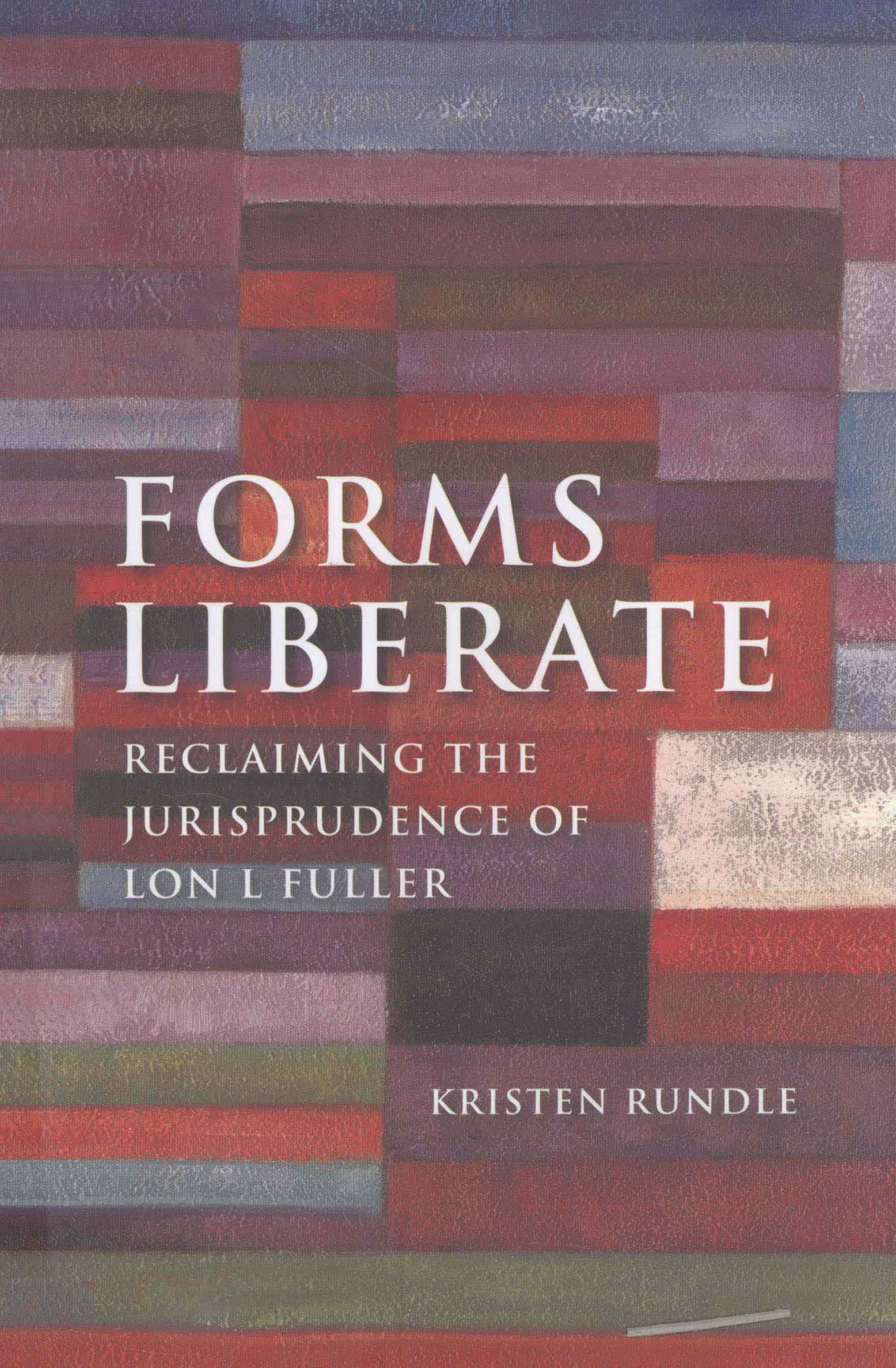
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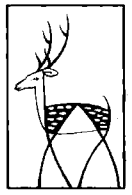
Reclaiming the Jurisprudence of Lon L Fuller

KRISTEN RUNDLE



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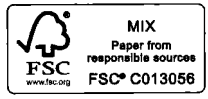

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Finally, tracing the genesis of the ideas contained in these pages to conversations

in 2001, I wish to convey my deep thanks to Rod Macdonald for his inspiration and generosity, then and since. My inner jury might still be out on whether you ought to be forgiven for tricking me into this academic path, but while the deliberations continue, it is my privilege to dedicate this book to you.

Kristen Rundle
London
April 2012

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1

Reclaiming Fuller

Lon L Fuller was something of an outsider within the intellectual climate of mid-twentieth century legal philosophy, which during his time came to be increasingly dominated by the legal positivist jurisprudence of HLA Hart. Today, among contemporary legal philosophers, Fuller still remains mostly known as the natural lawyer who apparently lost the debate about the connection between law and morality to his analytically superior opponent, with the consequence that his contribution to legal philosophy has often been cast in terms that suggest he offers little to enlighten the enduring debates of the discipline.[1] There is also a general impression, in many ways justified, that although rich with insights into the way that law works in practice, Fuller's jurisprudence is a scattered affair, unsystematic in focus and lacking any obvious internal coherence.

Why, then, should we consider taking the time to revisit Fuller, indeed, to reclaim his jurisprudence and situate it more securely on the agenda of twenty-first century legal philosophy? One way to begin answering this question is to invoke the image to which the title of this book refers, and which comes from an untitled and undated working note that can be found among Fuller's private papers that are held at the Harvard Law School Library. The note is comprised of no more than four lines of text, all of which have been crossed out in thick black pen, leaving only two exposed and circled in red: 'forms liberate'.[2]

In one sense there is nothing especially remarkable about this note, in so far as it shares much in common with many other notes from Fuller's archive that are littered with the crossings-out, exclamation marks and scrawled annotations of works in progress. Certainly, on its face it seems to say so little that one might wonder why it has been kept for posterity at all, which, indeed was my own thought when I first saw it. But as I became more immersed in Fuller's jurisprudence, and as my intuitions about how that jurisprudence should be interpreted

[1] The full exchange of the 'Hart-Fuller debate' consists of HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, and Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630. Hart and Fuller's exchange then continues through HLA Hart, *The Concept of Law* (Oxford, Oxford University Press, 1961); Lon L Fuller, *The Morality of Law* (New Haven, Yale University Press, 1964); HLA Hart, 'Lon L. Fuller: *The Morality of Law*' (1965) 78 *Harvard Law Review* 1281, reprinted in HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983); and Lon L Fuller, 'A Reply to Critics', in the 2nd edition of *The Morality of Law* (New Haven, Yale University Press, 1969).

[2] The Papers of Lon L Fuller, Harvard Law School Library, Box 12, Folder 1 (notes for 'Reply to Critics').

took shape, I began to think that this peculiar little working note might in fact have captured something fundamental, not only about the message of Fuller's legal philosophy, but also, in its frustrated air, about the difficulties that he experienced in bringing that message to expression.

I have thus chosen those words, 'forms liberate', as the frame for the project of this book precisely because of how they invite us to approach Fuller's jurisprudence from an underexplored angle: that is, from the angle of his interest in the connection between the form of law and its relationship to human agency. I hope to persuade the reader that 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. The result is as much a criticism of the dominant positivist account of law as it is a conception of law in its own right, and its essence can be stated as follows. 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.

My task in the chapters to follow is to draw out and explain the core ideas, and their interconnection, that give content to this jurisprudential claim. For introductory purposes, however, the basic thrust of Fuller's jurisprudence might be summarised in these terms. 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',[3] but rather to be a participant in a distinctly constituted social condition in which one is respected as an agent. This respect, and the social condition that speaks to and constitutes it, arises from the particular way that a legal order creates and communicates its norms, namely, through observance of principles of generality, promulgation, clarity, avoidance of contradiction and of impossibility, constancy through time, non-retroactivity, and the requirement that there be congruence between official action and declared rule. These eight principles, Fuller famously argued, constitute law's 'internal morality'.

To understand what Fuller was driving at when he designated law's distinctive mode of creating and communicating norms as a 'morality', it is necessary to call to mind the context within which he articulated this idea. When he began developing his thinking on the constitutive features of law, Fuller did so against the backdrop of the age-old jurisprudential debate between legal positivists and

[3] Undated and untitled document, The Papers of Lon L Fuller, Harvard Law School Library, Box 12, Folder 1 (notes for 'Reply to Critics').

natural lawyers on the question of the connection between law and morality. This means that, when we read Fuller, we need to see that he is working in two, in his view compatible, directions. First, he is seeking to investigate and to explain the distinctiveness of law's form: its attributes, presuppositions, formal features, and so forth. But then, second, he is also attempting to situate that investigation within the extant debates of jurisprudence; most particularly, within debates about the connection between law and morality.

This is the background against which Fuller advanced the idea that law is an intrinsically moral phenomenon, and which he defended along two interconnected lines, one relating to the moral demands of lawgiving, and the other to its moral value from the point of view of the legal subject. As Fuller explained it, when we take seriously the idea that law finds expression through a distinctive form, we come to see that to create and maintain that form requires the adoption of a distinctive ethos, a special understanding of the demands of his role, on the part of a lawgiver. Law is thus intrinsically moral in the sense that it is constitutively dependent on the observance of this ethos. But second, and itself a key part of the demands of this ethos, law 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.

It is these morally significant commitments that Fuller sees as distinguishing rule through law from rule by men, and he insisted that they are internal to law because of how they arise from the presuppositions that must be in place in order to support law as a distinctive form of social ordering. This leads in turn to Fuller's explanation of law's normativity, or, at least, his explanation of at least one of the reasons for law's normative force. If a lawgiver fails to observe the requirements of the internal morality of law, the legal subject can justifiably withdraw her fidelity because, as an agent and bearer of dignity, she cannot be expected to comply with the lawgiver's demands in the face of such disrespect for her status.[4] Thus, if the necessary reciprocity between lawgiver and subject that creates and maintains the distinctive attributes of a legal order disappears, so too must law, because the lawgiver has disavowed his commitment to law and is now proceeding through a different mode of ordering.

There have been multiple barriers to understanding Fuller's claims about law's morality in these terms. The primary reason for this is because analyses of Fuller's jurisprudence to this point have tended to be married to a particular, and particularly narrow, understanding of the kinds of connections between law and morality that the debates of jurisprudence ought to be interested in. As these analyses have it, exemplified in HLA Hart's own approach not only to debates about law and morality generally but in response to Fuller specifically, the main or indeed only question of importance is whether the fact of something being law guarantees the moral status of the ends pursued through it. This neat and powerful prism

[4] *Morality of Law* (n 1) 40.

of debate, historically, has been the primary one through which Fuller's contribution to legal philosophy has been read and evaluated.

As I explain in more detail below, it is not my aim in this book to marginalise discussion of what Fuller did have to say on this question of law's connection to the substantive morality of its ends, although it is important at the outset to note that at no point in his writings does Fuller claim any necessary conceptual connection between the two. But I am concerned to ensure that this particular way of understanding debates about law and morality no longer be allowed to obscure the other conversations that are extant in Fuller's jurisprudence, and which largely remain, to this day, under-acknowledged and under-explored. I hope to persuade the reader that the conversation Fuller thought we needed to have in jurisprudence, and which he also insisted was salient to traditional contests between positivism and natural law, was one about the distinctiveness of law's form and the implications of this distinctiveness for lawgiver and legal subject alike.

What, then, has prevented us from interpreting Fuller's contribution in this way, or, indeed, what is the cause of the apparent resistance with which legal philosophers have met Fuller's attempt to initiate a conversation in these terms? Although the strength of the assumption just explained that to debate about the connections between law and morality is to debate about the connections between law and substantive justice cannot be overstated, there have also been other powerful obstacles to both understanding and embracing Fuller's jurisprudence on the terms that he intended for it. One of these is the avowedly idealistic tenor of Fuller's project; how the demands of the internal morality of law clearly 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.

Yet none of this escaped Fuller himself. There is ample evidence in his writings to suggest that he was clearly alive to the conditions that might bear upon whether this standard could be met in the actual practice of an enterprise 'dependent 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'.[5] Still, his jurisprudence is uncompromisingly committed to the idea that the only meaningful account of law's nature is one that is capable of absorbing and accounting for these formal demands and the limits on the exercise of power that they impose. In that jurisprudence, the question of whether one is in fact governing through law is always measurable by the extent to which the morally significant demands of lawgiving are met. To abuse law is, at a certain point, to lose law.

But there is much about the way that Fuller gave expression to these claims that has not assisted their ready understanding. Although he did at times offer quite disciplined statements of his position, such as his exegesis of the eight principles of the internal morality of law in chapter two of *The Morality of Law*, the key insights of his jurisprudence are otherwise often scattered throughout his writ-

[5] ibid 145.

ings. To complicate matters further, Fuller could be undeniably sloppy in his choice of language, using terms interchangeably or being inattentive to their potential for contradiction, with the consequence that he often fed the fuel of his critics' interpretations of his jurisprudence much more readily than he guarded his position against them. These are just some of the reasons why reading Fuller can be an exasperating experience for philosophers trained in standards of clarity and rigour, and who expect the same from any work that makes claim to a philosophical engagement.

It is equally true that Fuller never managed or arguably adequately sought to reclaim his project from Hart's much narrower agenda. His 1958 reply to Hart's seminal essay, 'Positivism and the Separation of Law and Morals', might show much effort in this vein,[6] but when Fuller took the task on much more squarely in his 1969 'Reply to Critics' (itself an under-explored resource in analysis of Fuller's thought) the attempt was both too little and too late.[7] Surveying the writings linked to the Hart-Fuller debate over the course of those 11 years, therefore, we are ultimately presented with a strange mix of Fuller developing his distinctive jurisprudential project; Fuller being captive to Hart's agenda; Fuller losing himself and some of his best ideas to the challenge of understanding why Hart and others had dismissed him so harshly; Fuller saying some ridiculously polemical things; Fuller offering some profound insights; and then Fuller attempting to bring it all to a close by seeking to understand what it was about the priorities and methods of his critics' projects that might explain their apparent desire to keep his own jurisprudential agenda at a solid distance from the 'proper' concerns of legal philosophy.

Yet whether or not he made an adequate attempt to defend the terms of his own jurisprudential agenda against Hart's much narrower one, one thing that is clear is that this whole notion that legal philosophy has its 'proper' and 'improper' concerns was a thorn in Fuller's side from the very beginning. As a lawyer untrained in the tools of analytic philosophy, Fuller was well aware of how decisive the possession of a particular analytic skill-set had become to the possibility of being heard in twentieth century jurisprudence. The distress this caused him, and the sense of vulnerability and frustration that it precipitated, is made clear in his private correspondence and working notes. Referring to his exchanges with Hart in a letter to a colleague, Fuller confided that 'I genuinely do not have the philosophic insight to know just how to reproduce my own convictions properly, and if I did, I would not know what language to use to convey those convictions undistorted to my readers'.[8]

But it is important not to focus too much here on the extent to which Fuller was on the back foot. Although keenly aware of the disadvantage he faced in engaging effectively with 'real' philosophers, Fuller was also keenly sensitive to how the vocabulary of analytic philosophy operated to bring certain views about

[6] See chapter three.

[7] See chapter five.

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

the nature of law into focus at the same time as it actively marginalised others. The strength of Fuller's awareness of this agenda-setting force of the vocabulary of analytic legal philosophy is evident in how throughout his writings Fuller repeatedly tried to expose what is at stake in conceding to narrow standards of analysis as definitive of the agenda and the methodology of jurisprudence. This is perhaps expressed no better than in the closing words of his 'Reply to Critics', where he appeals to legal philosophers to give up their 'endless debates about definitions' and efforts to build 'conceptual models' in favour of 'an analysis of the social processes that constitute the reality of law'.[9]

The point, then, is that although the project of 'reclaiming' Fuller need not be an exercise in condemning the standards of analytical precision that in many ways have served legal philosophy well, it must nonetheless involve an appeal to the intellectual credibility of a wider view that accepts certain compromises of clarity in favour of a sensitivity to the insights that we might take from practice. Despite the numerous instances of hyperbole that infect some of his claims, Fuller actually never overstated the wider ambitions of his project. For example, he never suggested that his claims were to be accepted as universally applicable, in the style of general jurisprudence. Indeed, if we are to situate Fuller's project, we might say that it is loosely historicised around the phenomenon of modern law; cues we receive, amongst other resources, from the references to seventeenth century English case law that accompany the tale of King Rex in *The Morality of Law*,[10] and his reference in his final 'Reply to Critics' to the responsibilities involved in maintaining the rule of law in a modern state.[11] But what we can have little doubt about is that Fuller held very strong views about what, as participants in the enterprise of jurisprudence, we need to be asking ourselves. Though he might have framed it in various ways, the question itself is consistent: how well do our theoretical understandings of law, and the methods through which we pursue those understandings, serve our complex legal realities?

There is much evidence among recent writings of increasing sympathy for this question and, more generally, for the wider agenda for jurisprudence that Fuller sought. Progress in this direction seems in particular to have been triggered by the renewed attention given to Fuller's thought on the occasion of the 50th anniversary of Hart and Fuller's famous exchange in the 1958 *Harvard Law Review*.[12] This

[9] 'Reply to Critics' (n 1) 242.

[10] *Morality of Law* (n 1) 33.

[11] 'Reply to Critics' (n 1) 234.

[12] See especially the following contributions to the *New York University Law Review* symposium, 'The Hart-Fuller Debate at Fifty': David Dyzenhaus, 'The Grudge Informer Case Revisited' (2008) 83 *New York University Law Review* 1000; Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' (2008) 83 *New York University Law Review* 1059; and Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 *New York University Law Review* 1135. See further Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-first Century* (Oxford, Hart Publishing, 2009), and especially, in that volume, Nicola Lacey, 'Out of the "Witches" Cauldron?: Reinterpreting the Context and Reassessing the Significance of the Hart-Fuller Debate'; Martin Krygier, 'The Hart-Fuller Debate, Transitional Societies and the Rule of Law'; and Leslie Green, 'Law as a Means'.

occasion, however, was not an isolated moment of contact with Fuller, but rather built upon an emerging trend that has seen several scholars sympathetic to Fuller's position in his exchanges with Hart exploring those elements of his thought that suggest a link between law and freedom, or the status of the legal subject as an agent, and that attempt to make a case for a conceptual relationship between law and the rule of law.[13] A more nuanced picture has also been acknowledged by some who would ordinarily understand themselves as Fuller's critics, and yet who have recently affirmed aspects of his position.[14]

How these developments might be clarified and strengthened by the reading I supply in this book, and how they might be put into conversation with the dominant contemporary projects of legal philosophy, is a matter that I address in chapters six and seven, as well as in my conclusions in chapter eight. But here, as a way of bringing the concerns of this book into focus, it is helpful to dwell on the very idea of 'affirming' Fuller's position. As foreshadowed above, the common view still seems to be one in which to appraise Fuller's jurisprudence is to evaluate whether he advanced a compelling objection to Hart's positivist position on the connection between law and morality, and, specifically, with respect to the moral quality of legal ends. Thus, to affirm Fuller, this approach likely suggests, is to affirm some kind of connection between law and substantively moral outcomes, as if Fuller remains the modern guardian of this claim in our jurisprudential imagination.

In some contrast to this view—though, as already noted, without discounting fruitful conversations that might be had about Fuller's sense of this kind of connection between law and morality—the idea I wish to advance in this book is that the most meaningful concession that can be made to Fuller is one that sees the form of law as significant conceptually and salient morally. To reclaim this Fuller, we need to focus on his interest in the distinctiveness of law's form and its connection to human agency, and to do this it is helpful to return to the sense of his jurisprudential ambitions that has in the past been articulated especially insightfully, albeit with different aims in view, by two scholars in particular: Kenneth Winston and Jeremy Waldron.

The chapters to follow will reveal the extent of my debt to Winston's effort of compiling the archive of Fuller's private papers in the early 1980s. These archival materials have been essential to piecing together and lending support to my view that Fuller's jurisprudence is a much more coherent undertaking than he has generally been given credit for. But Winston's own analysis of Fuller's jurisprudence,

[13] See, most notably, Jeremy Waldron, 'Why Law? Efficacy, Freedom or Fidelity?' (1994) 13 *Law and Philosophy* 259; Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 *Law and Philosophy* 239; Jennifer Nadler, 'Hart, Fuller, and the Connection Between Law and Justice' (2007) 27 *Law and Philosophy* 1; Evan Fox-Decent, 'Is the Rule of Law Really Indifferent to Human Rights?' (2008) 27 *Law and Philosophy* 533. See also Nigel Simmonds, *Law as a Moral Idea* (Oxford, Oxford University Press, 2007). See further chapter six.

[14] Nicola Lacey makes this point in 'Out of the "Witches" Cauldron' (n 12) 4, noting Leslie Green's moves to this effect in 'Positivism and the Inseparability of Law and Morals' (2008) 83 *New York University Law Review* 1035.

read above all through the prism of Fuller's unfinished *eunomics* project, has equally been crucial to laying the foundations for the perspective I offer in this book.[15] As I explain in chapter two, this is because Fuller's eunomics project was an attempt to uncover the forms, limits and different kinds of moral value that attach to different modes of social ordering: a project, even if this has been greatly underrecognised, that shares many of its fundamentals with the jurisprudential position that Fuller developed in the context of his exchanges with Hart. Moreover, Winston has repeatedly emphasised Fuller's interest in agency,[16] and has suggested that the requirements set out in Fuller's idea of the internal morality of law are moral because they constitute what it means for a lawgiver to treat the legal subject with respect as a responsible agent.[17] My own reading of Fuller picks up and develops these intuitions in multiple ways.

Waldron's engagement with Fuller, which is ongoing, has generally been more squarely concerned with Fuller's contribution to questions of mainstream jurisprudence. In recent works, however, Waldron's exploration of that contribution has seen a turn towards the place of the agent within Fuller's jurisprudence, as part of questioning whether legal philosophers ought to be satisfied with the undiscriminating concept of law offered by positivism.[18] But Waldron's intuitions about the right way to approach Fuller's jurisprudence trace back to his 1994 essay, 'Why Law? Efficacy, Freedom or Fidelity?', where he suggests that Fuller's writings on the morality of law might be regarded as the initiation of a research programme that seeks to explain what the connection between legal forms and fidelity to law might actually consist in.[19]

This question of what we might learn from Fuller's investigation of the implications that flow from the form through which law is constituted and expressed has not, in my view, yet been given the attention that it deserves. My aim in this book is to provide at least a starting point for redressing this neglect and this, indeed, is why the 'forms liberate' image provides such a helpful frame for pursuing that endeavour. It points us to where we might look if we are to begin to understand Fuller on his own terms.

I Form and Agency

It should by now be apparent that my aim in this book is not only to advance the idea that the connection between legal form and human agency is a consistent

[15] Eunomics is also emphasised in Robert S Summers, *Lon L. Fuller* (Stanford, Stanford University Press, 1984).

[16] See especially Kenneth I Winston, 'Legislators and Liberty' (1994) 13 *Law and Philosophy* 389, 390, and generally 'Introduction to the Revised Edition' in Kenneth I Winston, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, revised edn (Portland, Hart Publishing, 2001).

[17] Winston, 'Introduction' (n 16) 51.

[18] Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1 , 13, 15.

[19] Jeremy Waldron, 'Why Law? Efficacy, Freedom or Fidelity?' (1994) 13 *Law and Philosophy* 259, 276.