact crossed that line into the territory typically occupied not by neutral lawyers but rather by partisan clients and cause advocates" [footnotes omitted]. Scholars already discussed would likely join Farrow in this criticism.

<sup>80</sup> Wendel, "Legal Ethics & Separation", supra note 33 at 120.

<sup>81</sup> Lon L. Fuller, "The Needs of American Legal Philosophy" [Fuller, "American Legal Philosophy"] in Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed. by Kenneth I. Winston (Oxford: Hart Publishing, 2001) [Fuller, *Social Order*] at 272-273. This is not to say that Fuller would agree with all of Wendel's particular prescriptions for action within these various contexts. Yet, Fuller's own work does indeed indicate Fuller's agreement with Wendel's account of the need for strong partisanship and the resultant checking mechanism in the litigation context. See Fuller's defence of the adversarial adjudicative system in Lon L. Fuller, "The Adversary System" in Harold J. Berman, ed., *Talks on American Law*, rev. ed. (Washington, D.C.: Voice of America, 1972) 35.

I have left the issue of the adversarial model of adjudication and lawyering mostly untouched throughout this paper because the adversarial model is potentially compatible, and might be made to cohere with,

difference cited by Wendel in this particular quote is the role of the adversarial system as a checking mechanism. The adversarial system, here, is the mechanism that lawyers can rely on in the litigation context to provide the means by which they can adopt an aggressive posture of lawyering and novel take on law and yet still practice law in such a way that is consistent with the Razian function of law.

Wendel then discusses how the OLC lawyers, specifically, failed to take account of the way in which the context of their practice of the law would affect, and provide, the limits within which they could engage in particular postures of lawyering and yet still remain within the bounds of treating the law as an peremptory reason and as a provisional settlement of the underlying dispute that calls for the procedural resolution that can be provided by the law. In the case of the OLC lawyers and the “torture memos”, the critiques that Wendel provides focus particularly on the extra level to which the approach taken by lawyers such as Yoo was particularly ill-suited to the context of OLC lawyers. Not only did the practice role of the OLC lack the safeguards of the litigation context that are provided by the adversarial model, but the position of the OLC lawyers as quasi-judicial officers exacerbated the degree to which their approach to lawyering undermined the Razian function of law. Wendel argues:

If a government lawyer says, for example, that the President has the authority as Commander-in-Chief to suspend the obligations of the United States under various international treaties, then for the purposes of that act, the lawyer's advice is the law. If the lawyer's advice is erroneous, the consequences for the government could be disastrous, but only if they are discovered. Secrecy, combined with an aggressively "forward-leaning" stance toward the law, essentially creates an unaccountable legislature within the executive branch. Rather than assisting the client to comply with the law, the government lawyers in this case simply abandoned the ideal of compliance altogether in favor of their own, custom-built legal system.<sup>82</sup>

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competing philosophical theories of law and lawyering. At the same time, my theory of Fullerian lawyering, both in terms of “thick moral normativity” and “thin moral normativity”, is potentially compatible with a range of adjudicative models, including with various expressions of familiar models such as the adversarial system. The task of exploring preferred adjudicative models, or of specifying the way in which my Fullerian theory, and other theories of philosophical legal ethics, would relate to the features of various adjudicative models, is briefly noted as an item for future research in the Conclusion, at 174-175, below. Nothing should be taken from my discussion of the adversarial model as it related to the case study in this paper other than that I am providing an illustration of how my Fullerian model of lawyering would apply to the particular details of a prominent case study within legal ethics. Doing this case study simply means working with the institutional details that are part of the context of the “torture memos”. These details include the adversarial system of adjudication.

<sup>82</sup> Wendel, “Legal Ethics & Separation”, supra note 33 at 120-121.

Couching his critique in the jurisprudential theory of exclusionary reason-giving and the political philosophy on which it depends, Wendel provides the summation of what his theory of lawyering would say about what went wrong in the case of the “torture memos”:

At bottom, the vice of the torture memos is the ethical solipsism of lawyers who sincerely believed they were right, despite the weight of legal authority against their position. Academic defenders of the administration cite the works of ‘dynamic young constitutional scholars’ whose views are better than those that have carried the day in the Supreme Court, Congress, and the forum of international treaty negotiation. No matter how brilliant these scholars are, their views are not the law. They have not been adopted by society, pursuant to fair procedures, as a resolution of the moral issue [of the permissibility of torture]. Lawyers functioning in a representative capacity have no greater power to act on the basis of an all-things-considered moral judgment than do their clients. If clients are bound by the law, then lawyers are bound to advise them on the basis of the law, not on the basis of the lawyer's own judgment about what the best ‘forward-leaning’ social policy would look like. Criticizing the administration's lawyers for their lack of fidelity to law is not an evasion of the moral horror of torture. It is a recognition of the moral entitlement of the law to respect, and a critique of the separate act of wrongdoing perpetrated by lawyers who deny the authority of law.<sup>83</sup>

Thus, according to Wendel, the OLC lawyers’ biggest mistakes involve a breach of not just *any* duty of lawyering, but of a duty that derives its force from what he argues is one of the necessary conditions for the existence of law, namely, the condition of law’s authority. It therefore also goes against what positivist view as one of the basic values of the law in terms of its worth in solving one of the basic issues in political morality, namely the law’s ability to procedurally resolve issues that spring up from viewpoint diversity about morality and other issues. This is especially troubling for lawyers tasked with the quasi-judicial role of the OLC. One might say thus that, according to Wendel, Yoo’s work, when understood not in the way that Yoo falsely presents it but with all of its flaws and true underlying commitments revealed, might even imply, to some extent, a theory of adjudication that is inconsistent with legal positivism’s basic conditions for the existence of law. This would indeed merit deep criticism from legal philosophers and legal ethicists of the positivist stripe.

I have presented a focused look into the cases that legal ethicists, both doctrinal and philosophical, make against the “torture memos”. The criticisms are like bunker busters in their ability to penetrate deep and explode the core of the problematic legal ethics of the OLC lawyers who wrote the “torture memos”. I will argue that a great deal more can be gained in this same vein with a look into the work of a particular legal philosopher.

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<sup>83</sup> *Ibid.* at 126-127 [footnote omitted].

## **7) Fullerian Lawyering and the “Torture Memos”**

Like authors considered in the two previous sections, I do not claim that the case that follows takes the place of moral reasons to oppose torture. Nor do I claim that my arguments give the most important reason for a lawyer, as a moral actor, to oppose torture. The moral arguments against torture are the most important reasons that any person should have at the top of his/her mind regarding to torture itself. Rather, the following is a moral/legal argument that takes into account the objections against torture itself, but which primarily gives the lawyer a basis, internal to his/her practical reasoning *as a lawyer*, for criticizing the “torture memos”.

### **7.1) The “Torture Memos” and the First Principle of Fullerian Lawyering**

Taking the interpretive theses offered in sections 4.3) and 4.4) of this paper, how did the authors of the OLC “torture memos” perform? Consider the first of my Fullerian Principles of Lawyering. Are the “torture memos” written in a way that respects the fact that moral truths are incorporated into the legal system by the internal morality of law? Those moral truths are the direct moral truths of the principles of legality themselves (e.g. the moral truth that it is wrong to retroactively punish a person for an offence) and perhaps also the foundational moral truths that the principles of legality are supposed to embody (such as the moral truth that personal autonomy over one’s own life is a moral value of law and is morally good). Recall that, as I argued above, “The lawyer can influence the client’s interaction with the law, and its internal or related values, so that the client’s experience either vindicates or deviates from the rule of law and its values”.<sup>1</sup> So, another question is whether the OLC lawyers provided advice in a way that made the executive branch’s approach to, and experience of, the law vindicate the rule of law and its values or deviate from those same standards. In keeping with the distinction drawn above between “thin moral normativity” and “thick moral normativity”, especially as applied to my principles of Fullerian lawyering,<sup>2</sup> I take stock of the fact that this question can be asked and answered to varying degrees of moral robustness. Thus, first, are the “torture memos” written in a way that respects the “thin moral normativity” and/or “thick moral normativity” that has been incorporated into the law by way of the rule of law? And did the OLC lawyers provide

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<sup>1</sup> Above, in Section 4.5) at 105.

<sup>2</sup> My distinction between “thin moral normativity” and “thick moral normativity” is found above in Section 4.2) and is used to shape the principles of Fullerian lawyering that I provide in sections 4.3) and 4.4).

advice in a way that vindicated the rule of law and its necessarily connected values in terms of the executive branch's approach to and experience of the law? The answer, at both levels of moral normativity, is that memos, and the statements of authors such as John Yoo, do not recognize the morality that has been incorporated into the legal system by the rule of law.

As a first and general matter that is relevant to both thin and thick moral normativity, one should consider the way in which Yoo's approach to his work as a lawyer fails to live up to the standards of the first principle of Fullerian lawyering. Yoo fails to even acknowledge that there are moral issues that, by way of their incorporation into the law *via* the rule of law, are relevant to his analysis.<sup>3</sup> As quoted above, Yoo understands of his work as the amoral retrieval of legal standards.<sup>4</sup> The conception of law that is the starting point for his legal analysis as a lawyer is thus incomplete. His first step on the road of legal analysis is one that fails to pick up on the insight of Fuller's legal philosophy and its most direct incorporation into lawyering as manifested in my first principle of Fullerian lawyering. Of course, there is also the question, raised elsewhere<sup>5</sup>, of whether Yoo actually stuck to this approach of amoral retrieval. However, even according to Yoo's defence of his approach, we can tell, from a Fullerian perspective, that he was not looking for law, or for norms that are relevant to determining the law, in all of the places that he should have explored. The normativity of law, *notably, of law pertaining to torture*, is obscured by an amoral lens. This is a failure to abide by the principles of Fullerian lawyering whether these principles are conceived of in terms of thin or thick moral normativity.

Having looked at a general problem of approach with regard to the first principle of Fullerian lawyering, it is appropriate to discuss specific ways in which Yoo's legal advice failed to live up to the standards of the first principle of Fullerian lawyering. Whereas the previous paragraph showed Yoo's failure to recognize the effect that the rule of law has on the normativity of law, the subsequent paragraphs will show the way in which the OLC "torture

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<sup>3</sup> See my discussion on the importance of recognizing the incorporation of morality into law as part of my first principle of Fullerian lawyering, above in Section 4.3.1), where I deal with the ontological reasons for this need. See also Section 4.3.2), where I discuss the shape of my first principle and some epistemological issues that arise around the shape of the first principle and the shape of the internal morality of law.

<sup>4</sup> "Frontline Interview with John Yoo" *PBS* (18 October 2005), online: WGBH Educational Foundation <<http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>> ["Frontline Interview"]; quoted above in Section 5), note 8 and accompanying text.

<sup>5</sup> Discussed in Section 6.1) at 128-129, especially note 32, above; Section 6.2) at 143, especially note 83 and accompanying text, above; Section 7.2), especially note 50 and accompanying text, below.

memos” contain direct violations of the principles of the rule of law. Thus, this failure to abide by the first principle of Fullerian lawyering is an actual normative violation, rather than what one might say is “merely”<sup>6</sup> a failure to have the proper outlook towards the normative relevance of the rule of law. It is a failure of action rather than a failure to hold in proper regard. This failure to abide by the first principle of Fullerian lawyering is more robust than the approach-based criticism discussed just above, however, it is clearly still consistent with the first principle of Fullerian lawyering when this principle is conceived of in terms of “thin moral normativity”. An advocate of “thick moral normativity”, such as I am, would certainly find this criticism compelling, but the substance-based case is, nonetheless, one that falls squarely within a view of the rule of law that could be adopted by a sympathetic positivist, such as Hart when he is equivocating in favour of the moral status of the rule of law, as discussed above.<sup>7</sup> Therefore, let me discuss the way in which *Yoo acted against the norms* by which he was supposed to abide under the first principle of Fullerian lawyering.

The “torture memos” actively undermined the rule of law with respect to the prohibition on torture. Even apart from the specific theory of Fullerian *lawyering* presented in this paper, the authors of the “torture memos” did not abide by the rule of law as stated by Lon Fuller, in the very desiderata themselves.<sup>8</sup> Recognizing this point, Bradley Wendel criticizes the authors of the “torture memos” in a way that makes use of rule of law principles. Beyond philosophical theories of *lawyering*, the “torture memos” are in discord with theories of *law*. Or, to put things differently, the “torture memos” are not merely inconsistent with notions or aspects of lawyering that have been derived by philosophical legal ethicists on the basis of philosophical theories of law, but also with the legal theories that give the conceptual grounding for the philosophical theories of lawyering. Wendel, for example, makes criticisms of the “torture memos” in ways that demonstrate the disrespect that the authors of the “torture memos” showed for the basic notions of the positivist legal theories that ground Wendel’s theory of lawyering.<sup>9</sup> Additionally, going beyond famous positivist notions such as the authority

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<sup>6</sup> The word “merely” is in quotation marks, of course, because a failure to have the proper outlook is actually quite the failure, even on its own.

<sup>7</sup> Above, in Section 4.3.2) at 86-89.

<sup>8</sup> See my summary of the desiderata above in Section 2.1), note 4 and accompanying text.

<sup>9</sup> Above in Section 6.2), note 83 and accompanying text.



of law, Wendel deals with the topic of the failure of the OLC lawyers to abide by the desiderata of the rule of law, says:

Whatever the attractiveness of a strong executive as a political matter, it is difficult to square this conception of separation of powers with a theory of law that permits it. The reason is that for a decision to count as lawful, as opposed to merely being in the executive's interest, it must comply with certain internal criteria such as generality, publicity, consistency, and clarity. If the government seeks to act under law (because it seeks the legitimacy or prestige of lawful action), then it may not be able to be as energetic as it desires.<sup>10</sup>

Since the OLC has a quasi-judicial role in determining the interpretation that the executive branch has of the laws of the United States, the poorly-reasoned and incorrect memos would have contributed to the creation of a policy, and perhaps quasi-legal framework, that violated the principles of legality because the framework was *not promulgated*<sup>11</sup>, was *retroactive*<sup>12</sup>, stated rules that were *contradictory* as judged against the law on torture<sup>13</sup>, and

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<sup>10</sup> W. Bradley Wendel, "Legal Ethics and the Separation of Law and Morals" (2005) 91 Cornell L. Rev. 67 [Wendel, "Legal Ethics & Separation"] at 115.

<sup>11</sup> Despite the fact that the advice has an important role in determining the policies of the executive branch, the advice, coming in the form of a memo, is understandably not made public and is thus practically unreviewable. This means that the people subject to the executive's rule and subject to classification as enemy combatants would have had no way of knowing of the policies to which they were subject. In fact, all of the legal standards of which they would have known, including the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Geneva Convention, *Civilian Persons*]; *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [Geneva Convention, *Prisoners of War*]; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [*Torture Convention*], would have told them the opposite of the conclusion to which the "torture memos" came.

Interestingly, Bradley Wendel speculates that the "torture memos" would have been drafted very differently if the authors had known, going in, that they would have had to defend the memos in public, in "Legal Ethics & Separation", *ibid.* at 85. In light of that, the unreviewability of these quasi-judicial opinions calls for extra care in drafting OLC opinions. I have summarized and noted arguments that such care was not taken. See Section 6.1) at 124-129, Section 6.2) at 141-142, especially note 80 and accompanying text, above, for my summary of the criticisms in legal ethics about the OLC "torture memos" in relation to some lawyers within the OLC taking an adversarial interpretive stance in a situation that did not have adversarial checking mechanisms, and Section 6.2) at 142-143, especially note 82 and accompanying text, above, for my summary of Wendel's arguments about the same topic but made in light of the specific contextualizing fact (for the purpose of determining proper interpretive stance) that is the quasi-judicial role of the OLC.

<sup>12</sup> Because the memos, in part, provided a sense of legitimacy (see Section 5), note 6 and accompanying text, above) to illegal practices (including the classification of prisoners as enemy combatants and the torture of these prisoners) by way of forward-looking legal advice, that had already been implemented. The use of legal advice to provide a sense of legitimacy for illegal practices that were already underway

broke the congruence between the rules as announced and their actual administration.<sup>14</sup> Just to consider one of these violations in particular, broken congruence between rules as announced and actual administration, the violation was undeniable. The relevant and promulgated law prohibited torture with criminal sanctions. Torture was clearly understood to be illegal.

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was discussed in Section 5), note 7 and accompanying text, above, citing George C. Harris, "The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11" (2005) 1 J. Nat'l Sec. L. & Pol'y 409 [Harris, "Rule of Law"] and Harold Hongju Koh, "Protecting the Office of Legal Counsel from Itself" (1993) 15 Cardozo L. Rev. 513 [Koh, "OLC"].

<sup>13</sup> Because they counseled in favour of practices, and thus had a determinative role in setting executive branch policies (including classification of prisoners as enemy combatants and torture of these prisoners), that were contradictory to the explicit and positively-stated legal norms, including the *Geneva Conventions*, *supra* note 11, in the case of the classification of the status of prisoners, and the *Torture Convention*, *supra* note 11, in the case of the torture of prisoners.

<sup>14</sup>Namely, again, referring to the legal prohibitions on torture, including in the *Geneva Conventions*, *ibid.*, and the *Torture Convention*, *ibid.*, and the actual use of torture; see my summary of the use of torture in Section 5), note 5 and accompanying text, above, citing Mark Mazzetti & Scott Shane, "Interrogation Memos Detail Harsh Tactics by the C.I.A." *The New York Times* (16 April 2009), A1 April 17 2009, online: The New York Times Company <<http://www.nytimes.com/2009/04/17/us/politics/17detain.html?pagewanted=all>> [Mazzetti & Shane, "Harsh Tactics"]; Brian Ross & Richard Esposito, "CIA's Harsh Interrogation Techniques Described" *ABC News* (18 November 2005), online: ABC News Internet Ventures <<http://abcnews.go.com/Blotter/Investigation/story?id=1322866#.T6jFJetYtul>> [Ross & Esposito, "Techniques Described"]. Additionally, there is the lack of congruence between the *Geneva Conventions'* positive law about the classification of the status of prisoners, *Geneva Conventions*, *ibid.*, and the invented and incongruous enemy combatant classification found in the "torture memos".

Furthermore, the lack of congruence between the rules as announced and their actual administration was continued in the United States' (especially the Justice Department's) failure to criminally prosecute the perpetrator of torture and to civilly discipline, in any way, the authors of the "torture memos". See Carrie Johnson & Julie Tate, "New Interrogation Details Emerge as Administration Releases Justice Department Memos" *Washington Post* (17 April 2009), online: The Washington Post Company <<http://www.washingtonpost.com/wp-dyn/content/article/2009/04/16/AR2009041602768.html?hpid=topnews>>; "CIA Off The Hook For Past Waterboarding" *CBS News* (18 June 2009), online: CBS Interactive Inc. <[http://www.cbsnews.com/2100-503723\\_162-4950212.html](http://www.cbsnews.com/2100-503723_162-4950212.html)>; Mark Mazzetti & Scott Shane, "Harsh Tactics", full citation in the current footnote; David Cole, "The Torture Memos: The Case Against the Lawyers," *The New York Review of Books* 56:15 (8 October 2009), online: NY REV Inc. <<http://www.nybooks.com/articles/archives/2009/oct/08/the-torture-memos-the-case-against-the-lawyers/>>; Rupert Cornwell, "Torture: Obama's painful legacy from the Bush years" *The Independent* (23 April 2009), online: The Independent <<http://www.independent.co.uk/news/world/americas/torture-obamas-painful-legacy-from-the-bush-years-1672721.html>>. See also Claire Finkelstein & Michael W. Lewis, "Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?" (2010) 158 U. Pa. L. Rev. PENumbra 195 for a scholarly debate on the question of whether the Bush Administration law should be *criminally* prosecuted, a subject which is related to the subject of this paper, but which goes beyond my professional ethical focus.

Additionally, some specific interrogation practices, such as waterboarding, had received judicial consideration.<sup>15</sup> The accused in those cases received severe legal punishments.<sup>16</sup> Yet, the OLC memos advised that the practices were legal. The advice was thus not in congruence with the law as announced.

One would do well, in considering this section, to keep in mind Fuller's discussion of the practicalities of abiding by the rule of law and its desiderata. Fuller says that "[I]nfringements of legal morality tend to become cumulative. A neglect of clarity, consistency, or publicity may beget the necessity for retroactive laws. Too frequent changes in the law may nullify the benefits of formal, but slow-moving procedures for making the law known".<sup>17</sup> One could argue that the violations of one or more desiderata discussed here begot violations of the other desiderata that were mentioned. For example, incongruence between the rules as announced and the actual administration of the rules could be said to nullify the benefits of prospective and promulgated law.

Additionally, under the same focus on practical aspects of abiding by the rule of law, Fuller says "[T]he stringency with which the eight desiderata as a whole should be applied, as well as their priority of ranking among themselves, will be affected by the branch of law in question, as well as by the kinds of legal rules that are under consideration".<sup>18</sup> Fuller argues, for example, that in fields such as criminal law, the desideratum of prospectivity is of heightened importance. I would argue that, as it pertains to *advice given by the OLC*, generally speaking, the desideratum of congruence between the rules as announced and their actual administration takes on extra importance. When doing the work of the OLC, lawyers should pay special attention to their abidance of the desideratum of congruence. This is especially so when OLC lawyers are providing advice on the topic of a crucial legal archetype such as the positively-stated prohibition on torture.<sup>19</sup> The failure of the OLC lawyers to abide by the desideratum of congruence in the case of the "torture memos" is thus particularly troubling with respect to the

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<sup>15</sup> Above in Section 6.1), note 34, especially Wallach, "Water Torture in U.S. Courts".

<sup>16</sup> Above in Section 6.1), note 34, especially Wallach, "Water Torture in U.S. Courts".

<sup>17</sup> Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) [Fuller, *Morality of Law*] at 92.

<sup>18</sup> *Ibid.* at 93.

<sup>19</sup> Above, in Section 6.2) at 132-137, particularly note 61 and accompanying text, see my summary of Waldron's discussion of the archetypal importance of the legal prohibition of torture and the ways in which the authors of the "torture memos" undermined that legal archetype.

vindication of the rule of law. With this and other examples, the OLC lawyers failed in stunning ways to live up to the first principle of Fullerian lawyering that I advocate in this paper.<sup>20</sup> They did not abide by the desiderata of the rule of law. They did not meet the basic conditions for abiding by the norm that is the rule of law. Both thin and thick conceptions of my first principle would take this to be a failure to abide by my first principle of Fullerian lawyering.

Having said that, one will also want to consider the way in which more morally robust views of the first principle of Fullerian lawyering apply to the case of the “torture memos”. Such an analysis will be based on “thick moral normativity” and will thus engage broad notions of individual autonomy as well as the possible incorporation of other values (such as justice) into the legal system by way of their relationship with the rule of law. Recall above,<sup>21</sup> where I built an account of the shape of my first principle of Fullerian lawyering by drawing upon the legal philosophy of N.E. Simmonds and the “thick moral normativity” that I find therein. Simmonds argues that one cannot abide by the rule of law without also satisfying the demands of justice insofar as the various facets of justice have a necessary connection with the rule of law. For a lawyer to satisfy my first principle on such an account, s/he must recognize the robust moral values that are bought into the law or have a necessary connection to law (by transitivity through the necessary connection that these moral values have with the rule of law and which the rule of law has with law). Recognizing these moral values is partly a matter of approach, as discussed above<sup>22</sup>, but, more onerously, is also a matter of lawyering in a way that is in accordance with the demands of “thick moral normativity”, such as the demand to actually do justice. Applying this account, I argue that Yoo also failed to live up to the demands of my first principle of Fullerian lawyering when the principle is expressed in terms of “thick moral normativity”.

For the sake of simplicity, I will keep my analysis to the moral demands of a robust notion of respect for individual autonomy and of justice. These are two norms that have already been discussed as being demands of “thick moral normativity”. Thus is will discuss no other moral values that may also have a necessary connection with the rule of law and thus also with

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<sup>20</sup> See my presentation of my first principle of Fullerian lawyering (the Internal Morality Thesis), above, in Section 4.3), and a brief summation of this principle at the end of Section 4.4) at 102.

<sup>21</sup> Above, in Section 4.3.2) at 92-96.

<sup>22</sup> Yoo’s failure to explicitly recognize the moral aspects of law in his legal analysis is discussed above in this same section at 144-145.

law. I begin by discussing the robust notion of respect for individual autonomy. As noted immediately above in my application of “thin moral normativity” to the case study at hand, the “torture memos”, in their departure from the desiderata of the rule of law, fail to show even the minimal kind of respect that legal systems, by their very nature as participants in the category called “law”, are to show to individual autonomy. In addition to this failure of minimal respect, which undermines all notions of legal systems’ respect for individual autonomy, what can be said about the “torture memos” and their relationship with rich notions of autonomy, such as the one defended by Simmonds, being not merely the fact of having the law guide one’s human conduct, but as being defined by the “notion of freedom as independence from the power of others”<sup>23</sup> and providing “domains of optional conduct that are independent of the will of others”?<sup>24</sup> The answer is that Yoo fails to respect these notions and thereby does not live up to my first principle of Fullerian lawyering. Rather than recognize the thick moral notion of respect for individual autonomy that is incorporated into the law by way of the rule of law, Yoo undermines the “thick moral normativity” of the rule of law.

Yoo’s approach to legal advice in the case of the “torture memos” undermines thick notions of individual autonomy because of the particular moral impropriety to which his legal advice gave approving comfort. The violation of the rule of law happened with respect to a legal prohibition that guards against an activity that involves dehumanizing its victims. In the act of torture, victims, far from being independent from the power of others or having a domain of optional conduct, are put under the full control of other people (in this case without the benefit of due process) and are subject to extreme force in the pursuit of the will of others. The values that are directly violated in the act of torture include, in a prominent way, the values that are embodied in the rule of law. Because of the violence it does, the violation of the conditions of the rule of law, in this case, is particularly damaging and is an extreme infringement of the values embodied in the rule of law, especially as conceived of under “thick moral normativity”. Even when torture is not done in a way that infringes any of Fuller’s desiderata of the rule of law, its use is nonetheless inconsistent with the rule of law because torture violates the basic moral value of which the rule of law is an embodiment. It is of great importance to note, in

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<sup>23</sup> N.E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) [Simmonds, *Law/Moral Idea*] at 191.

<sup>24</sup> *Ibid.* at 188.

considering this point, that the violation of the desiderata is a sufficient condition for a purported law or government action to be inconsistent with the rule of law and thus to be ruled as non-law based on the Fullerian theory. The desiderata are *not*, however, necessary conditions, the violation of which are the only ways in which to a law or government action to be inconsistent with the direct rule of law (and not just with associated necessary conditions such as justice). To fail to see this would be to miss the forest for the trees. It is the functionality and the morality that is the key to the rule of law, not the desiderata, which tell us specific ways in which the functionality and morality of a purported law or government action can be assess across the dimensions of the rule of law's functionality and morality.

Furthermore, the prohibition on torture, taking Waldron's argument into account, is a legal archetype that is particularly salient to the issue of the use of force and the protection of individual autonomy within the legal system. If the prohibition on torture is archetypal of the relationship between law and force, as Waldron says<sup>25</sup>, then I ask the question of what the relationship is between law, force and individual autonomy (the value of which the rule of law is an embodiment). Waldron, although not dealing directly with this topic, goes some way towards answering this question. In describing the way in which the prohibition on torture constraints the state's use of force upon people subject to the power of the state and its laws, Waldron says, "People may fear and be deterred by legal sanctions...but even when this happens, they will not be herded like cattle or like broken horses....Instead, there will be an enduring connection between the spirit of law and respect for human dignity".<sup>26</sup>

The use of torture, and the breach of this legal archetype, deviates from respect for human autonomy in a way that undermines this particularly poignant legal value that Waldron identifies. The treatment of people when torture is used, namely the breaking and herding of people through force and fear, is a deep rejection of the value of human dignity and human autonomy and thus of the rule of law. One cannot have any control over one's own life when one is receiving treatment that is literally not far removed from being shocked along the desired path by a cattle prod. Thus, the use of torture represents its own avenue of disrespect for the

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<sup>25</sup> I quote Waldron on this point above in Section 6.2), note 61 and accompanying text, where I cite Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 Colum. L. Rev. 1681 [Waldron, "Torture & Positive Law"] at 1726-1727.

<sup>26</sup> Quoted above Section 6.2), note 61 and accompanying text; quoted from *ibid*.

value of human autonomy. That is to say, the use of torture does not need to directly violate the rule of law's desiderata in order to be an act of disrespect for the value of human autonomy and thus the rule of law.

In the particular case of the "torture memos", the lawyers participated in the disrespect of individual autonomy by way of their failure to abide by the rule of law when performing their role as legal advisors. At least as far as the OLC lawyers are concerned, the case of the "torture memos" represents a *substantive* disrespect for human autonomy and the moral concern of the rule of law (in the very pursuit of torture) through a *procedural* disrespect for individual autonomy in the violation of the desiderata of the rule of law. It is difficult to envision a case in which my first principle of Fullerian lawyering, conceived of in terms of "thick moral normativity" and focusing on a robust value of individual autonomy, could provide greater grounds for condemning the actions of lawyers. The OLC lawyers' failure on this front is of massive moral proportions.

The difficulties do not stop there in terms of the critique that could be made from my first principle of Fullerian lawyering when it is conceived of in terms of "thick moral normativity". Recall that, in addition to a robust notion of respect for individual autonomy, my first principle, thickly-interpreted, also supports the consideration of moral values that have necessary connections with the rule of law.<sup>27</sup> The discussion of justice, the rule of law and lawyering in this "torture memos" case study is particularly interesting.

As noted above, Simmonds makes the argument that as the law's substance moves further away from justice, the law thereby offers less interpretive guidance and leaves more room "[F]or the exercise of ungrounded choice by the judge who must interpret its provisions".<sup>28</sup> The relevance of justice for the purpose of this particular analysis is the necessary connection that justice has with the rule of law. Simmonds argues that the relevance of justice in the context of rule of law analysis is the relationship that the justice of legal norms has to the ability of the legal system to vindicate the value that the rule of law embodies. As Simmonds says, "Since legality is the set of conditions within which we can be independent of the power of others, and since subjection to the choices of the judge is a clear subjection to the power of

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<sup>27</sup> Above, in Section 4.3.2) at 92-96.

<sup>28</sup> Quoted above in Section 2.3.2), note 54 and accompanying text; quoted from Simmonds, *Law/Moral Idea*, *supra* note 23 at 198.



another, significant departure from justice tends to breed departure from legality”.<sup>29</sup> Here, he is surely talking about deviation found in the positive law and in the actions taken by government and such deviations substantively being in discord with justice. As argued previously<sup>30</sup>, although lawyers cannot have a direct “rule of recognition”-style influence on the substance of the law, lawyers can participate in the interpretation and use of the law and thereby influence the experience that their clients have with the substantive positive law, the rule of law and, notably for the purpose of my present point, with the necessarily-connected moral value of justice and its relationship to the law and the rule of law.

The question, then, is whether Yoo’s memos shaped the executive branch’s experience (and the experience that those who were tortured) of the legal system such that justice was vindicated within the legal system or, conversely, such that the legal system and the experience thereof deviated from the requirements of justice, especially to the extent that the value of justice is necessarily tied to the rule of law. Additionally, to take account of the particular relevance that Simmonds says justice has for the rule of law, but to also put that relevance in terms of the way that lawyers are able to affect the client’s experience of the rule of law<sup>31</sup>, the question that I ask (coming from the discussion in the previous paragraph) is whether Yoo’s advice in the “torture memos” affected the parties’ experience of the law such that the law governing this field was characterized by the law’s (and the legal system’s) justice-facilitated respect for the autonomy of the individuals governed by it. Or, on the contrary, was the law governing this field characterized by the justice-infringing ungrounded choice of some individuals determining the way in which other individuals were treated?<sup>32</sup>

My answer is that Yoo’s work in the “torture memos” deviated from justice in a way that undermined the rules of law as stated in Simmonds’ robust conception. I argue that Yoo’s legal opinion undermined procedural justice, retributive justice and restorative justice as they pertain to the issues at stake. Rather than allowing the positively-stated law to govern, the functional

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<sup>29</sup> Quoted above in Section 2.3.2), notes 54, 80 and accompanying text; both quoted from *ibid.* at 198.

<sup>30</sup> Above in Section 4.5).

<sup>31</sup> Again, not as a matter of having a “rule of recognition”-style effect at the level of legal philosophy, but rather an effect on the interpretation and use of the positive law, the rule of law and related values, as explained above in Section 4.5).

<sup>32</sup> The notion of “ungrounded choice” was discussed above in Section 2.3.2) at 51-58, especially Section 2.3.2), note 77 and accompanying text, quoted from Simmonds, *Law/Moral Idea*, *supra* note 23 at 198; and Section 2.3.2), note 81 and accompanying text, quoted from *ibid.*



effect of the advice given by Yoo and the authors of the “torture memos” was to facilitate the movement of the practice of the executive branch away from the positively-stated law and the law’s ability to bring justice to bear on the situation. I summarized earlier<sup>33</sup> the clear arguments that legal ethicists, and scholars in other fields of law, have made for the idea that the interrogation techniques undertaken by the Bush administration in relation to prisoners at locations such as Guantánamo Bay were illegal and that substantive law calls for criminal sanctions for this illegal action. Yoo’s advice, especially given his role at the quasi-judicial OLC, played a great role in determining the *experience of justice for those government officials* who would undertake (and had undertaken already, even before Yoo’s advice was rendered) the various practices of torture under discussion in this paper. *From the perspective of the persons who were subjected to torture*, their cases are left without the vindication of justice (albeit after the fact, of course) which would have been achieved within the legal system if the torturers had been subject to criminal prosecutions.

With this being the case, the legal system and the government experience of the law on the matter did not vindicate the demands of justice (especially as justice is relevant to the protection of individual autonomy), and also did not thereby prevent the law governing this field from being characterized (at least in the sense in which was experienced by the individuals being acting upon and being affected by the state and its application of the law governing the field) as the “ungrounded choice” of some individuals determining the way in which other individuals are treated. Instead, the advice in the “torture memos” had the effect of making it so that the law as experienced by the parties involved (the government officials, on one hand, and the prisoners, on the other), was characterized by the lack of respect for the individual autonomy of individuals (namely the prisoners) and the “ungrounded choice’ of some individuals [i.e. government officials] determining the way in which other individuals [i.e. prisoners] are treated”. This goes against the idea of government by law rather than by people.

How, specifically, did the “torture memos” have the functional effect of insulating government officials from the reach of procedural, retributive and restorative justice in such a way that it undermines the vindication of justice? The basic idea that I present on this front is

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<sup>33</sup> See above in Section 5), especially note 12 and in Section 6.1), note 34; the latter citing especially Wallach, “Water Torture in U.S. Courts”.

that Yoo functionally removed the relevant legal obstacles (which were especially needed in the case of a legal infringement as fundamental as torture) that would have vindicated justice in this case study. This includes procedural justice *ex ante*, which was not respected while the interrogations were taking place and while the government was considering the legality of engaging in torture and actually approving its use, with the consultation that took place in the “torture memos” being highlighted for the purpose of this paper. The “torture memos” additionally undermined certain kinds of after-the-fact substantive justice (namely restorative justice and retributive justice) that (1) might influence the behaviour of government officials involved with the impugned means of interrogation, either as a deterrent or (after the fact) as a normative (especially legal) impetus for corrective action to make amends or (2) would vindicate the demands of moral desert *vis-à-vis* the relevant government officials. Whichever avenue of after-the-fact substantive justice one might prefer<sup>34</sup>, both are undermined. So too is the *ex post* legal protection of procedural justice that would be used to arrive at the two after-the-fact forms of substantive justice.

How did the “torture memos” remove these legal obstacles? Consider the content of the advice given in the “torture memos”. From the perspective of changing the relationship that government officials have with the value of justice on this particular topic, it is, first, necessary see how the OLC and the Bush administration participated in the creation of a situation that engages justice issues. Yoo’s advice does so to the extent that it engages the conditions of any one or more of the demands of justice, including especially the conditions of any of the particular kinds of justice, such as procedural justice, retributive justice and restorative justice.

Procedural justice is engaged simply by the fact that the prisoners are subject to government action. In a society of laws, governments must abide by the procedural justice

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<sup>34</sup> I am, of course, aware that these ideas of after-the-fact justice, especially the idea of moral desert, are contested in terms of their legitimacy or desirability as forms of justice. See Michael Davis, “Punishment Theory’s Golden Half Century: A Survey of Developments from (about) 1957 to 2007” (2009) 13 *Journal of Ethics* 73; Dena M. Gromet & John M. Darley, “Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals” (2009) 43 (1) *Law & Soc’y Rev.* 1; Michael Wenzel *et al.*, “Retributive and Restorative Justice” (2008) 32 (5) *Law and Human Behaviour* 375; and a short survey of the debate around the question of the relationship between desert and justice in Owen McLeod, “Desert”, *The Stanford Encyclopedia of Philosophy* (Winter 2008), Edward N. Zalta, ed., online: Center for the Study of Language and Information, Stanford University <<http://plato.stanford.edu/archives/win2008/entries/desert/#5>>; Nonetheless, people will tend to find the vindication of at least one of these kinds of after-the-fact justice (retributive, restorative or both) to be desirable.

guaranteed in the legal system and are also called to meet the moral standards of procedural justice to the extent that these are conditions for the existence of law. The “torture memos” thus engage procedural justice merely by virtue of the fact that they are intended to provide legal advice to government officials for the purpose of shaping their conduct in relation to persons who are under the government’s influence. Procedural justice is engaged here already in the sense that government officials are legally and morally obligated to abide by the requirements of procedural justice. Additionally, however, different concerns of procedural justice are raised when procedural justice is violated by a government official and when procedural justice thus makes additional demands for the appropriate ways in which to handle such a violation (and for the consideration of the values at stake). Thus, there are at least two levels at which one can fail to vindicate procedural justice. Retributive justice and restorative justice, conversely, are engaged at only one of these two levels, namely, after the violation of, or deviation from, the demands of justice, morality generally, or certainly the positive law and any of its relevant norms. Procedural justice is also engaged in this second way though. As I noted just now, the “torture memos” and the practices of the executive branch that are the subject of the case study, engage procedural justice concerns merely because of the involvement of the US government. What about the relationship that can be generated by what I will call “engagement through violation or failure to vindicate”?

The criticisms of the “torture memos” discussed in the previous two sections of this paper<sup>35</sup> refer to instances in which the authors of the “torture memos”, and the government officials who carried out the torture, *engaged* the conditions of procedural, retributive and restorative justice by way of their violation of moral and legal norms. But how did the “torture memos” specifically violate these conditions? In terms of procedural justice, the authors of the “torture memos” violate both moral and legal requirements of procedural justice. This includes procedural failures committed by the OLC, such as the failure to mention opposing legal and moral opinions despite the level of idiosyncrasy of the opinions rendered<sup>36</sup>, and the problem of

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<sup>35</sup> Above in sections 5) and 6).

<sup>36</sup> I noted Yoo’s failure to describe his own view as idiosyncratic, above in Section 6.1), note 6 and accompanying text. Above, in Section 6.1) at 125-129, see my discussion of Yoo’s failure, in the “torture memos”, to address (highly noteworthy) mainstream legal opinions that differed from his own view.

lock-in<sup>37</sup> (which was generated both by the lawyering dynamic and by the actions of an executive branch that undertook deeply legally problematic practices without consulting the OLC). It includes not abiding by the protections to which the prisoners would have been entitled under the Geneva Conventions<sup>38</sup>. The failures just discussed also engage the collateral procedural demands that procedural justice makes about how the US government and legal system are to deal with these violations of procedural justice. Additionally, the procedural violations themselves raise collateral questions of retributive justice and restorative justice. The question that arises is: how will the legal system deal with the procedural failings in terms of retributive justice, which is about dealing out normative (whether moral or legal) desert, and restorative justice, which is centred on the idea of rectifying the procedural wrongs? These are after-the-fact considerations of justice show the depth of the way in which the procedural justice issues are engaged and even the way in which the violation of procedural justice, by way of “engagement through violation or failure to vindicate”, raises issues of other kinds of justice.

The following, however, is the perhaps most important engagement of justice issues. The normativity is strongest because of the seriousness of the substantive violations. This is the engagement of justice issues by the violation of the moral and archetypal legal prohibitions on torture. The very fact of the practice of torture itself brings some of the most serious questions of justice to bear on the case study at hand. What does justice have to say about the commission of acts that degrade humans? How should the legal system respond to the treatment that detainees received, including, as discussed above<sup>39</sup>, waterboarding, head slaps, sleep deprivation, and a whole host of other tactics? If the OLC lawyers who drafted the “torture memos” had been acting in accordance with my first principle of Fullerian lawyering, as conceived of in terms of “thick moral normativity”, they would have been alert to these demands of justice in providing their advice. They would do their legal work in such a way as to vindicate the demands of justice in terms of the use of the relevant legal norms, the experience that people have of the relevant legal norms and the legal system as a whole. Thus, lawyers acting according to my Fullerian standards would have sought the vindication of procedural,

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<sup>37</sup> Discussed above in Section 5), note 7 and accompanying text; Section 6.1), note 5 and accompanying text; and in the present section, note 12 and accompanying text.

<sup>38</sup> Sources discussing these protections are cited above in Section 6.1) at 125-129, especially notes 19, 21, 23, 24, 34.

<sup>39</sup> Above in Section 5), note 5 and accompanying text.

retributive and restorative justice in the use of legal norms and the experience that detainees and Bush administration officials had of the legal system. This is true in terms of the pre-violation *engagement* of justice issue and also of cases where justice issues are *engaged* by a violation of moral of legal norms.

Having discussed the question of how justice issues are engaged by the case study at hand, it is appropriate to ask whether justice was indeed vindicated. Given the role that justice plays in the Simmonds-inspired theory of Fullerian lawyering that I have developed, the strong prohibitions on torture in the positive law and the archetypal importance of the norm against torture (as conceived of by Waldron), the answer to this question of justice is essential to the task of determining whether the legal system lives up to the standards of a robust rule of law. This answer is necessary for the task of assessing whether the legal system shows respect for the autonomy of the individuals who are governed by it or whether the legal system's use in the field is characterized by the "'ungrounded choice' of some individuals determining the way in which other individuals are treated".<sup>40</sup>

Rather than vindicating the demands of these various kinds of justice that were just discussed, the "torture memos" that Yoo and Bybee drafted had the function of undermining the vindication of justice. The way in which Yoo did this was by failing, as a lawyer within the OLC, to give an *accurate and full* substantive account of the positive law on the matter of detainee rights and the interrogation of prisoners. This failure has substantive and procedural aspects to it. At the substantive level, Yoo's failure to give a full and accurate account of the substance of the positive law on the matter (including the positive law that would pertain after-the-fact of a violation of the prohibition against torture and impose sanctions on individuals involved in the perpetration of torture) turned the legal system and the executive branch away from the positively-enacted and morally-sound<sup>41</sup> norms against torture.

Consider the following example of the way in which the "torture memos" advise in such a way that facilitates a substantive deviation from the vindication of justice. Yoo discussed his view that interrogators may be able to avoid criminal responsibility for torture through the use of the defence of necessity. In such a case, after-the-fact issues of justice are raised because of

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<sup>40</sup> Introduced above, in the current section, in the context of the "torture memos" case study at 153-155.

<sup>41</sup> Sound in the strong substantive sense of being the norms that actually bind according to external morality.

the violation of legal and moral norms against torture. An answer consistent with the substantive demands of *ex post* justice (including the deterrent, and thus the *ex ante* effect that is part of the focus of after-the-fact justice) would seek the vindication of procedural, retributive and restorative justice. The way for a lawyer to vindicate this kind of justice in the provision of legal advice in a memo (recall that the “torture memos” are situated *ex ante* in relation to some actions of torture and *ex post* in relation to other actions of torture<sup>42</sup>) would be, first, to provide advice that is a full and accurate representation of the positive law on the topic of criminal responsibility for the commission of acts of torture.

Additionally, the lawyer, because of his/her recognition that moral values make their way into the law by way of the rule of law, should interpret the law such that the content of the interpretation, the use and the experience of the law are consistent with the rule of law. Given the violation of the substantive moral and legal norm against torture, the positively-stated criminal law and other legal sources, including case law, that deal with this matter,<sup>43</sup> an interpretation of the law in a way that is consistent with the moral norms incorporated into the law by way of the rule of law (especially in the morally thick way for which I am currently arguing) would call for the OLC to advise that the US legal system does call for criminal liability for the commission of acts of torture. Doing so would vindicate both the *ex ante* and *ex post* demands of retributive and restorative justice that are required both as a moral matter and as a legal matter when justice issues are raised in such a way. Does the advice contained within the “torture memos” do so?

On the contrary, as summarized above,<sup>44</sup> Yoo makes the morally and legally fatuous argument that the perpetrators of torture may be able to avoid criminal responsibility by making a necessity argument. Such an argument, if it were to have substantive sway and have full or inchoate instantiation with the legal system<sup>45</sup>, would undermine one of the main avenues that

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<sup>42</sup> Above in Section 5), note 7 and accompanying text; citing Harris, “Rule of Law”, *supra* note 12 at 443-445.

<sup>43</sup> Referenced above in Section 6.1), note 34, especially Wallach, “Water Torture in U.S. Courts”.

<sup>44</sup> Above, in Section 5) at 119.

<sup>45</sup> To some extent, the authors of the “torture memos” did have some capacity to have their arguments adopted because of the role of the OLC in advising and determining the policy of the executive branch. This quasi-judicial role means that the arguments in the “torture memos” were closer to actual instantiation within the legal system. Thus, the memos’ substantive departure from the vindication of justice means quite a bit more than it might mean in the case of lawyers who do not advise the executive

the legal system has to provide restorative and retributive justice to the victims and to society for the legal and moral wrongs committed by the perpetrators of torture. Remember that justice is here conceived of as a moral concept.

On the retributive side, such arguments attempt to undermine the legal system's ability to provide those responsible for torture with their moral and legal desert.<sup>46</sup> If there is exculpation from *criminal* liability, or even no *legal* liability or consequences at all, for that matter, then the legal system loses some or even all of its impetus for pursuing both moral and legal desert in the case at hand. Why pursue desert if there is exculpation from the consequences of the illegal action? On the restorative side, Yoo is making an argument that, if adopted would undermine almost any ability that the legal system (especially the criminal law) has to have the perpetrators of torture make amends to the victims and society. Again, if there is exculpation from the violation of the legal norm, then what exactly must the offender rectify? Or, put differently, why would the offender be *responsible* for rectifying anything?

This flies in the face of the demands that after-the-fact justice would make for the justice issues that arises from the violation of the moral and legal norm against torture, which would call us to abide by the demands of retributive and/or restorative justice. The OLC's advice also does so by undermining a positively-stated legal norm and by making the argument as a justification of the dehumanizing practice of torture. Yoo's memo thus notably undermines the vindication of justice (i.e. advises a break with justice) in a way that directly disrespects individual autonomy and turns the experience and use of the law into the normatively

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branch of government. That is not to say, of course, that substantive divergence from the demands of justice does not count for lawyers who do not work for the government. Even in those cases, given the ability of lawyers to influence the use and experience of the legal system, as explained above in Section 4.5), lawyers can make their substantive legal advice have some instantiation within society. Finally, I do not mean to suggest by this argument that a lawyer's substantive deviation from the vindication of justice matters only when the lawyer has some capacity to instantiate his/her substantive views within the experience and use of law. Any substantive deviation from the vindication of justice is problematic because, under my theory, lawyers are to advise their clients in a way that is consistent with the rule of law and the moral values that are incorporated into the legal system because they have a necessary connection with the rule of law.

<sup>46</sup> *Moral* desert, here, is the concept of desert discussed in moral philosophy. *Legal* desert is a term that I am using to refer to the application of legal penalties in situations that merits those penalties (merit being conceived of merely in terms of engaging/meeting the substantive necessary conditions of instantiating the relevant infraction that carries the specific legal punishment). While there is no necessary connection between the two, legal desert may vindicate moral desert.

underground (both legally and morally ungrounded) choice of individuals (both the individual choice of the torturers and the authors of the legally and lawyerly-faulty “torture memos”). This argument about the necessity defence is one example of the way in which the “torture memos” substantively undermine justice, therefore also the rule of law, and finally thus fail to abide by my first principle of Fullerian lawyering. However, the “torture memos” also procedurally undermines the vindication of justice.

The mere provision of Yoo’s particular legal advice serves to procedurally undermine all three kinds of after-the-fact justice (including procedural, retributive and restorative justice) and thus to undermine legality in this context. As noted previously, even if a court were to substantively reject Yoo’s advice, the people who relied on the advice in the “torture memos” (or who were ordered to perform acts of torture by superiors who were relying on the advice in the memos) could use the legal advice in an Enron-esque fashion as a shield against criminal and legal liability.<sup>47</sup> Essentially, if the perpetrator of torture were to face legal troubles, they would attempt to escape legal sanction by claiming that they were merely acting in accordance with the legal advice that they received from their lawyer (in this case from the very heights of the OLC). Yoo’s role as a lawyer (and a special kind of government lawyer in terms of function and influence on government action, given his role in the OLC) is especially relevant to the way that his memos functionally subvert the ability of the legal system to impose criminal and other legal sanctions and thus to mete out some of the restorative and retributive justice that it would normally impose. It also undermines the procedures that would normally be used to mete out retributive and restorative justice. The lawyer, here, can functionally undermine the ability of the courts to vindicate the positive law and justice in part due to his/her role as an officer of the court. This is a dissonance between the law as enacted and the law as enforced (a departure from one of Fuller’s eight desiderata), making it a direct affront to the rule of law.

It is worthwhile to note that this procedural aspect of the effect of the “torture memos”, as a position taken by legal and government officials, has not even had to make its way to the courts and may never have to do so. The reason is that, either as a political matter or a matter of prosecutorial discretion (depending on your perspective), criminal prosecution has not been

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<sup>47</sup> Above in Section 5), note 6 and accompanying text; citing David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) [Luban, *Legal Ethics*] at 200-201; Wendel, “Legal Ethics & Separation”, *supra* note 10 at 121, n. 200.



forthcoming for those who were involved in the torture of detainees at locations such as Guantánamo. This lack of charges has continued under the tenure of President Obama and Attorney General Eric Holder.<sup>48</sup> The US Justice Department has largely let the legal matter drop. The problem discussed here is perhaps the most troubling issue of all in terms of justice and the rule of law. Justice, especially in the aspects of which have necessary connections to the rule of law, cannot be vindicated in such cases if the behaviour in question never has a hearing in court (meaning never faces the adjudicative process as fully expressed in the US by the adversarial system).

Turning back to the procedural divergence from justice and the rule of law as achieved directly just by way of Yoo's "torture memos", I argue that this procedural aspect stifles the legal and moral justice pursued by the legal system, thereby undermining the rule of law's "thick moral normativity". This defensive strategy is accomplished through Yoo's role as a lawyer and has the extra ability to protect the relevant legal officials because it does not have to withstand substantive scrutiny. Rather, the defence is able to succeed on the basis of Yoo's merely having provided the advice and perhaps having himself believe in its correctness, despite stinging rebukes from other members of the legal community.<sup>49</sup>

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<sup>48</sup> Ewen MacAskill, "Obama releases Bush torture memos" *The Guardian* (16 April 2009), online: Guardian News and Media Limited <<http://www.guardian.co.uk/world/2009/apr/16/torture-memos-bush-administration>>; See also the New York Times' editorial criticism of the prosecutorial decisions of the Obama Administration on this matter in "No Penalty for Torture," Editorial, *The New York Times* (4 September 2012), A26. online: The New York Times Company <[http://www.nytimes.com/2012/09/05/opinion/no-penalty-for-torture.html?\\_r=0](http://www.nytimes.com/2012/09/05/opinion/no-penalty-for-torture.html?_r=0)>.

<sup>49</sup> In considering the fact that Yoo may have believed in the correctness of his interpretation, it is always important to remember that, although he may have been so convinced, he did receive substantial negative feedback from elsewhere in the legal community before the memos were published (e.g. Taft's memo to Yoo), as discussed above in Section 6.1) at 125-127; citing especially Memorandum from William H. Taft IV, Legal Adviser to the Department of State, to John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, "Your Draft Memorandum of January 9" *Torturing Democracy* (11 January 2002), online: National Security Archive, George Washington University Gelman Library <<http://www.torturingdemocracy.org/documents/20020111.pdf>> [Taft, "Your Draft Memorandum"]. Recall the chronology of the exchange of memos discussed above in Section 6.1), note 23; citing David D. Caron, "If Afghanistan Has Failed, Then Afghanistan Is Dead: 'Failed States' and the Inappropriate Substitution of Legal Conclusion for Political Description" in Karen J. Greenberg, ed., *The Torture Debate in America* (New York: Cambridge University Press, 2006) 214 [Caron, "Failed States"] [Greenberg, *Torture Debate*] at 219-220. Yoo discussed neither the negative feedback received from Taft nor the novelty of his own interpretation in the advice that he gave in the "torture memos".

The preceding analysis has been an account of the way in which the “torture memos” fail to live up to Fullerian legal theory both in terms of the rule of law and in terms of the way in which that central legal value is expressed in relation to a lawyer’s work within the legal system. The “torture memos” fail in terms of a thin account of the normativity of the rule of law (“thin moral normativity” being a view which some positivists might find amenable) and in terms of a thick account of the normativity of the rule of law (the thick account being one that I endorse and which would cohere more with natural law theories).

## 7.2) The “Torture Memos” and the Second Principle of Fullerian Lawyering

Having made a critique of the OLC “torture memos” on the basis of my first principle of Fullerian lawyering, let me turn to the application of my second principle, the Moral Orientation Thesis. Given that the United States has a legal system that accords with the principles of legality and that the laws prohibiting torture do the same (meaning that the relevant provisions of the positive law are consistent with the rule of law at the fundamental level) were the “torture memos” written in a way that treats the prohibitions on torture as tending away from evil? The answer to this is a resounding no. The memos do not show evidence of the OLC lawyers regarding the law as tending away from evil. Or, stated in a way that recognizes that the work of lawyers like Yoo may have substantially involved incorporation of the OLC lawyers’ *own* moral views and previous intellectual commitments into the legal opinions<sup>50</sup>, the memos show

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<sup>50</sup> Curtis A. Bradley, a law professor who has written skeptically about international law, is quoted as saying “One concern that people have raised is that John [Yoo] had a lot of these views going into the government and was perhaps overeager to write them” in Tim Golden, “A Junior Aide Had a Big Role in Terror Policy” *The New York Times* (23 December 2005), online: The New York Times Company <<http://www.nytimes.com/2005/12/23/politics/23yoo.html?pagewanted=all>>.

In the same article, Timothy E. Flanigan, former deputy White House counsel is quoted as saying “John Yoo, given his academic background and interests, was sort of the go-to guy on foreign affairs and military power issues”. Flanigan continues, “[Yoo] was the one that Gonzales and I went to to get advice on those issues on 9/11, and it just continued”.

As a specific example of Yoo’s own views determining his view of the law, consider Bradley Wendel’s discussion of Yoo’s analysis of the possibility of CIA interrogators using the defence of necessity to exculpate themselves from criminal liability. Wendel argues that the authors of the “torture memos” brought in their own moral views to the provision of legal advice, but importantly, that the particular moral views that they brought were not in any way founded on the positive law that they were supposed to be interpreting for the client (in this case, the executive branch of the US federal government). Wendel

evidence that the authors treated the law on torture, as clearly stated in the relevant legal sources as, in fact, tending away from the good and towards the evil. On this second reading, the authors of the “torture memos”, take an unstated premise, and true impetus for their reasoning, to be the thesis that an absolute prohibition against torture gets the moral analysis wrong in, for example, the ticking time-bomb scenario.

The problems with Yoo doing so are twofold. First, the legal system of the United States and the law on torture easily satisfied Fuller’s principles of legality and were thus entitled, under the Fullerian interpretive principles proposed in this paper to be treated by Yoo, especially in his quasi-judicial role *as a lawyer* at the OLC, as tending away from evil. This includes tending away from the evils of the ticking time-bomb scenario and other instantiations of evil that would have been part of Yoo’s own moral reasoning in relation to the law on torture. Simply, *in the role of the lawyer*, Yoo was supposed to view or treat the laws as tending towards the morally right answer.

If we conceive of the second principle in terms of Dyzenhaus’ two levels of legal reasoning, we might say that Yoo, either ignored the second step, the doctrinal step, in the second principle of Fullerian lawyering, or smuggled in a fundamental level legal analysis that determined his reading of the doctrinal level and which either did not include the appropriate rule of law fundamental analysis, or did not pay heed to it despite the conclusions that one could not help but draw from it, i.e. the conclusion that the law on torture does accord with the principles of legality. In each of these possibilities, Yoo’s result is perverse. It is unsound to say that the law regulating torture in the United States failed to abide by the principles of legality.

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says: “The error here is not strictly a jurisprudential one; the OLC lawyers acknowledge that moral considerations (such as the balance of harms) are relevant to interpreting the law. The fault in the reasoning instead lies in the careless extension of the ticking-bomb hypothetical to the far more mundane scenarios actually confronting investigators, in which there are no background facts to suggest a substantial likelihood that a given detainee is likely to have critical, time-sensitive information”, Wendel, “Legal Ethics & Separation”, *supra* note 10 at 84. Therefore, the particular use of morality in Yoo’s legal analysis was unacceptable from the perspective of Wendel’s inclusive legal positivist theory of lawyering. Later, in his paper, *ibid.* at 121-126, Wendel also gives an argument about why, even taking the ethics on its own apart from the legal analysis, the moral position supporting the use of torture that is implicit in Yoo’s use of the necessity defence is problematic.

See also Trevor Farrow’s discussion of this issue in Trevor C.W. Farrow, “Post-9/11 Lawyers” in David L. Blaikie, Thomas A. Cromwell and Darrel Pink, eds., *Why Good Lawyers Matter* (Toronto: Irwin Law, 2012) 167 [Farrow, “Post-9/11 Lawyers”] at 184.

The rules were general, promulgated, prospective, etc. Given this, Yoo should have undertaken a doctrinal analysis of the law that reached a vastly different result. He should have treated the doctrinal law as being entitled to be seen to avoid evil. The way to have done so would be to give a robust reading to the values, such as respect for the dignity and autonomy of persons, actually expressed in the law and the values of the legal system.<sup>51</sup> Yoo should not have substituted a wildly incorrect analysis that, as we shall see next, was based on his own different view of good and evil.

Second, the moral reasoning that would have been used by Yoo as he substituted his own morals for the morality of the law on torture is problematic in its ethical reasoning and is ultimately morally false. Thus with respect to the structure of Yoo's deviation from the second interpretive principle, he replaces a law (and its moral content) that is entitled to be treated as tending away from evil, with an interpretation of the law that not only breaks the structural aspect of the second interpretive principle but which also ultimately is flawed in its moral reasoning. See the failure to abide by justice catalogued above.<sup>52</sup>

Consider, additionally, the deviation from the requirements of my Fullerian theory of legal ethics if one were to indeed take the prohibition against torture to be an archetype in the way that Jeremy Waldron does. Thus, let us assume Waldron's theory about the disruptive effect on other legal norms that can take place when one undermines a legal archetype.<sup>53</sup> In that case, one would see that the legal ethics failures of the "torture memos" also raise the

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<sup>51</sup> A relevant discussion for this purpose, from the perspective of what might fall under the rule of law conceived of in terms of "thick moral normativity", is seen in the work of Farrow and his analysis of interpretive guides such as the "public interest". Similar to the suggestions that I have made here, Farrow argues that the reading of terms such as the "public interest" in cases such as that of the "torture memos" should be "[G]rounded in robust notions of not only rule of law values, but also with a contextual understanding of the requirements of substantive justice and equality. On this view, reasonable limits on rights cannot be justified by just any grounds, but rather only by grounds that resonate loudly with fundamental rule of law values as contemplated in a free and democratic society. And the notion of a society about which I am talking here must be a pluralistic one", Farrow, "Post-9/11 Lawyers", *ibid.* at 189 [footnote omitted]. Farrow also makes the point that the issues that he raises in his piece are relevant to the question of how we "[Conceive] of the rule of the law, in a rights-seeking, diverse society in which we are fundamentally guided by robust notions of the public interest, justice, substantive equality, and the rule of law", *ibid.* at 168.

<sup>52</sup> Above, in Section 7.1) at 153-164.

<sup>53</sup> See my summary of Waldron's theory of legal archetypes above in Section 6.2) at 132-136, especially note 55 and accompanying text, for a mention of the disruptive effect that undermining a legal archetype can have.

following question: if the OLC torture lawyers do not give the prohibition against torture its proper consideration as a law, or set of laws) that tends away from evil, how will these lawyers, and the rest of the executive branch, respond when it comes time to consider the question of the degree to which related legal norms tend away from evil and may thus be worthy of the moral regard that is due to provisions, legal systems and areas of law that cohere with the principles of legality but run contrary to the personal and idiosyncratic morality of lawyers like Yoo? Given the undermining of the anti-torture archetype, how else will Yoo also readily allow his own view of morality to colour his legal advice and thus again fail to use the interpretive approach of granting to legal norms the judgment that, at least from the internal perspective of a lawyer, they tend away from evil? With this archetypal constraint on executive behaviour removed, we have loosened important restraints on state power.

When the authors of the memos were asked to give their analysis and felt the political and institutional pressure on them, they should have done the following. First, they should have known that the kind of advice that the administration was seeking for them to produce would deviated from the positive law on torture, from the principles of legality and from their duty, as lawyers, to abide by these principles. Second, they should not have provided such mistaken advice. Third, any of the individual lawyers, seeing that the advice given by their co-workers was undermining the rule of law, should have pushed back against it in defence of the rule of law. This could have been done as an activity under the heading of legal advice provided to the relevant government officials or as direct communication with the lawyer who provided the impugned advice (such a reply was given to Yoo by state department lawyers)<sup>54</sup>, on the grounds that the OLC was badly misinterpreting the law. Another option would have been to provide advice under the heading of topics besides direct interpretation of law. As Trevor Farrow argues, “[The lawyers needed to have a very frank discussion with their instructing officials about the moral, ethical, practical, and political implications of the potential available courses of action (regardless of what the outcome was of their legal deliberations and regardless of the personal preferences or desired results of either the lawyers or their instructing officials”.<sup>55</sup> Farrow points out that exactly this kind of advice would have been contemplated under the permission

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<sup>54</sup> As discussed above in Section 6.1) at 125-127; citing especially Taft, “Your Draft Memorandum”, *supra* note 49.

<sup>55</sup> Farrow, “Post-9/11 Lawyers”, *supra* note 50 at 186.

found in Rule 2.1 of the ABA *Model Rules*, and would have been called for as part of the role of government lawyers.<sup>56</sup> If they saw no ability to effectively push back, their duties as lawyers and in advising the President in a quasi-judicial role obliged them to refuse to be involved in the perpetuation of violations of the rule of law. Finally, to give a brief hint at the way in which I may apply my theory of Fullerian lawyering to the issue of fidelity to law in future work, one might say that, after engaging in a contextual analysis of fidelity under the second principle of Fullerian lawyering that I present in this paper, the lawyers involved in dealing with the “torture memos”, upon seeing the legal regime surrounding torture descend into a state of non-compliance with the principles of legality, would at least have had a positive duty, not just a permission, to undermine the brave new interrogation regime in a way that was consistent with the relevant laws of the United States for doing so, e.g. through any whistleblower legislation, internal reporting, etc. Lawyers, especially those tasked with ensuring that the executive branch faithfully executes the US Constitution, as in the case of the OLC, owe their duty as lawyers, first and foremost, to the law as enacted and read in accordance with the principles of legality.

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<sup>56</sup> *Ibid.* at 186-187. Refer also to the American Bar Association, *Model Rules of Professional Conduct*, online: [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) [ABA, *Model Rules*], r. 2.1. This rule is discussed above in Section 4.1), note 1 and accompanying text and Section 6.1), note 30 and accompanying text. Notably, under my view, however, the furnishing of such moral advice would be required under my second principle of Fullerian lawyering, rather than simply permitted, as it is in the ABA *Model Rules*.

## **Conclusion**

### **Recapitulation**

Philosophical legal ethics has, in recent years, taken one of the most normatively fruitful turns that it could have taken through its focus on the jurisprudence of the great legal philosophers of the 20<sup>th</sup> century. If we are seeking to know more about the relationship between lawyers, legal ethics and law, some natural sources to which we can turn are theories about the relationship between law and morality. I have argued that Lon Fuller, among the great legal philosophers, has been overlooked and that his theory of legal philosophy explains one of the central pieces of legal philosophy, and therefore also the philosophy of legal ethics.

The theory of law's internal morality, as articulated by Fuller, shows a necessary connection between law and morality that goes straight to the core of the conceptual category of "law". The ability of the rule of law to be an internal *morality* of law is seen in powerful ways, both in terms of widely-agreeable "thin morality normativity" and the more morally rich "thick moral normativity" that authors such as Simmonds introduce. Nigel Simmonds' work on this topic calls for special mention for his particular development of Fuller's ideas. In presenting a theory that I categorize as expressing "thick moral normativity", Simmonds turns the focus around from dealing only with the rule of law in terms of its role as a necessary condition of law. He also asks what some of the necessary conditions of the rule of law are. In Simmonds' view, among the necessary conditions of the rule of law is condition of vindicating robust moral values such as justice. We see in the work of Simmonds that the rule of law is so powerful because the necessary connection that it has with law is so deep that it takes criterial priority in relation to other conditions for the existence of law. The theory thus deals with the categories of law and morality in a profoundly foundational way. Also worthy of special note for his analysis of Fuller is David Luban, who provides an innovative reading of Fuller that focuses the morality of law on the role played by the relevant legal officials within a legal system, especially lawyers. Luban's work demonstrates what may be a unique ability of Fuller's theory of law. It may have the capacity to be more than a theory of legal philosophy which can also be translated into a theory of legal ethics. Legal philosophy, under such a view, becomes more than that thing out there to which we also have to pay attention to be good lawyers. Some questions of legal philosophy and legal ethics are, in substantial ways, the same project.

Philosophical theories of legal ethics take account of the insights that can be gained from doing legal philosophy. As noted above from the work of Tim Dare, “The point of the institution which supports a given role will feature significantly in any justification of that role and its role-obligations”.<sup>1</sup> From the arguments considered in this paper, it is clear that a theory of lawyering that is based on legal positivism misses significant aspects of the point or function of a legal system. It thus misses some of the necessary conditions of a legal system and thus the justification of the roles and role-obligations of lawyers as actors within the legal system.

Given the richness of a Fullerian account of the point of the law, Fuller’s ideas ought to also feature significantly in the justifications of the lawyering role and its role-obligations. With this in mind, I have developed the Fullerian theory of lawyering presented in this paper. My two principles of Fullerian lawyering, the Internal Morality Thesis and the Moral Orientation Thesis, provide guidelines for the project of lawyering in a way that coheres with legality as a necessary condition of law. The application of these two principles implies a vision of fidelity to law that is steeped in the necessary moral normativity of law and which may deviate significantly in its approach to fidelity when compared to the positivist theories of philosophical legal ethics. My Fullerian-inspired theory proposes strong fidelity to law, to legality, to the category of law. When the legal system abides by the rule of law, this means strong fidelity to the positive law within that legal system and a particular moral outlook with respect to that legal system. When the legal system does not abide by the rule of law, I argue that lawyers are to recognize the divergence between the legal system and the rule of law and maintain their fidelity to the latter.

My two principles of Fullerian lawyering also draw on the ethical robustness of Fuller’s work and subsequent Fullerian theory. Moreover, the theses both respect notions of client autonomy and, at the macro level, advance the experience of autonomy that all citizens have in their interactions with the legal system. A theory of legal ethics that works on the basis of my Fullerian principles, and indeed many theories that allow and encourage lawyers to engage their clients in more substantial discussions about the ethics of their case, avoids many of the issues involved in the combination of legal positivism and the zealous model of advocacy.

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<sup>1</sup> Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer’s Role* (Farnham, UK: Ashgate Publishing, 2009) [Dare, *Counsel of Rogues*] at 59; discussed above in Section 1.1), note 8.



Finally, in favour of the theory of legal ethics presented in the present paper, because of the criterial precedence that the rule of law has, it is able to connect law and morality at a level that cannot be pre-empted by positivist concerns. The rule of law and Fullerian theory (both in general jurisprudence and legal ethics) are not subject to the particular criticisms of theories of law that have not based their support for the connection between morality and law on as strong an ontological criterion as the rule of law. At the same time, because of the normatively, and morally, modest core substantive claims of Fuller's procedural naturalist Internal Morality Thesis (especially when expressed in terms of "thin moral normativity")<sup>2</sup>, there is much in the Fullerian theory of law and lawyering that proponents of some forms of positivism would either not find objectionable or perhaps even find attractive.

The case study presented in this paper is used to illustrate the application of my Fullerian theory of lawyering and the justification that my theory makes for the role and role-obligations of lawyers. The authors of the "torture memos" did not live up to lawyering obligations that take account of the insights of Fullerian legal philosophy. The authors of the "torture memos" engaged in a kind of legal reasoning that brings law, lawyers, and the administration of justice into disrepute. Several kinds of theories have been offered to explain the wrongness of the OLC lawyers' actions, not least of which are those criticisms based on the moral objection to torture. Legal ethicists have been prominent among the voices calling for more from our lawyers. If there is a position other than general morality from which to criticize the "torture memos", it is certainly from the perspective of the ethics of the legal profession, the role of which the authors of the "torture memos" were to have been performing. Philosophers of legal ethics bring their criticisms from the perspective of philosophy of law as well as legal ethics. In this paper, I have argued that legal philosophy is particularly helpful for the purpose of understanding the ethical duties of the legal profession and for explaining the failures of the authors of the "torture memos" to abide by the ethics of the legal profession. The lawyer's task is shaped in significant ways by the functional moral conditions for the existence of law. If lawyers are to live up to the hope of the project of law, they must take account of the

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<sup>2</sup> Meaning that Fuller's Internal Morality Thesis, a kind of procedural naturalism, does not make claims that wide-ranging substantive norms are necessarily incorporated into the substance of law.

excellences that are particular to law. Instead, the authors of the “torture memos” moved away from the values of legality and facilitated a regime that disengaged from the morality of law.

As I have noted at times throughout this paper, the work of Lon Fuller has not received the attention that it deserves in the fields of legal philosophy or philosophical legal ethics. I hope to have contributed to a scholarly movement which says that this can no longer be the case. The power of the substance of Fullerianism and the depth of the understanding that it shows of the foundations of law warrant a new regard for the relevance that the rule of law has for both legal philosophy and legal ethics. By looking at the work of Lon Fuller, and to the rule of law, legal ethicists can engage the normativity of lawyering more fully and ground our appreciation of this normativity more firmly in law’s nature. We can better appreciate the normativity of legal ethics by seeing the concept of “good lawyering” as both a moral and legal idea.<sup>3</sup>

### **Looking Forward**

My hopes for further developing a Fullerian theory of philosophical legal ethics are ambitious and will lead me to consider the way in which fundamental questions of philosophy and reasoning pertain to legal ethics and lawyering. At the most theoretical level, truly understanding Lon Fuller’s theory of legal philosophy and the way in which it applies to lawyers will require substantial inquiry into meta-ethics, the field in which we ask questions about the nature of morality. Specifically, the focus is on the basic metaphysics and epistemology of morality, namely, what morality is and how we can gain knowledge about morality. Particular theories about the metaphysics of morality may make better sense of the morality that is necessarily connected to law and also of the moral duties of lawyers.

In terms of moral epistemology, which I expect will be my primary focus, I want to explore the question of how it is that the lawyer has the epistemic capacities to do the things that are required of him/her under my principles of Fullerian lawyering. I am calling for an account in which lawyers can develop the ability to apply epistemological methodologies, such as intuition, reflective equilibrium, conceptual analysis and logical deduction,<sup>4</sup> to morality and

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<sup>3</sup> Borrowing the phrase “law as a moral idea” from N.E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) [Simmonds, *Law/Moral Idea*].

<sup>4</sup> Methodologies of moral epistemology, such as reflective equilibrium and intuition, are discussed in Michael R. DePaul, “Intuitions in Moral Inquiry” in David Copp, ed., *The Oxford Handbook of Ethical Theory*

to the connections that morality has with law. In addition to discussing the epistemology of individuals, I would find it particularly worthwhile for my Fullerian theory of lawyering to include a proposal about the way in which lawyers' use of such methodologies of moral epistemology, play into the larger epistemic structures of legal systems and the way in which these legal system make use of various actors to arrive at the knowledge (such as about the material facts of cases) that the legal systems seek to obtain.

Posing questions about the moral epistemology and Fullerian lawyering in this social way reveals social epistemology as an illuminating take on the epistemology of lawyers. The philosopher Karen Jones describes social epistemology in the following way:

Social epistemology is not an epistemological theory as such, but rather a research project characterized by a commitment to understanding the role of social relations and institutions in the production of knowledge. Social epistemology is a normative and not merely a descriptive project inasmuch as it aims to evaluate and not merely describe our epistemic practices....Central questions in social epistemology include the justification of testimony, the role of epistemic divisions of labour and norms for cognitive authority, the role of social interests in inquiry, and the role of socially available background beliefs in justification.<sup>5</sup>

Social epistemology is thus committed to understanding the epistemic relationships between actors. Fuller himself was interested in the social organizing role of lawyers<sup>6</sup> and I expect that social epistemology will be helpful in explaining Fuller's internal morality of law, including both the desiderata themselves (e.g. prospectivity and retroactivity) as well as the embodied moral value of individual autonomy.

Coming out of my interest in moral epistemology, I recognize that it will be fruitful to discuss the internal deliberative process of the lawyer and how this process plays into the epistemic role of the lawyer, especially the engagement of the lawyer (the core ethical actor in

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(Oxford: Oxford University Press, 2006) 595 [DePaul, "Intuitions"]; Gerald Dworkin, "Theory, Practice, and Moral Reasoning" in David Copp, ed., *The Oxford Handbook of Ethical Theory* (Oxford: Oxford University Press, 2006) 624 [G. Dworkin, "Moral Reasoning"].

<sup>5</sup> Karen Jones, "Moral Epistemology" in Frank Jackson & Michael Smith, eds., *The Oxford Handbook of Contemporary Philosophy* (Oxford: Oxford University Press, 2005) 63 [Jones, "Moral Epistemology"] at 64. Note that there is every reason to believe that Fuller would have been deeply interested in these projects given his work on legal theory and social organization, especially with respect to the topics of "epistemic divisions of labour and norms for cognitive authority" discussed by Jones. Above, in the Introduction, note 1; citing Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed. by Kenneth I. Winston (Oxford: Hart Publishing, 2001) [Fuller, *Social Order*], I briefly referenced an example of Fuller's work that pertains to this topic.

<sup>6</sup> See the previous note.

the social epistemology of the internal morality of law) the internal morality of law. Hutchinson's "phases and components of ethical behaviour" provide insight into this internal deliberative process.<sup>7</sup> The "phases and components" include moral sensitivity, moral judgment and moral conviction.<sup>8</sup> Importantly, the particular "phases and components" that any individual uses are the subject of evaluation of both traditional epistemology (which concentrates on the individual) and social epistemology. A person's method of moral judgment, for example, may be assessed for its capacity to lead to true and justified beliefs in the individual and in the legal system at large as the individual plays his/her role as an actor (e.g. as a lawyer) with the system. I noted above<sup>9</sup> that, for the purpose of this paper, I was mostly interested, among Hutchinson's three "phases and components", in providing a framework for moral judgment within the field of legal ethics. In future work, it will be useful to develop my theory in a way that deals with the issues of lawyers' moral sensitivity and moral conviction.

The broad outlines that I have mentioned in the present section will structure my future research. Such questions are interesting in their own right, but they also provide promising pathways from which to approach other topics in legal philosophy and legal ethics. For example, we may be able to gain insights about the question of what it is to be a lawyer because a full explanation of the conditions of being a lawyer should involve discussions of how a person qualifies to be recognized for, and operate within, the role that the lawyer plays in a legal system's social epistemology. It may include questions about whether there are universal and/or localized functional, moral or social epistemic conditions<sup>10</sup> that a person must meet in order to *be* a lawyer in any legal system. Related to the conditions of being a lawyer, it is important to consider which of the competing theories makes better sense of the ethical values that are associated with different adjudicative models (especially the adversarial model of adjudication

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<sup>7</sup> Allan C. Hutchinson, "A Loss of Faith: Law, Justice and Legal Ethics", Book Review of *Lawyers and Fidelity to Law* by W. Bradley Wendel, Int J of Legal Profession [forthcoming] [Hutchinson, "Loss of Faith"] at 11 of draft; discussed above in Section 4.6), note 61 and accompanying text.

<sup>8</sup> Recall the definitions cited from *ibid.* at 12 of draft [emphasis in original], and reproduced above in Section 4.6), note 64 and accompanying text.

<sup>9</sup> Above, in Section 4.6) at 109-110.

<sup>10</sup> And, from a Fullerian perspective, functional conditions that may also be moral conditions.

and the European inquisitorial model of adjudication),<sup>11</sup> and the values that lawyers should pursue as they perform their functions within these adjudicative models.

We should be aware of the way in which the topic of political obligation engages the lawyer's social epistemic role (especially the lawyer's role in making knowledge about law socially available). The question of the lawyer's moral duty to abide by the law can have important implications for the way and degree to which the lawyer makes knowledge about law socially available. The ethical appropriateness of a lawyer's fidelity to, or withdrawal of fidelity from, the legal system, in both the advising and advocacy contexts, should be considered in light of the epistemological role of the lawyer in the legal system. Finally, one ought to consider Hutchinson's account of the "phases and components of ethical behaviour", particularly moral judgment and moral conviction, in relation to the topic of political obligation. Understanding these issues means understanding the internal deliberative process in which a lawyer engages in making a decision about his/her own abidance of law.

The future projects mentioned here are varied and extensive. They touch many aspects of legal philosophy and legal ethics at multiple levels of abstraction, ranging from meta-theory to applied theory. However, a complete and sophisticated theory of lawyering needs to engage in inquiry at every level.

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<sup>11</sup> Above, in Section 6.2), note 81, I noted the potential compatibility of my theory of Fullerian lawyering with various adjudicative models.

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