

# Legal Positivism and the Rule of Law<sup>+</sup>

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## I. Introduction

One familiar account of the rule of law is that it is a political ideal with two aspects. One aspect is that it consists in the laws of a legal system, and the system as a whole, possessing certain features. A legal system and the laws within it, it is said, must be sufficiently general, clear, publicly accessible, internally consistent, capable of being obeyed, relatively stable in content over time, prospective, and applied consistently with their content by legal officials. If the laws of a system, and the system itself, fully possess these features, then the rule of law prevails and the system is commendable on those grounds. I'll refer to these eight features collectively as the requirements of the rule of law (hereafter 'R'). The second aspect is that if the laws of a legal system utterly fail to have one or more of these features, then, on this view, the result is not merely a defective or dysfunctional legal system. Rather, an utter failure to conform to the requirements of the rule of law to some minimal degree results in there being no legal system at all. I'll call this the *minimal conformity thesis* about the rule of law. These two aspects together form an account, one which has become widely accepted among legal philosophers,<sup>1</sup> which gives us the idea that the elements of R serve not only as *ideals* to which a legal system

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<sup>1</sup> Cf. Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) 119, who notes that this sort of theory, which he terms a 'formal' theory of legality, is 'most favored by legal theorists'. Timothy Endicott also notices that 'there is a consensus about the requirements' of the rule of law, those being the eight requirements just mentioned. See his 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1-2. For a discussion of the formal (vs. substantive) conception of the rule of law, see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law*, 467-487, and Robert S. Summers, 'A Formal Theory of the Rule of Law' (1993) 6 *Ratio Juris* 136ff.

aspires but also as *existence conditions* of that system. While the rule of law is in fact one way we may *evaluate* legal systems, it is nonetheless the case that in order for law to *be*, it must, to some minimal extent, be as it should.

This is of course a rough sketch of Lon Fuller's account of what he called 'the internal morality of law', what most theorists now call the rule of law or formal legality.<sup>2</sup> Fuller saw himself as offering what he provocatively called a 'procedural natural law' theory,<sup>3</sup> by which he meant an account of law according to which the existence of law implies the existence of standards for its own evaluation, i.e., standards he identified as the requirements of the rule of law. On this view, law is essentially an *evaluative* concept, since it bears an essential conceptual connection to the normative ideal of the rule of law. Fuller therefore intended to offer an account of law that rivals the one argued for by legal positivists like H.L.A. Hart, who deny any such connection.<sup>4</sup>

It should come as a surprise then that most legal positivists accept R as a generally correct substantive account of the rule of law. Positivists as diverse as Raz,<sup>5</sup> Coleman,<sup>6</sup> Campbell,<sup>7</sup> Endicott,<sup>8</sup> Marmor,<sup>9</sup> Gardner,<sup>10</sup> Kramer,<sup>11</sup> Waldron,<sup>12</sup> and perhaps even Hart himself,<sup>13</sup> all endorse similar sets of requirements which laws and legal systems should possess in order to achieve the rule of law. Moreover, many of these positivists also accept the

<sup>2</sup> *The Morality of Law*, rev. edition (1969) Chapter 2.

<sup>3</sup> Cf. Fuller, above n 2, 96-97: 'The term 'procedural' is...broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.'

<sup>4</sup> Fuller, above n 2, 191-204. See also David Lyons, 'The Internal Morality of Law' (1970-71) 71 *Proceedings of the Aristotelian Society* 105-119.

<sup>5</sup> Joseph Raz, 'The Rule of Law and its Virtue', in *The Authority of Law* (1979) 210-229.

<sup>6</sup> Jules Coleman, *The Practice of Principle* (2001) 190-195.

<sup>7</sup> Tom D. Campbell, *The Legal Theory of Ethical Positivism* (1996) 119-120.

<sup>8</sup> Endicott, above n 1.

<sup>9</sup> Andre Marmor, 'The Rule of Law and its Limits' (2004) 23 *Law and Philosophy* 1.

<sup>10</sup> John Gardner, 'The Legality of Law' (2004) 17 *Ratio Juris* 168, 179-181, and 'Legal Positivism: 5 ½ Myths' (2001) 46 *The American Journal of Jurisprudence* 210-211

<sup>11</sup> Matthew H. Kramer, *In Defense of Legal Positivism* (1999) 37-77.

<sup>12</sup> Jeremy Waldron, in an unpublished manuscript, 'The Concept and the Rule of Law.'

<sup>13</sup> H.L.A. Hart, *The Concept of Law*, 2d edition, ed. Penelope Bulloch and Joseph Raz (1994) 206-207.

minimal conformity thesis.<sup>14</sup> That is, many of them accept the idea that an utter failure to conform to one or more elements of R may result in no legal system at all. However, *qua* positivists, they of course reject Fuller's further conceptual claim about law, that it essentially contains standards for its own evaluation.<sup>15</sup>

It has recently been suggested that positivists cannot consistently hold this combination of views.<sup>16</sup> The objection has focused on Raz's account of the rule of law in his article, 'The Rule of Law and its Virtue',<sup>17</sup> one which has lead other positivists to accept both R and the minimal conformity thesis as a satisfactory account of the rule of law. The objection claims that Raz is committed to a functional concept of law,<sup>18</sup> just as Fuller is,<sup>19</sup> and that instantiating the elements of R constitutes law's fulfillment of its function. Moreover, Raz, like Fuller, accepts the minimal conformity thesis.<sup>20</sup> However, Raz of course does not share Fuller's concept of law: he does not think that the rule of law is a necessary aspect of the concept of law, that is, that the rule of law is part of the concept of law. The objection insists that consistency requires Raz (and *mutatis mutandis* any other positivist who accepts these premises) to give up this last claim, i.e., to endorse Fuller's position entirely and hold that there is an essential conceptual connection between law and the ideal of the rule of law.

In this essay, I hope to show that this objection rests on a misunderstanding of both legal positivism and Raz's position in particular, and will argue, as Hart once suggested,<sup>21</sup> that legal positivists can accept R (or

<sup>14</sup> Raz, above n 5; Marmor, above n 9; Kramer, above n 11; Endicott, above n 1.

<sup>15</sup> Kramer is an exception to this characterization; he argues that a positivist can consistently accept Fuller's account because ROL does not constitute any kind of *moral* value. Positivist can accept R, he says, while still maintaining the separation thesis, i.e., a necessary separation between law and *morality*. See his 'On the Moral Status of the Rule of Law' (2004) 63 *Cambridge Law Journal* 65-97. The issue of whether the rule of law necessarily involves a kind of moral value is outside the scope of this paper. However, the argument below is meant to show that the issue is moot anyway once we understand what the elements of R are *about*. See *infra*.

<sup>16</sup> Mark Bennett, "'The Rule of Law' Means Literally What it Says: The Rule of the Law": Fuller and Raz on Formal Legality and the Concept of Law,' (2007) 32 *Australian Journal of Legal Philosophy* 90.

<sup>17</sup> Raz, above n 5.

<sup>18</sup> Bennett, above n 16, 104.

<sup>19</sup> Robert S. Summers, *Lon L. Fuller* (1984) Chapter 2.

<sup>20</sup> Raz, above n 5, 223-224: 'Clearly, the extent to which generality, clarity, prospectivity, etc., are essential to the law is minimal and is consistent with gross violations of the rule of law.'

<sup>21</sup> Hart, n 13 above, 206-207.

some similar set of features) as a plausible account of the rule of law without falling into any inconsistency. My argument for this claim will proceed in two steps. First, I will show that the way out of the allegedly inconsistent set of premises just mentioned is to recognize that positivists need not hold, with Fuller, that law is a functional concept; indeed, my contention will be that Raz himself does not. Second, I will try to put Fuller's account of the rule of law into proper perspective by showing that it doesn't really offer any insights into the distinctive features of the rule-of-law ideal that we associate with legal systems. I will argue that his functional analysis of law, and the account of the rule of law which he thinks is attendant on it, instead calls our attention to essential features of *norms*, the creation of them, and more broadly, *normative systems*, especially ones in which there are norm-governed procedures for either creating norms or changing the application of existing norms. The list of features which Fuller identified as the core requirements of the rule of law (R) apply broadly to any system of conduct-guiding norms, whether they be legal, religious, or less momentous, for example, the rules of chess. As a result, Fuller and positivists like Raz can agree that a legal system must minimally conform to R and that greater conformity is *ipso facto* valuable; but in fact they are not agreeing on anything peculiar or important about the nature of law. They are simply agreeing about an aspect of the nature of norms and normative systems, legal or otherwise.

It may seem, once this is established, that the rule of law isn't a unique ideal of law at all; Fuller's account as stated certainly is not. But Raz, I will argue, is quite aware of this result and that the account of the rule of law he provides *is* an ideal peculiar to legal systems, in virtue of the content he gives to the elements of R, content which makes reference to uniquely legal institutions and the conduct of legal officials. Raz modifies Fuller's list of requirements so as to make the claim that the rule of law is the 'specific virtue'<sup>22</sup> of the law more plausible and useful in clarifying how instantiating the rule of law contributes to the evaluation of a given legal system.

## II. The Concept and the Rule of Law

Before looking at the arguments in detail, we should, with Bennett, distinguish between two ways of viewing the conceptual relationship between the ideal of the rule of law and law.<sup>23</sup> On one view, represented by Fuller, the rule of law is a *part of* the concept of law. In other words, there cannot be law without law conforming (to some degree) to the ideal of the rule of law. Bennett calls this view 'monism' and contrasts it with 'dualism,' of which Raz is the prominent defender, holding the view that the rule of law and law are conceptually separate. The dualist view denies that law *as such* must conform

<sup>22</sup> Raz, above n 5, 226.

<sup>23</sup> Bennett, above n 16, 91-92.

to the requirements of the rule of law, and the fact that a legal system meets those requirements is a contingent state of affairs.<sup>24</sup>

It has often been said that the apparent linguistic relationship between ‘law’ and the ‘rule of law’ – the fact that we use the same word ‘law’ in both expressions – is *prima facie* evidence that monism is the correct view. Simmonds, for example, remarks: ‘Taking words at face value, might we not reasonably assume that “the rule of law” refers to a state of affairs where law rules? Is it really possible to think of law’s existence as one thing and its ‘ruling’ as another?’<sup>25</sup> Since the word ‘law’ is obviously a part of the meaning of the expression ‘the rule of law’, then monism, a view claiming a necessary connection between the two concepts, is at least *prima facie* plausible.

I think the practice of drawing substantive philosophical conclusions (even ones about *prima facie* plausibility) based on superficial linguistic similarities is problematic in its own right, and, in any case, it leads to nothing but confusion in the present case. It may well be that law has as much (or as little) to do with the rule of law as thumbs have to do with rules of thumb. In other words, it may turn out that we should understand the phrase ‘the rule of law’ as if it were one word, i.e., as a syncategorematic term.<sup>26</sup> ‘Law’, as a linguistic matter, would not bear any necessary relationship to ‘the rule of law,’ despite linguistic appearances. It is true that a phrase like ‘rule of thumb’ might be distinguished from ‘rule of law’ by saying that whereas the former is an instance of metaphor, the latter is not.<sup>27</sup> While it is outside the scope of this paper to pursue this issue, it seems at least an open question (and one not often asked) whether the word ‘rule’ in the phrase ‘rule of law’ is being used metaphorically. It is at least initially plausible that law does not ‘rule’ in the same way that human beings rule, as the traditional contrast has it.<sup>28</sup>

However that may be, I think it can at least be conceded that an analysis based on linguistic considerations will not be dispositive on the relation between law and the rule of law. We will have to look more closely at the merits of the respective positions. I will therefore begin by comparing Fuller’s

<sup>24</sup> Ibid.

<sup>25</sup> Nigel Simmonds, ‘Law as a Moral Idea’ (2005) 55 *University of Toronto Law Journal* 63. See also Richard H. Fallon, Jr., ‘The Rule of Law’ as a Concept in Constitutional Discourse’ (1997) 97 *Columbia Law Review* 10.

<sup>26</sup> I thank Jeremy Waldron for this way of putting the point.

<sup>27</sup> I thank Tara Smith for this suggestion.

<sup>28</sup> Cf. Aristotle, *Politics*, 1287a28-30: ‘Therefore he who bids law to rule bids only God and intelligence to rule; while he who asks for the rule of a human being is importing, in addition, a wild beast...’ (my translation). It is interesting that the same verb here is used to express the idea of either law or a human being ruling (*archein*), but it is a further question whether Aristotle himself is here speaking metaphorically about the law.

monism with Raz's influential account, and afterwards assess whether Raz's position must be revised on pain of inconsistency.

### III. Fuller's Monism

It is worth noting from the start how Fuller arrives at his view within the dialectic of the opening chapters of *The Morality of Law*. Just before launching into a detailed discussion of the eight requirements that comprise the rule of law, Fuller gives us a lengthy and colorful allegory about Rex, the unusually incompetent ruler.<sup>29</sup> In the course of his reign, Rex commits a number of peculiar mistakes, much to the dismay of his people. From the unhappy story of Rex, Fuller lists the particular mistakes that Rex has made and then develops that into the list of requirements that constitute the rule of law. I won't discuss these requirements in any detail; they have been discussed at length elsewhere.<sup>30</sup> But before Fuller arrives at his laundry list of requirements, he notes, almost in passing, one undesirable and startling consequence of a legal system failing, in some profound way, to meet them: '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...'<sup>31</sup> This is a concise statement of what I have called the minimal conformity thesis.

The intuitive plausibility of the minimal conformity thesis is shown by reflection on examples of legal systems which do not exhibit one or other of the requirements in Fuller's list. If a system of laws utterly fails on the score of generality, for example, then one will be hard pressed to identify a *system* of laws at all. Fuller says that 'the complaint registered' against institutions that fail to enact laws that are sufficiently general "is not so much that their rules are unfair, but that they have failed to develop any significant rules at all."<sup>32</sup> The idea applies both directly to individual laws – if they fail completely to be general, they fail to be laws – and indirectly to legal systems; if a legal system contains a sufficient number of law completing lacking in generality, then we may legitimately doubt whether we are dealing with a legal system at all, instead of, say, a loose collection of orders. Fuller notes that the same sort of claim applies to other features on the list, such as promulgation and clarity. If enough of the laws enacted in a given system are so 'obscure and incoherent' that its subjects acting in conformity with them is either impossible or extremely difficult, then it is doubtful that a legal system exists.<sup>33</sup>

<sup>29</sup> Fuller, above n 2, 33-38.

<sup>30</sup> See, e.g., Marmor, above n 9.

<sup>31</sup> Fuller, above n 2, 39.

<sup>32</sup> Fuller, above n 2, 47.

<sup>33</sup> See the discussion of these features in Fuller, above n 2, 49-51 and 63-65.

As I said at the outset, the idea that a complete failure to meet the requirements of the rule of law, or even a gross deviation from one or more of them, will result in no legal system at all (and not merely a system which is *bad* or *imperfect*) is as well entrenched among legal theorists as is Fuller's substantive list. Robert Summers has articulated the idea more clearly than Fuller:

What should we say if violations of principles of the rules of law were to occur...on a major scale[?]. Should we say, with Fuller, that such a 'system' is not really a system of law at all? Certainly any massive violation would strain our very *concept of a legal system*, for it would not be congruent with our very concept of the minimal essential form of a legal system...A system of law is not, conceptually, merely a system that includes first order rules and other first order laws having the type of substantive content that purports to order human relations. A system of law is, conceptually, a system that actually operates in its breadth and length in law-like ways. That is, it generally operates in accord with second order principles of the rule of law.<sup>34</sup>

The idea that emerges is that the requirements of the rule of law, as articulated by Fuller and adopted by many theorists after him, are at once *ideals* which a legal system may instantiate, or fail to instantiate, and also a subset of the very conditions under which a legal system may be said to *exist* at all. Another way to put the central claim of this kind of view is that, as Raz also puts it, 'a legal system must of necessity conform to the rule of law to a certain degree.'<sup>35</sup>

This widely accepted account of the rule of law was developed by Fuller with a particular view about the nature of law: for Fuller, law is by nature purposive and value-laden.<sup>36</sup> Fuller stipulated that law had a particular function, 'the subjection of human conduct to the governance of rules.'<sup>37</sup> The positing of this function is a crucial step in Fuller's account of the rule of law. For the elements of R (generality, clarity, etc.) are precisely those features which, if a legal system possesses them, allows it to fulfill its function. That is, the very activity of rule-governance is made possible by law exhibiting the features contained in R. It is true according to Fuller that *mere governance*

<sup>34</sup> Robert S. Summers, 'The Principles of the Rule of Law' (1999) 74:5 *Notre Dame Law Review* 1691, 1700.

<sup>35</sup> Raz, above n 5, 223.

<sup>36</sup> For an illuminating discussion of Fuller's views about the purposive nature of law, see Summers, above n 19.

<sup>37</sup> Fuller, above n 2, 106.

can be achieved in some way other than by means of law, for example by pure military order. His point is that if a ruling regime *does* employ law to achieve their substantive ends, then it is constrained by the law's purposive nature and the complex of normative requirements which are necessarily derivable from it.

#### IV. Raz's Dualism and Positivism

I now turn to Raz's account of the rule of law, so that we may then see its relationship to Fuller's. Raz has given an account of the rule of law that describes its value and nature in a precise and subtle way which has been the most influential one among so-called 'formal' theorists.<sup>38</sup> One reason it has been influential is because it makes salient many of the mistakes one can make in characterizing the rule of law. For example, he says that the rule of law cannot simply be the rule of good (i.e., just or fair) laws, for in that case the concept would encompass an entire social philosophy and be theoretically useless.<sup>39</sup> Raz maintains instead that the rule of law is a virtue peculiar to law, in the sense that only legal systems can possess it (or fail to possess it) and this fact makes the rule of law unique in comparison to the many other values that the law may possess or lack (e.g., justice, equality, etc.).

In particular, the rule of law is what he calls a 'negative virtue,' and 'in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself.'<sup>40</sup> The mere existence of law makes certain kinds of evil possible, e.g., civil unrest as a result of poorly constructed or badly applied laws, and the rule of law, if implemented, can prevent those kinds of evils from occurring. It is less clear, however, that this constitutes a *good* in any meaningful sense. The distinction that Raz introduces between positive and negative virtues is unusual and is not argued for in the course of his argument. The distinction, as far as I know, does not appear anywhere else in Raz's work. On Aristotle's account of virtue, for example, all the virtues are positive in Raz's sense; that is, they all are characteristics of an agent which constitute a good character and cause the agent to perform actions that are morally good

<sup>38</sup> By 'formal', I mean nothing more than any account which does not include among its ideal features which have anything to do with the substantive content of particular laws or with the moral value of that content, e.g., that they be just, impartial, or even that they further certain social policies. For an explanation of the formal/substantive distinction, see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law' (1997) *Public Law* 467.

<sup>39</sup> Raz, above n 5, 211.

<sup>40</sup> Raz, above n 5, 224.



and so to increase the goodness in the world. So it's not clear that within this framework, *preventing* evil will count as a *good* at all.<sup>41</sup>

However that may be, Raz argues for his particular account of the value of the rule of law by pointing out that, on his view, the value of the rule of law is independent of the many values that a legal system in a given society might serve. It makes no difference whether the law is used for good or ill; we can judge whether a legal system lives up to the rule of law by employing entirely separate criteria, criteria which relate to the specific nature of law. This is the essence of Raz's dualism; the constitutive elements of the rule of law are conceptually separable from the law itself. But even given these separate criteria, it may still be wondered how Raz, *qua* legal positivist, can make such claims as that 'the extent to which generality, clarity, prospectivity, etc., are essential to the law is minimal and is consistent with gross violations of the rule of law.'<sup>42</sup> Remarks such as this, where Raz quite clearly endorses the minimal conformity thesis, are what have inspired the objection I will address shortly. Before doing that, however, it's necessary to briefly characterize Raz's positivism.

Raz's positivism seems to have superseded Hart's as the standard account. The positivist account of law, despite its many recent and historical variations, can be characterized by two theses: (1) what counts as law in a society is solely a matter of social fact,<sup>43</sup> and (2) there is no necessary connection between law and morality.<sup>44</sup> Austin famously put the second point this way: 'The existence of law is one thing; its merit or demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to

<sup>41</sup> The distinction between positive and negative virtue may have originated with Bentham, who distinguishes between positive and negative *good*: '...since good and evil are opposites, the promoting of good where the good is negative is but another name for the averting of mischief when the mischief is positive: as the averting of negative good is for the promoting of positive mischief...the end of law being not the mischief itself, but the good which consists in the prevention of that mischief.' Jeremy Bentham, *Of Laws in General*, ed. H.L.A. Hart (1970) 32-33.

<sup>42</sup> Raz, above n 5, 223-224.

<sup>43</sup> This is sometimes called the Sources Thesis, the Social Thesis, or even the Social Sources Thesis. Raz argues for his positivism primarily in two essays: 'Legal Positivism and the Sources of Law', in *The Authority of Law: Essays on Law and Morality* (1979) 37-52, and 'Authority, Law, and Morality', in *Ethics in the Public Domain: Essays in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed. (1994) 210-237.

<sup>44</sup> This is often referred to as the Separation Thesis. See Jules L. Coleman and Brian Leiter, 'Legal Positivism', in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (1996) 241-260.

an assumed standard, is a different enquiry.’<sup>45</sup> But unlike Austin’s, Raz’s positivism relies on a sophisticated account of authority and the conditions under which authority is legitimate.<sup>46</sup> The details of this account need not concern us here; the important point is that Raz is committed to a concept of law that is free of any necessary connection to moral and even *evaluative* concepts.<sup>47</sup> For Raz, all law is source-based, which means that ‘its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument.’<sup>48</sup> In view of this outline of positivism, then, Fuller can be taken as insisting, through his account of rule of law, that the two inquiries Austin mentioned – what the law is and what it ought to be – are in fact *not* different; the existence of law and whether it conforms to an assumed standard, namely R, are two aspects of a single enterprise: investigating the nature of (the concept of) law.

## V. A Problem for Raz?

The objection posed against Raz by Mark Bennett runs something like this.<sup>49</sup> Bennett claims that Raz and Fuller both accept the following claims: (1) the concept of law is best analyzed in functional terms,<sup>50</sup> (2) the requirements of the rule of law (R) are those features of a legal system which serve as standards of evaluation of law as such in order for law to serve its function, and (3) the minimal conformity thesis, i.e., those features also serve as existence conditions of a legal system, since utter failure to conform to one or more results in something not properly called law. But, the objection continues, once one grants these claims, then one is forced to also accept Fuller’s concept of law, of which the rule of law, a political ideal, is a necessary element. A positivist account of law, it is said, is incompatible with (1)-(3). Therefore, Raz – and *mutatis mutandis* any other positivist who accepts (1)-(3) – have fallen into inconsistency, and should either give up (1)-(3) or modify their concept of law. Bennett suggests that Raz is forced to accept Fuller’s monism which is obviously inconsistent with his positivism.

<sup>45</sup> John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (1995 [originally published 1832]) 175.

<sup>46</sup> Raz’s theory of authority is developed primarily in *The Morality of Freedom* (1986) 23-70, and ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 *Minnesota Law Review* 1003.

<sup>47</sup> For an illuminating discussion of the Separation Thesis, see Leslie Green, ‘Positivism and the Inseparability of Law and Morals’ (2008) 83:4 *New York University Law Review* 1035.

<sup>48</sup> Raz, ‘Authority, Law and Morality’ in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed. (n1994).

<sup>49</sup> Bennett, above n 16, 107-112.

<sup>50</sup> More particularly, Bennett claims that the function which Raz and Fuller ascribe to law is essentially the same, that of *guiding conduct*. See Bennett, above n 16, 104.

## VI. The Function of Law

I think Bennett's claim that Raz endorses an essential or distinctive function of law, one which he allegedly shares with Fuller, is mistaken. Bennett understands both Raz and Fuller to be making the very same claim about law's function: that it essentially guides conduct, or is capable of guiding conduct.<sup>51</sup> And he considers this 'something of a concession to Fuller's view of the rule of law as a necessary aspect of the concept of law.'<sup>52</sup> Since it is of the essence of law to guide conduct, and the standards of the rule of law must be followed for this to happen, then it seems that the rule of law falls within any plausible concept of law. Raz therefore cannot consistently maintain his dualism.

The notion that law has a unique and distinctive function has been both discussed and criticized in recent years.<sup>53</sup> The crucial point for our purposes is that Raz has never claimed such a unique and distinctive function for law. On the contrary, he is quite clear about his doubts that there is such a thing, though he acknowledges that there are many sorts of contingent functions which law can serve, the distinctions among which can be illuminating.<sup>54</sup> Many readers have misunderstood him on this very point. Bennett relies principally on Coleman's reading of Raz in *The Practice of Principle*, where Coleman is quite clear in attributing such a view to Raz.<sup>55</sup> Hart's remark in the Postscript has contributed to this misconception, where, probably under the influence of Raz, he remarks that 'I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct.'<sup>56</sup> It is no surprise then that Bennett also attributes such a view to Raz.

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<sup>51</sup> Bennett, above n 16, 104.

<sup>52</sup> Ibid.

<sup>53</sup> See, e.g., Michael Moore, 'Law as a Functional Kind', in Robert P. George (ed.), *Natural Law Theory* (1992); Leslie Green, 'The Functions of Law' (1998) 12 *Cogito* 117; John Gardner, 'Law's Aim in Law's Empire', in Scott Hershovitz (ed.), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (2006).

<sup>54</sup> See Raz, 'The Functions of Law', in *The Authority of Law: Essays on Law and Morality* (1979) 163-179.

<sup>55</sup> (2001). See, e.g., the discussion at 68-69, where Coleman summarizes Raz's argument against inclusive positivism: '[Raz] is objecting [that moral criteria of legal validity] are *impossible* – because they cannot guide conduct, whereas law must, as a conceptual matter, be able to do so. Raz is concerned with the logical conditions imposed by the concept of legal guidance, not with the practical conditions under which such guidance can be effective' (emphasis in original).

<sup>56</sup> H.L.A. Hart, *The Concept of Law*, (2<sup>nd</sup> ed. 1994) 249.

But a closer reading of Raz will reveal that this is not his view. It is true that Raz thinks that it is essential to law that it be capable of guiding conduct, and further that the elements of the rule of law can be derived from this 'one basic idea.'<sup>57</sup> But why is it essential that law be capable of guiding conduct? Raz gives a clear answer to this question: laws are *norms*, and legal systems are *normative* systems, and it is essential to *norms* that they guide conduct. Raz affirms this a number of times in his early work.<sup>58</sup> And it is by no means a bold claim; norms can quite plausibly be explained functionally by reference to how we use them, indeed how we must use them, given their nature. As Raz says,

In a more indirect way the concept of the functions of law is also of interest to normative philosophy, for it bears on a more general explanation of the functions of norms, which is part of the elucidation of the nature of normative systems whether legal, moral, social, or other.<sup>59</sup>

Norms *as such* guide conduct, in whatever normative system of which they are a part, whether that system is a legal system or some other normative system, e.g., the rules of chess or the Catechism of the Catholic Church. We thus see that Hart himself was too vain in attributing the guidance of conduct as the *specific* purpose of law *as such*, since any other normative system (as such) shares this purpose.<sup>60</sup>

If this is a correct statement of Raz's views, it may be wondered how he can consistently claim that the rule of law is the 'inherent virtue' or 'specific excellence' of the law.<sup>61</sup> The reason is that the claim he makes about law that might also be misunderstood as a claim about law's unique and distinctive function *does* allow the inference: 'It is of the essence of law to guide behavior *through rules and courts in charge of their application*. Therefore, the rule of law is the specific excellence of the law.'<sup>62</sup> Note that this is a different claim than Fuller's and different from the one Bennett actually

<sup>57</sup> Raz, above n 5, 223.

<sup>58</sup> See, e.g., *The Concept of a Legal System* (1970) 73; 'Permissions and Supererogation' (1975) 12:2 *American Philosophical Quarterly* 163; *Practical Reason and Norms*, (2<sup>nd</sup> ed., 1990) 138-139. Raz was clearly under the influence of the pioneering work of Georg Henrik von Wright, whose sophisticated analysis of norms makes this idea fundamental. See especially his *Norm and Action: A Logical Enquiry* (1963).

<sup>59</sup> Raz, above n 52, 163.

<sup>60</sup> Hart was not entirely consistent on this point. See note 64, below, for a view that is *prima facie* inconsistent with attributing a 'specific' purpose to law.

<sup>61</sup> Raz, above n 5, 225.

<sup>62</sup> *Ibid*, my emphasis.

attributes to Raz. It is not a claim that law simply guides conduct, but *how* it guides conduct, i.e., through the rule-governed resolution of disputes in the courts.<sup>63</sup> Therefore, strictly speaking, it is not obviously a *functional* claim at all. It is a claim about law's particular mode of normative guidance, one which Fuller does not seem to recognize.

## VII. Positivism and the Rule of Law

This crucial point – that the function that has been imputed to law is actually just a function of norms generally – is the key to understanding how Raz (and other positivists who are sympathetic to Fuller's account) can consistently accept R and the minimal conformity thesis as a plausible account of the rule of law and still be a dualist, i.e., maintaining the separation between the rule of law as an evaluative ideal and the nature of law. If Bennett is right that the standards in the rule of law make it possible for law to serve its function, then the claim should now be modified to say that the rule of law makes it possible for the law *as a kind of normative system* to serve its function. The qualified claim now leaves room for Raz's dualist claim – that the rule of law and the law are conceptually separate. The rule of law (on Fuller's account) is related to law's nature as a normative system, but not in a way that is peculiar to law as such.

The problem that emerges is that the rule of law is transformed into an ideal that, strictly speaking, bears no interesting connection to law as such, contrary to our intuitions and the conventional wisdom among legal theorists. The ideal of the rule of law becomes, on this account, simply the rule of *norms*, and one which doesn't live up to the Aristotelian claim made by Raz, that the rule of law is the 'inherent virtue' of legal systems. But we must be careful to distinguish Raz's account of the rule of law from Fuller's. The eight features of R very clearly can be applied to any normative system and the norms which compose it; *any* individual norm, whether its content relates to chess, religious doctrine, or the law, must exhibit a certain degree of generality, clarity, consistency (with other norms of the system), publicity, etc., to guide the conduct of the subjects to which it is addressed. However, Raz, in seeming recognition of the broad application of Fuller's criteria, introduces elements that *are* specific to legal systems. Fuller's requirements are certainly incorporated into Raz's account, but Raz goes much further in characterizing aspects of the rule of law in a way that does support the conclusion that the rule of law is the 'specific excellence' of the law.

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<sup>63</sup> Cf. Leslie Green's claim that law is 'a modal kind and not a functional kind at all.' Leslie Green, 'The Concept of Law Revisited' (1996) 94 *Michigan Law Review* 1711.

Compare Raz and Fuller's account of the requirements of the rule of law in the following table.<sup>64</sup>

Fuller	Raz
1. Generality	1. All laws should be prospective, open, and clear.
2. Promulgation	2. Laws should be relatively stable.
3. Prospectivity	3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
4. Clarity	4. The independence of the judiciary must be guaranteed.
5. (Logical) Consistency	5. The principles of natural justice must be observed.
6. Practicability (Possible to be obeyed)	6. The courts should have review powers over the implementation of the other principles.
7. Stability	7. The courts should be easily accessible.
8. Applied consistently with their content by officials	8. The discretion of the crime-preventing agencies should not be allowed to pervert the law.

<sup>64</sup>

It is interesting that Hart also recognized the wide application of Fuller's characterization of the function of law, that of subjecting human conduct to the governance of rules. In his review of *The Morality of Law*, Hart remarks that 'This large conception of law, admittedly and unabashedly, includes the rule of clubs, churches, schools, 'and a hundred and one other forms of human association'.' See his *Essays in Jurisprudence and Philosophy* (1983) 343. Hart no doubt meant this as an objection to Fuller's view.

Positivists like Raz therefore need not worry about any inconsistency in holding a dualist thesis about the relationship between the rule of law as an ideal and the concept of law. Fuller's criteria are perhaps 'standards of evaluation' (and so in some sense an 'internal morality') of *norms* generally, and any normative system, especially ones in which there are norm-governed procedures for either creating norms or changing the application of existing norms. It is certainly plausible to think that the norms governing those procedures would have to conform to Fuller's 'internal morality' to some minimal extent if they are to be successful in governing norm-creation or changes in the application of existing norms. But this does not entail – and positivists need not maintain – that this claim should be taken as asserting something essential to the nature of law.<sup>65</sup>

## VIII. Conclusion

Over forty years ago, Fuller gave us an account of what he called the 'internal morality of law', or as the title of one chapter in *The Morality of Law* reads, 'the morality that makes law possible.'<sup>66</sup> With this account, he saw himself as offering an implicit criticism of legal positivism, as it was then understood (under Hart's and even Austin's version), since he was effectively arguing for a connection between law and morality that positivists have always denied. One would therefore expect positivists to defend themselves against Fuller's account. Indeed, Hart, the leading positivist at the time Fuller's argument first appeared, understood it as a criticism, and vigorously argued against it.

But Hart was concerned with arguing that Fuller's account does not establish the denial of the separation thesis, specifically by showing that Fuller's discussion of law was unsuccessful in attributing any moral value to law *as such*. As we've seen, Hart also suggested another problem for Fuller's account, based on his broad characterization of the function of law. Raz develops the criticism further within a complex theory of law as a certain kind of normative system. The view I have tried to extract from Raz's early work ,

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<sup>65</sup> It is doubtful, however, that the idea of an 'internal morality' of norms can be given any coherent content. For if R was in fact a set of standards of evaluation of norms as such, then the principles of R would themselves be norms. But in that case, they themselves could be judged according to either R or some other set of norms which compose *their* 'internal morality'. But then it seems we have been set upon an infinite regress of 'internal moralities'. The other logical possibility is that R is somehow a set of standards of evaluation which are not themselves norms. But this is incoherent. The view, therefore, that the elements of R serve as teleological bases of evaluation of norms as such is incoherent.

<sup>66</sup> Fuller, above n 2, 33.

in answering Bennett's objection, is that guiding conduct or being capable of doing so is not a distinctive feature of law, but rather a distinctive function of *norms*, and so of law only *qua* norm or normative system.

My conclusion is that, given a proper understanding of Raz's positivism and theory of norms, we see that Fuller has identified standards of evaluation of *norms* (and not only laws), adherence to which make it possible for them to fulfill their function of guiding conduct. To this extent, Fuller has said nothing distinctive about law as such; rather, he has drawn our attention to some existence conditions and a functional claim about norms, and perhaps also some interesting features of normative systems in which there are norms directing individuals how to either create new norms or change the application of a pre-existing norm.

A consequence of my argument in this paper is that Fuller's account of the rule of law is no longer a political ideal, i.e., an ideal which applies uniquely to legal systems. For this very reason, Raz's conception of the rule of law is, while similar to Fuller's, goes substantially further in making distinctive claims concerning legal systems (open access to courts) or political philosophy (the required adherence to the principles of natural justice.) Without these additional ideas, the ideal of the 'rule of law' would be nothing more than a rule of *norms*, i.e., a list of conditions for the successful creation of norms, an 'ideal' that is much less interesting and relevant to discussions in contemporary jurisprudence.