



LON L. FULLER

AND THE ENTERPRISE OF LAW

**BARRY
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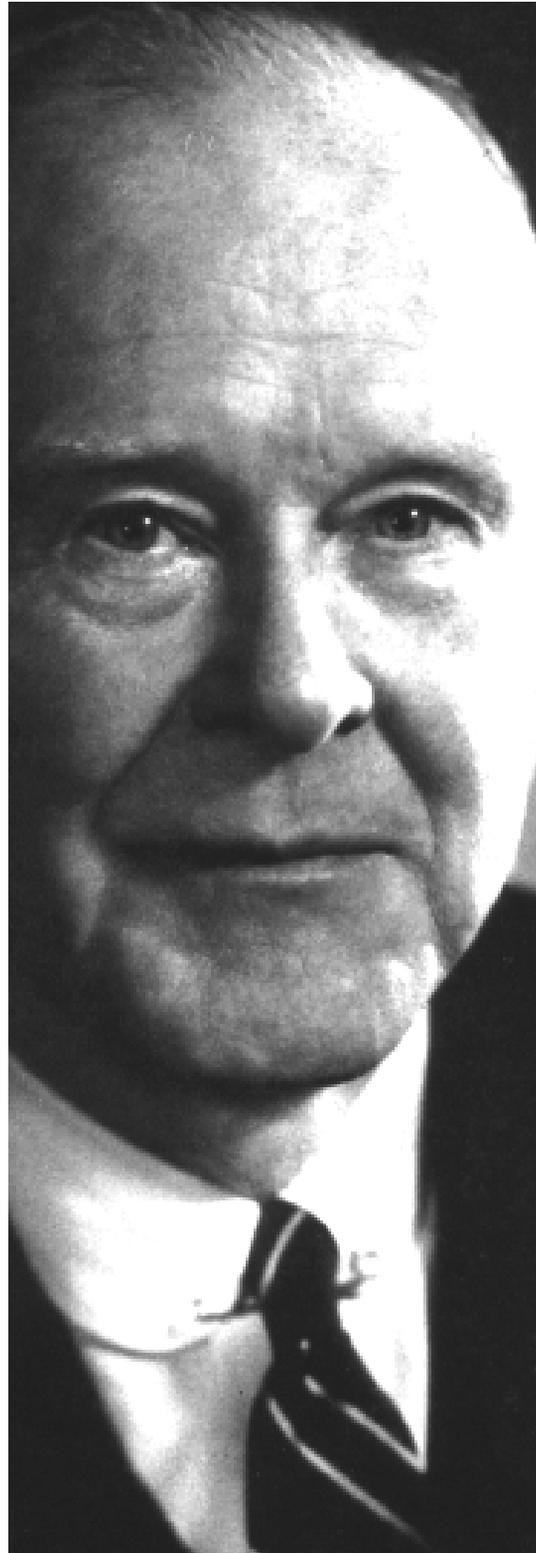
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FOR LIFE, LIBERTY AND PROPERTY

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BARRY MACLEOD-CULLINANE

“The only formula that might be called a definition of law offered in these writings is by now thoroughly familiar: law is the enterprise of subjecting human conduct to the governance of rules. Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort.”

Lon L. Fuller — *The Morality of Law*¹

I INTRODUCTION

At a time when legal positivism — the doctrine that law and morality must be separated — was riding high, there emerged an eloquent champion of natural law theory, albeit in a secularised form, whose distinctive and thoughtful arguments won applause even amidst the controversy he sparked. The legal philosophy of Lon L. Fuller (1902-1978) has largely gone unnoticed by those interested in the processes and institutional order of a market society — a fact I am seeking to remedy in the present Paper. However, this should not be taken as my final word on the subject; rather, it represents my first tentative examination of the richness and vitality of Fuller’s thought. I hope that such inadequacies as may be found will serve to promote discussion and exploration of the issues raised by Fuller.

Fuller’s *The Morality of Law*, first published in 1964, is his most famous and, perhaps, his most controversial work. At a time when legal positivism still dominated jurisprudence, the suggestion that law and morality were not only connected but connected intimately was such an affront to scientific thinking that it brought repeated charges of “axe grinding” from one reviewer. “[A]s a theory of law, many readers will find what the author says unsatisfactory. He is obviously grinding an axe, and such emphasis inevitably distorts.”² Interestingly enough, that reviewer, Robert S. Summers, has subsequently come to revise both his evaluation of Lon Fuller’s writings and also substantially to shift his methodological outlook towards Fuller’s position.³ But *The Morality of Law* did not begin controversy: it was, by Fuller’s own reckoning,⁴ merely round four in a long-running dispute between himself and the English legal theorist, H. L. A. Hart. Moreover, a reading of the particular rounds, the papers and books published by Hart and

Fuller, indicates that disagreement was not founded solely upon Hart’s legal positivism and his insistence upon the separation of law and morals. Several other themes contributed to define what Fuller, in his later “Reply To Critics”, characterised, after Hart, “fundamental differences in our ‘starting points’ ”⁵ and which seemed to preclude a coherent dialogue from emerging between him and the legal positivists.

These “starting points” include the conception of law as a dynamic process of creation and discovery. In his continuing emphasis upon customary law, i.e. spontaneously evolved rules emerging through dispute arbitration and adjudication combined with the spread of superior ways of doing things through competition and imitation, as exemplified by the Law Merchant,⁶ Fuller entirely endorses the description by the Italian legal thinker, Bruno Leoni, that:

Individuals make the law, insofar as they make successful claims. They not only make provisions and predictions, but try to have these predictions succeed by their own intervention in the process. Judges, juriconsults, and, above all, legislators are just individuals who find themselves in a particular position to influence the whole process through their own intervention.⁷

Indeed, there is an emphasis throughout *The Morality of Law* upon law not only as an enterprise, but as one which is most at home and compatible with the market order, which it itself mirrors. Building upon his examination of “the conditions that make a duty most understandable and most palatable to the man who owes it”,⁸ Fuller asks what form of society will most likely meet these conditions. When will observance and compliance of moral and legal duties be most complete? Fuller relates that “the answer is a sur-

prising one: in a society of economic traders”.⁹ His subsequent approval of F. A. Hayek’s close identification of the rule of law with the market order is further confirmed by an excellent presentation of the ideas of Soviet theorist Eugene Pashukanis, particularly his Commodity Theory of Law, which Fuller suggests should be renamed “the Commodity Exchange Theory of Legal and Moral Duty”¹⁰ and which serves to underscore the “somewhat startling conclusion that it is only under capitalism that the notion of the moral and legal duty can reach its full development”.¹¹

In addition, the law serves a very important coordinative function by providing a chart against which an individual might orientate his plans and actions and rationally evaluate their (likely) interplay with those of (often anonymous) others.¹² Thus, “[i]n one aspect our whole legal system represents a complex of rules designed to rescue man from the blind play of chance and to put him safely on the road to purposeful and creative activity.”¹³ It is perhaps illuminating to note that Fuller’s examples of this coordinative role are *entirely* drawn from the commercial sphere (the law of quasi contract, the law of contract, and tort law) and whose “acceptance today represents the fruit of a centuries-old struggle to reduce the role of the irrational in human affairs”.¹⁴

And, like Leoni,¹⁵ Fuller is wary indeed of the legislative ‘creation’ of law as opposed to emergent, customary law. Partly this reflects his lengthy experience as a commercial arbitrator.¹⁶ But it also stems from his distrust of what Hayek describes as the “constructivist rationalism”¹⁷ that grounds legal positivist thinking. For “[t]he characteristic error of the constructivist rationalists ... is that they tend to base their argument on what has been called the *synoptic delusion*, that is, on the fiction that all the relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order.”¹⁸

This concern is especially apparent in Fuller’s caution to the legislative draftsman that the latter should not force upon the interpreting agent “senseless tasks”.¹⁹ For not only does the problem of interpretation reveal “the cooperative nature of the task of maintaining legality”,²⁰ but it clearly demonstrates how the draftsman has to “be able to anticipate rational and relatively stable modes of interpretation”²¹ in order to create meaningful laws. Echoing Hayek, Fuller explains that “[n]o single concentration of intelligence, insight, and good will, however strategically located, can insure the success of the enterprise of subjecting human conduct to the governance of rules.”²² If law-making is essentially a process of entrepreneurial discovery, then only a free market in law can be entirely compatible with the enterprise of law, of “subjecting human conduct to the governance of rules”.²³

It is in this light that the present Paper is offered. I divide it into two main sections. First, I deal with the ideas particularly connected with *The Morality of Law* such as: the distinction between the moralities of duty and aspiration; the nature of law’s internal morality; and Hart’s criticisms of the foregoing as violating the legal positivist distinction between what is and what ought to be, i.e. the confusion of law and morals. The second section is an elaboration of Fuller’s procedural natural law theory. Here I examine his contention that protection of rights can emerge from customary law, taking particular notice of the spontaneous

evolution of the medieval Law Merchant. I conclude by drawing out the implications of Fuller’s ideas for contemporary thinking on the nature of law and society.

II THE MORALITY OF LAW

(A) The Two Moralities

In opposition to B. F. Skinner’s deterministic behaviourism, Fuller sees in man the capacity to alter his actions by conscious decision; the role of law being to enable his social orientation. Indeed, though “legal morality can be said to be neutral over a wide range of ethical issues”¹ Fuller argues that it cannot remain neutral to the nature of man himself since “the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.”²

Guiding man’s life are the moralities of duty and aspiration, whose nature and interplay define the role, aims, and limits of law. The morality of aspiration, the pursuit of virtue in Greek philosophy, represents “the morality of the Good Life, of excellence, of the fullest realisation of human powers.”³ In contrast, whereas

... the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible. ... It does not condemn men for failing to embrace opportunities for the fullest realisation of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.⁴

After Adam Smith,⁵ Fuller describes how the rules of language mirror the morality of duty by specifying certain basic requirements for social communication. Rules to achieve excellence are notoriously vague for “the closer a man comes to the higher reaches of human achievement, the less competent are others to appraise his performance.”⁶ Far from entailing society’s dissolution, excellence can only be achieved within a social context; outside of which “none of us could aspire to anything much above a purely animal existence. One of the highest responsibilities [therefore] of the morality of aspiration is to preserve and enrich this social inheritance.”⁷

In evaluating the passion for “deep play”, and whether such ‘excessive’ forms of gambling should be outlawed, Fuller observes that “there is no way by which the law can compel a man to live up to the excellences of which he is capable.”⁸ However, when certain activities threaten the social bond the law can look for guidance “to its blood cousin, the morality of duty”.⁹ A moral scale can be envisaged rising from the most basic conditions required for civil association to the very peaks of human possibilities. Because it is the line of division between duty and the pursuit of excellence that delimits the scope of law’s ‘compulsive domain’¹⁰ so this “invisible pointer” is shrouded by “the whole field of moral argument” as thinkers engage in “a great undeclared war over the location of this pointer”.¹¹ Indeed, this is an excellent characterization of toleration. Those urging the pointer higher betray the intolerance of moral censors who, “[i]nstead of inviting us to join them in realising a pattern of life they consider worthy of human

nature, try to bludgeon us into a belief we are duty bound to embrace this pattern."¹²

Platonism has "needlessly complicated"¹³ the locating of this pointer. By arguing that in order to know bad one has to grasp perfection, Platonism claims that "moral duties cannot be rationally discerned without first embracing a comprehensive morality of aspiration".¹⁴ Yet, the legal impotence that Platonism would have expected from millennia of conflicting substantive moral theories has not materialised: "[t]he moral injunction 'thou shalt not kill' implies no picture of the perfect life. It rests on the prosaic truth that if men kill one another off no conceivable morality of aspiration can be realised."¹⁵

Similarly, Fuller continues, examples can be found throughout "the whole field of human purpose"¹⁶ refuting the proposition that it is impossible to reject "what is plainly unjust without committing ourselves to declare with finality what perfect justice would be like".¹⁷ In this, Fuller is profoundly located within Classical Liberalism's traditional emphasis upon the establishment of "a framework for utopia" (to steal Robert Nozick's beautiful phrasing) that adheres to a conception of 'negative liberty' as opposed to 'positive liberty'.¹⁸ Composed from injunctions upon that range of actions hostile to the continued existence of the social commonwealth, the idea of negative liberty is succinctly conveyed in Herbert Spencer's famous 'Law of Equal Freedom'.

Hence, that which we have to express in a precise way, is the liberty of each limited only by the like liberties of all. This we do by saying: Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man.¹⁹

This runs in sharp contrast to 'positive liberty' or 'entitlement' claims to welfare fulfilled at another's expense. Indeed, it is the very institutionalisation of class interests by the coercive, redistributive power of the State that endangers social peace.²⁰ Thus, the very anti-perfectionism of Classical Liberalism enables us "to create the conditions that will permit a man to lift himself upward. It is certainly better to do this than to try to pin him to the wall with a final articulation of his highest good."²¹

But "this issue is far from prosaic", Nolan attacks Fuller.²² For, "if we should not kill on the grounds that we destroy higher aspiration moralities some idea of what those moralities are would be needed other than the implied benefits of leaving people free (to exchange goods and services)."²³ Not only is this infused with Platonism but it betrays a profound naivete concerning the alternatives of social organisation that is dangerously irresponsible. As Ludwig von Mises explains, only two choices (capitalism or socialism) ultimately exist. And,

[i]f one further realises that socialism [too] is unworkable, then one cannot avoid acknowledging that capitalism is the only feasible system of social organisation based on the division of labour. ... A return to the Middle Ages is out of the question if one is not prepared to reduce the population to a tenth or a twentieth part of its present number and, even further, to oblige every individual to be satisfied with a modicum so small as to be beyond the imagination of modern man."²⁴

Surely the reality implied by the severing of the social bonds overcomes Nolan's objection: for, in the extended order, there is a morality of aspiration achieved by "leaving people free (to exchange goods and services)".²⁵

(B) The Inner Morality of Law

To illustrate "the problems of institutional design",²⁶ and to derive the requirement for the "Inner Morality of Law", Fuller marshals his "mythopoetic powers"²⁷ in "The Problem of the Grudge Informer".²⁸ The problem is not that a legal system (of sorts) did not previously exist, but that what did exist not only sanctioned but actually encouraged individuals to settle old-scores through the coercive power of the State. With the dictatorship gone the demand that such "grudge informers" be punished emerges.²⁹ It falls to the reader, newly elected as Justice Minister, to resolve the problem. Whilst such acts were not illegal under the old regime, current public sentiment is such that individuals so accused are likely to be lynched.³⁰

Fuller dampens the constructivist temptation with the sobering tale of King Rex and the eight ways in which he failed to make law. Of the routes to failure:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicise, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure to achieve congruence between the rules as announced and their actual administration.³¹

Rather than adopt a substantive natural law approach, postulating a higher law that sanctions the legislative function of the State (as did some German legal postivists like Gustav Radbruch³²), Fuller counsels in favour of a procedural natural law approach. Taking up his eight ways to fail to make law Fuller explains that they are mirrored by eight "desiderata" or "eight kinds of legal excellence toward which a system of rules may strive"³³ and embodied in the Inner Morality of Law.

The IML is essentially a morality of aspiration: whilst the law *should* be promulgated most of the demands for legal excellence cannot easily be expressed as duties, thereby condemning the Inner Morality of Law "to remain largely a morality of aspiration and not of duty. Its primary appeal must be a sense of trusteeship and to the pride of the craftsman."³⁴

The other major feature of the Inner Morality of Law is that, apart from the pursuit of such legal excellence, it is not concerned with *any* substantive ends. Behind the rule of law stands an approval, originated in what Albert Jay Nock aptly called 'social power' in contrast to 'state power',³⁵ and which characterizes the social contractarian aspect of Leveller, Lockean, and American Revolutionary thought³⁶ cited approvingly by Fuller. It is for the external morality

of law, anchored in this basic social morality characterising ‘social power’, to define those substantive ends (i.e., concerns for justice) to be sought through the law. But as has already been intimated, this urge is constrained by the enterprise of law itself: too many regulations would undermine the law.³⁷ For, as will be shown, there is a disproportionate amount of coercion involved in implementing State legislation, as compared to judgements arising from customary law which relies upon voluntary support.

Moreover, the very desiderata comprising the Inner Morality of Law can, and must, vary with external circumstances. Fuller’s account of how retroactive laws may be justified (to resolve a failure in another desiderata, for instance) is a case in point. But, he concludes, referring back to the division of labour in the extended order, “to know how, under what circumstances, and in what balance these things should be achieved is no less an undertaking than being a lawgiver.”³⁸

In the case of the “grudge informer” retroactive legislation can be justified in the attempt to restore respect for the law. Not only is this a swifter and surer approach than attempting to interpret Nazi statutes as to their legality at the time, or to argue that their very vagueness compels the rejection of such legislation, it also counters the unstated system of rules, imposed by the Party’s terror in the streets and pressure on the judiciary, that existed without formal legislative enactment.

It is useful at this point, however, to recall the arguments of the Marxist legal theorist, Pashukanis. Pashukanis suggested that there is just as much economic calculation, or evaluation of the consequences accruing from an action, in the moral sphere as there is in the economic sphere.³⁹ Thus,

in bourgeois criminal law we find a table of crimes with a schedule of appropriate punishments or expiations — a kind of price list for misbehaviour. ... The legal subject is thus the legal counterpart of the economic trader.⁴⁰

Clearly, with no “price list for misbehaviour”, it might naturally be assumed that no wrong was committed by the “grudge informers”.

But the heart of law is not dependent upon subjective calculations, i.e. the economics of marginal utility or its moral equivalent the morality of aspiration. The conception of acting man re-ordering his activities in accordance with his constant creation and revision of plans is incompatible with the requirements of the morality of duty sustaining society. For, with the continual change of opportunity costs, i.e. the imagined value of the moral desirable alternative foregone at the moment of choice, ‘laws’ facilitating the settling of grudges will radically influence individual choice and, therefore, action. Marginal utility theory is positively hostile to the social bond in this respect. Thus it remains the province of the morality of duty, or the economics of exchange, to defend the ‘basic ground rules’ required for social cooperation based upon voluntarily assumed, reciprocal relationships. In this manner it is apparent that even with *no* legislative proscriptions certain acts will still violate the most basic social duties and, hence, be subject to legal punishment. It is because the IML is anchored in the maintenance of civil association that such “grudge informers” can be viewed as having violated the minimum duties required

for social living, regardless of the condition of positive law, and be rightfully made subject to legal and social sanctions.

There is, in this, a remarkable similarity to the natural law thesis of a higher law. But Fuller’s thesis is far more modest. Arising from his conception of acting man and the necessity of social life are the very institutions of individual rights, property, and, above all, the rule of law that substantive natural law theorists set down in theocratic tablets of stone.

(C) The Positivist Quest and Hart’s Review

I turn now to deal with the issues raised by legal positivism.⁴¹ In his *The Law in Quest of Itself*⁴² Fuller relates how legal positivists have attempted to divorce law and morality. Following the strides made by the natural sciences, these thinkers took up what they perceived — mistakenly — to be the mantle of scientific method.⁴³ Legal positivism’s basic tenets will first be presented as a foundation upon which the subsequent critical appraisal of Hart’s Review of *The Morality of Law* can be set. I have mostly neglected the debate in 1958 in the *Harvard Law Review* in this context since the key issues are drawn out in Hart’s “Review”⁴⁴ and Fuller’s “Reply to Critics”.

Two ideas mark the positivist project: (1) a belief in “a general criterion by which the law could be identified and differentiated”; (2) and an attempt to draw a “sharp line between law and non-law (especially morals)”.⁴⁵ Ever since the Power-grounded theories of Hobbes, legal positivism has attempted to ground the identification of law in some master test. To do otherwise would be to slide towards accepting the proposition that ‘general acceptance’ is the hallmark of law, unpalatable for legal positivists since this would also include moral concepts.

Hart’s “Review” roughly consists of a restatement of these two basic themes. First, there is his “rule of recognition”, an attempt to establish a general criterion to separate law from non-law and particularly aimed at Fuller’s wide conception of law that, “admittedly and unashamedly, includes the rules of clubs, churches, schools ‘and a hundred and one other forms of human association’.”⁴⁶ Secondly, Hart argues that it is impossible to speak of an “Internal Morality of Law”: to do so would be to speak of the “internal morality of poisoning” that stresses the basic requirements and challenges to the excellence of (efficient) poisoning.

Hart begins his attack upon the IML with a remark that the eight desiderata “are compared by the author to principles (he says, ‘natural laws’) of carpentry. They are independent of the law’s substantive aims just as the principles of carpentry are independent of whether the carpenter is making hospital beds or torturers’ racks.”⁴⁷

But Fuller’s “insistence on classifying these principles of legality as a ‘morality’ is a source of confusion both for him and his readers”⁴⁸ serving to perpetuate “a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality.”⁴⁹ Hart then turns to consider how similar principles might not also inform the poisoner’s craft, concluding that this would blur efficiency related to a purpose with moral judgements about the activities and purposes themselves. The “grotesque results” of such a confusion stems from Fuller’s belief that the purpose of subjecting human conduct to the governance of rules represents “some ideal development of human capacities which

is taken to be the ultimate value in the conduct of life”,⁵⁰ i.e. that it represents a morality of aspiration. I have already defended, against Nolan’s objections, the Inner Morality of Law in this light. But, to extend Hart’s analogy of the poisoner, might not the legislator also use laws, enacted in clear observance to all the desiderata, to terrorize the populace?

In reply, Fuller looks to Soviet Russia and the making of “economic crimes” punishable by death. Asking is it inefficient to pass retroactive legislation in this manner, Fuller explains that even Soviet lawyers viewed such actions as undermining confidence in law. Thus, a theory of social disharmony, generated in the trade-off between short-run efficiency and the longer term existence of law, pushes Hart and the legal positivists “across the boundary they have so painstakingly set up to distinguish morality from efficiency ... [and] they might have saved themselves a good deal of trouble by simply talking about morality in the first place.”⁵¹

The other feature of Hart’s “Review” is his intention to establish a “rule of recognition”:

In my book [*The Concept of Law*] I insisted that behind every legislative authority (even the supreme legislature of a legal system) there must be rules specifying the identity and qualification of the legislators and what they must do in order to make laws. ... I used the expression ‘the rule of recognition’ in expounding my version of the common theory that a municipal legal system is a structure of ‘open-textured’ rules which has at its foundations a rule which is legally ultimate in the sense that it provides a set of criteria by which in the last resort the validity of subordinate rules of the system is assured. This rule is not to be characterized as either legally valid or invalid — though it may be the subject of moral criticism, historical or sociological explanation, and other forms of inquiry.⁵²

In reading Hart’s discussion of the “rule of recognition” (though sometimes “rules of recognition”) there is an apparent *gap* that singularly torpedoes his *entire* position. He traces the day to day activity back to, and finds their validity in, a general rule which itself conforms to the criteria for legality of the subordinate laws⁵³ but, as he admits in *The Concept of Law*,⁵⁴ “is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity.”⁵⁵

Moreover, this “legally ultimate rule differs both from the ordinary subordinate rulers of the legal system and from ordinary social conventions or customs.” Now, whilst the reason for adopting a ‘rule of recognition’ is to avoid⁵⁶ what Hart calls the “gunman situation writ large”⁵⁷ his account descends precisely into this abyss. At no point does he overcome Fuller’s characterization of legal authority in his scheme as “Who’s Boss around here anyway?” The entire tradition that government is sanctioned by the governed is lost on Hart, with merely an identification of legal authority with Power. Yet, for a ‘rule of recognition’ to be a useful tool, some way of deriving the legitimacy of a ‘legal authority’ is essential, and this account is absent in Hart. In contrast, Fuller’s notion of law anchored in custom and morality is far more plausible, especially at times when State law collapses.⁵⁸ In fact, as Benson suggests, there is

in Fuller’s view an “implicit constitution” which “emanates from reciprocity, as does the recognition of duty (and, therefore, law) in general.”⁵⁹

III CUSTOMARY LAW AND THE LAW MERCHANT: ELABORATING FULLER’S PROCEDURAL NATURAL LAW THEORY

The previous section argued that Hart’s conception of law is inadequate either to explain or to define the enterprise of law. Indeed, his emphasis upon the ability to punish as the defining feature of a legal system is humbled by the lowly tennis club’s capacity to fine, suspend or expel members non-compliant to its rules. The identification of Law and Power is thus misguided and obstructive. Moreover, because law is an enterprise it must necessarily be concerned about *what ought to be* as well as about *what is*. Typically, when individuals in dispute ask their lawyers ‘what is the law?’ they look not to the present but to the future; they want to know *how* the legal confusion *will be* resolved. In this endeavour it is clear that law-making must be animated by moral concerns, especially the challenge to excellence. But it should be stressed that:

Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design.¹

If, as Menger observed, even law can emerge without conscious design² then a procedural natural law theory, relying merely upon self-interest, might be shown (both historically and theoretically) to recognise and protect rights.

(A) The Medieval Law Merchant³

Emerging during the eleventh and twelfth centuries from the self-interested concerns of merchants, the Law Merchant represents what Fuller calls a “language of interaction”⁴ facilitating trade. The Roman Empire’s collapse had been followed by a near extinction of commercial activities, only being revived by an expansion of agricultural productivity, which freed labour to engage in industrial manufacturing in the newly emergent towns. This synergistic relationship, between the revival of commerce and the improvement in agriculture, marks a greater level of specialisation and thus increasing economic activity. Trade, specialisation, and the emergence of money, the most marketable commodity, by substituting indirect exchange for barter, increases productivity and individual welfare. Similarly in law, with the fracturing of the Roman Empire there existed no uniform body of law; towns, regions, and countries all had different legal systems. Indeed, within any town there was likely to be a profusion of legal jurisdictions: ecclesiastical, manorial, or civil. With growing returns to be made from commerce crossing different legal systems, a way of resolving disputes became increasingly valuable.

(B) Customary Law

Merchants are, of necessity, engaged in purposeful activity orientated towards others. As Hayek observes, business practices generate, over time, expectations in the minds of others; expectations “reasonably formed because they corre-

sponded to the practices on which the everyday conduct of the members of the group was based.”⁵ Furthermore,

The significance of customs here is that they give rise to expectations that guide people’s actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which thereby condition the success of most activities.⁶

Because customary law is rooted in “the existence of ‘social mores’ defining rules of conduct”⁷ it is necessarily associated with the basic rules establishing civil association, i.e. it is dependent upon the morality of duty. Three conditions, Fuller suggests, underpin duty. “*First*, the relationship of reciprocity out of which the duty arises must result from a voluntary agreement between the parties affected; they themselves ‘create’ the duty. *Second*, the reciprocal performances must in some sense be equal in value.”⁸ Because it is nonsensical to consider equality as exact identity some common unit of measurement, into which differences can be subsumed, is necessary. And, “[*third*, the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I may owe you tomorrow in other words, the relationship of duty must in theory and in practice be reversible.”⁹

Based upon voluntary trade, a common unit of comparison (money), and the changing roles of individuals (as buyers and sellers), the market order is that form of social organisation that best accords to the morality of duty. For only “in a society of traders” can Fuller’s conception of duty, based upon reciprocity, be realised.

(C) The Evolution of Customary Law

The “dirty feet” characterisation of the Law Merchant conveys the pressing urgency for resolving disputes and differences in business practices faced by merchants anxious to move on to their next market. Also present is their reluctance to use local laws: royal courts typically considered void contracts specifying interest, whilst few local legal authorities were technically competent in the area of commercial practice.¹⁰

A new procedure or ruling, satisfying both parties, was likely to be copied and adopted by other merchants in both their initial contracts or during arbitration. As the circumstances to trade altered so new rules displaced older and less efficient practices. Gradually, there evolved a universal body of rules, the Law Merchant, that in “turn was a prerequisite for the rapid development of trade”,¹¹ and which, importantly, was not based upon compulsion by the State (or private individuals). Fuller notes that, as opposed to the hierarchical or “vertical” order imposed by State law, customary law and the Law Merchant are examples of “horizontal forms of order”.¹²

Customary law is superior to not only statute but also judge made law. Whereas a bad statute or, less commonly, bad judicial decision affects the entire legal system, through enforcement and precedent, customary legal systems quickly abandon bad, unjust, or inefficient rules and limit damage to only a portion of the extended order.¹³ Benson finds that, with respect to the Law Merchant, a number of legal innovations were adopted “because they promoted speed and informality in commerce and reduced transactions costs”¹⁴ whereas though “royal law, such as the Common Law in England, was developing during this same period,

and while supporters of the common law take pride in its rationality and progressiveness, the fact is that this state produced law as enforced by the king’s courts simply did not adapt and change as fast as the rapidly changing system required.”¹⁵ Precisely this point is emphasised by Fuller:

From the standpoint of the internal morality of law, for example, it is desirable that laws remain stable through time. But it is obvious that changes in circumstances, or changes in men’s consciences, may demand changes in the substantive aims of law, and sometimes disturbingly frequent changes.¹⁶

(D) Consent — The Foundation of Customary Law

At the heart of any system of customary law lies the voluntary support of all participants. Unlike State law, marked by the coercive subjugation of citizens beneath leviathan, customary law is a cooperative enterprise. Profitable relationships are jeopardized by the adversarial nature of State courts¹⁷ and its delays. Thus, speedy resolution, under a mutually agreed upon arbitrator, is attractive even to merchants who had not originally stipulated resort to arbitration in their contracts. The conceptual choice of conflict or conversation still holds in this instance. By avoiding arbitration (conversation) a recalcitrant merchant thereby embraces either the hostility engendered by State courts or the violation of contractual agreements, i.e. property rights, which, in the case of agricultural products, with high perishability, would be tantamount to theft or wanton destruction.¹⁸ Since both parties agreed to arbitration both voluntarily accept the arbitrator’s resolution. Damages for rights violations, in the form of *torts*, would take the form of economic restitution. Benson explains that:

... these courts’ decisions were accepted by winners and losers alike because they were backed by the threat of ostracism by the merchant community at large a very effective boycott sanction. A merchant who broke an agreement or refused to accept a court ruling would not be a merchant for long because his fellow merchants ultimately controlled his goods. The threat of a boycott of all future trade “proved, if anything, more effective than physical coercion”.¹⁹

(E) Customary Law as Procedural Natural Law

Emerging out of the exigencies of trade the Law Merchant reflected the concerns of the merchants themselves. Private property and the sanctity of contracts were both recognised by participatory merchant courts. Moreover, an element of fairness coloured the Law Merchant both in holding that “[f]raud, duress or other abuses of the will or knowledge of either party in an exchange”²⁰ invalidated contracts whilst, as Berman notes, “even an exchange which is entered into willingly and knowingly must not impose on either side costs that are excessively disproportionate to the benefits to be obtained; nor may such exchange be unduly disadvantageous to third parties or society generally.”²¹ Indeed, Fuller notes, this principle of fairness in exchange is bound up in the very idea of reciprocity.²² Few, if any, would knowingly enter a trade or “would voluntarily recognize a legal system that was not expected to treat him fairly”.²³

At the start of this section it was suggested that Fuller’s procedural natural law theory would give rise to exactly those institutions characterizing substantive natural law. As

I have attempted to demonstrate, the Law Merchant, a spontaneously evolved legal system, bears out Fuller's thesis. Confirming this is Benson's contention that customary legal systems (such as the Law Merchant) generally exhibit the following features:

- (1) a predominant concern for individual rights and private property;
- (2) laws enforced by the victims backed by reciprocal agreements;
- (3) standard adjudicative procedures established to avoid violence;
- (4) offences treated as torts punishable by economic restitution;
- (5) strong incentives for the guilty to yield to prescribed punishment due to threat of social ostracism; and
- (6) legal change via an evolutionary process of developing customs and norms.²⁴

IV Conclusion

Fuller closes *The Morality of Law* reaffirming the need to open communication between men; without such spreading of knowledge the extended order cannot function and man's existence will, ultimately, be threatened. This laissez-faire vision of international free trade arises because

the morality of aspiration offers more than good counsel and the challenge of excellence. It here speaks with the imperious voice we are accustomed to hear from the morality of duty. And if men will listen, that voice, unlike that of the morality of duty, can be heard across the boundaries and through the barriers that now separate men from one another.¹

The current public law crisis,² characterised by escalating crime rates and soaring State spending on 'law and order', has its very roots in "[t]he criminal justice system's neglect of crime victims. ... Crime victims must be involved in the pursuit and prosecution of criminals if a system of law and order is to be effective."³ With no recourse to restitution victims are additionally burdened by the costs of detection, apprehension, trial, and detention of criminals. Piled upon this weakened structure are ever more burdensome statutes, regulations, and informal rules expanding the sphere of State action. As Gustave de Molinari predicted in 1849, State provision of law and order threatens the cooperative venture of society,

[Y]ou forthwith see open up a large profession dedicated to arbitrariness and bad management. Justice becomes slow and costly, the police vexatious, individual liberty is no longer respected, the price of security is abusively inflated and inequitably apportioned, according to the power and influence of this or that class of consumers. ... In a word, all the abuses inherent in monopoly or in communism crop up.⁴

Fuller's teachings offer an alternative account of the origin and function of law: his close identification of law with the market, a theme Benson explores in depth, suggests that the enterprise of law sits uncomfortably with legislation. But rather than condemn man to a Hobbesian war of each against all, Fuller's emphasis is upon often informal, customary legal systems to coordinate human interaction. The creation of law through a procedure of entrepreneurial discovery and competition, as I have shown, will recognise individual rights and preserve the voluntary social order.

One idea, which Fuller insufficiently emphasised, now forms the basis of the burgeoning law and economics

movement. Scarcity and competing claims generate economic incentives to establish property rights rather than resort to violence.⁵ With technological solutions like barbed wire fences on the treeless prairies, or the creation of new legal rules, individuals beyond the reach of established governments still endeavoured to subject their conduct to the governance of rules. As the breakdown in State law becomes more apparent, so the customary legal systems typically characterising the open frontier⁶ will more and more become the default of settled societies.⁷

I will close this account with a statement from Harold J. Berman, a colleague of Fuller's, reflecting much of the richness of Lon Fuller's thought that I have sought to portray here:

The conventional concept of law as a body of rules derived from the statutes and court decisions — reflecting a theory of the ultimate source of law in the will of the lawmaker ('the state') — is wholly inadequate to support a study of a transnational legal culture. To speak of the Western legal tradition is to postulate a concept of law, not as a body of rules, but as a process, an enterprise, in which rules have meaning only in the context of institutions and procedures, values, and ways of thought.⁸

NOTES

I would like to thank the following individuals for stimulating my original interest not only in law but in the issue of competitive legal structures: Dale Nance, Mario Rizzo, Randy Barnett, Ejan Mackaay, Kurt Leube, and Leonard Liggio, and other faculty and participants on various summer seminar programs run by the Institute for Humane Studies and the Cato Institute. Special thanks must go to Bruce L. Benson, whom I had the good fortune to meet at Aix-en-Provence in 1990 and who subsequently provided a number of papers and manuscripts relating to the subject matter herein. More importantly, Professor Benson's emphasis upon the work of Lon L. Fuller led me to the latter's scholarship. Lastly, I would like to thank Mr. Ian Gregory of the University of York for encouraging me to write upon Lon Fuller and the enterprise of law. Responsibility for any errors remains mine alone.

I INTRODUCTION

1. Lon L. Fuller, *The Morality of Law*, (New Haven and London: Yale University Press, 1969; [1964]): p. 106.
2. Robert S. Summers, "Professor Fuller on Morality and Law", 18 *Journal of Legal Education* 1 (1966); reprinted in *More Essays in Legal Philosophy: General Assessments of Legal Philosophies*, selected and edited by Robert S. Summers, (Oxford: Basil Blackwell, 1971): pp. 101-130, p. 117.
3. See Robert S. Summers, *Lon L. Fuller*, (London: Edward Arnold (Publishers) Ltd., 1984): p. vii, where Summers notes that his earlier published recantation had pleased Fuller, appearing as it did shortly before the latter's death.
4. See "A Reply To Critics" (in *The Morality of Law*, pp. 187-242, p. 188) where Fuller outlines what he sees as the crucial rounds of that battle. Yet, even there, Fuller intimates that Hart's Holmes Lecture (delivered at Harvard Law School in April 1957, and published as "Positivism and the Separation of Law and Morals", 71 *Harvard Law Review* 593-629 (1958); reprinted in Joel Feinberg and Hyman Gross, ed., *Philosophy of Law*, Fourth Edition, (Belmont, Calif.: Wadsworth Publishing Company, 1991; [1975]): pp. 63-81), which he regards as 'round one', was actually grounded in an attempt "to defend legal positivism against criticisms made by myself and others".
5. From H. L. A. Hart's "Review of *The Morality of Law*", *Harvard Law Review*, Vol. 78, (1965), pp. 1281-1296: pp. 1295-1296.

6. The best general introduction to the literature on the Law Merchant is Bruce L. Benson's "The Spontaneous Evolution of Commercial Law", *Southern Economic Journal* 55 (Jan 1989): pp. 644-661. Importantly, Benson adopts an approach that builds upon Fuller's thought.
7. Bruno Leoni, "The law as Individual Claim", developed from lectures given at the Freedom School Phrontistery in Colorado Springs, Colorado, December 2-6, 1963; reprinted in *Freedom and the Law*, expanded 3rd edition, (Indianapolis: Liberty Fund, 1991; [1961]), pp. 189-203: p. 202. See also Tom G. Palmer and Leonard P. Liggio, "Freedom and the Law: A Comment on Professor Aranson's Article", *Harvard Journal of Law and Public Policy*, Vol. 11, No. 3, pp. 713-725.
8. Fuller, *The Morality of Law*, p. 23-24.
9. *Ibid*, p. 24.
10. *Ibid*, p. 25-26. See *ibid*, note 19, Chapter 1, p. 24-25 for references to Pashukanis's ideas. Nolan's argument appears to flounder when he considers Fuller's discussion of Pashukanis: "He is thus forced into the bizarre position where he can quote with apparent approval the Soviet theorist Eugene Pashukanis ..." (Nolan, *Is Law As It Ought To Be?: Or, Can We Make Any Sense of Lon L. Fuller's Concept of The Internal Morality of Law?*, (unpublished manuscript, circulated to the Political Theory Workshop, University of York, 16/03/93, 7.30pm): p. 20.) I argue, below, that it is because Nolan is not wholly at home in market process economic theory that he misrepresents Fuller and collapses his own paper into confusion, *ibid*, pp. 20-21.
11. Fuller, *The Morality of Law*, p. 24.
12. In this respect, of law and institutions like private property, contract and money serving as 'orientation maps' for human activity (in the market process) see Richard M. Ebeling's discussion of the ideas of Alfred Schutz, "Cooperation In Anonymity", *Critical Review*, Fall 1987, pp. 50-61.
13. Fuller, *The Morality of Law*, p. 9. It should be noted that Fuller's analysis is in sharp contrast to Karl Marx's view of alienation expressed in the latter's Paris Manuscripts, *Economic and Philosophical Manuscripts of 1844*. In contradistinction to Marx, Fuller quotes (pp. 26-27), at length, the economist Philip Wicksteed upon how the market order, of the division of labour, draws individuals together.
14. *Ibid*, p. 9.
15. Leoni, *Freedom and The Law*, esp. chap. 5, "Freedom and Legislation".
16. See Robert S. Summers, *Lon L. Fuller*, chap. 1, pp. 1-15, esp. p. 7-9, for a brief overview of Fuller's life.
17. F. A. Hayek, *Law Legislation and Liberty*, Vol. 1, "Rules and Order", (London and Henley: Routledge and Kegan Paul, 1973): esp. chap. 1, "Reason and Evolution", pp. 8-34.
18. *Ibid*, p. 14.
19. Fuller, *The Morality of Law*, p. 91.
20. *Ibid*, p. 91.
21. *Ibid*, p. 91.
22. *Ibid*, p. 91.
23. *Ibid*, p. 106. See also Tom W. Bell, "Polycentric Law", *Humane Studies Review*, Vol. 7, No. 1, (Winter, 1991/92): pp. 1-10, and Bruce L. Benson, *The Enterprise of Law: Justice Without the State*, (San Francisco: Pacific Research Institute, 1990).
10. I'm not entirely happy with this characterization but feel that this best expresses the social requirement to observe law and to what extent may dereliction or fault attract legal censure. Perhaps Ronald Dworkin's phrase "Law's Empire" would be more appropriate to the idea that I'm trying to present here.
11. Fuller, *The Morality of Law*, pp. 9-10, p. 10.
12. *Ibid*, p. 10.
13. *Ibid*, p. 10.
14. *Ibid*, p. 11.
15. *Ibid*, p. 11.
16. *Ibid*, p. 11.
17. *Ibid*, p. 12. This point is also forcefully made by Professor Kurt Leube in his lecture *Justice, Rule of Law, and Legal Positivism* given at the Université d'Été, Aix-en-Provence, France, August 1991.
18. An excellent discussion of this distinction is to be found in Loren Lomasky's *Persons, Rights, and the Moral Community*, (New York and Oxford: Oxford University Press, 1987): esp. chap. 5, pp. 84-110.
19. Herbert Spencer, *The Principles of Ethics*, (1892-93; reprinted, with an Introduction by Tibor R. Machan, Indianapolis: Liberty Press, 1978): Vol. II, pp. 61-62; see also discussion of Spencer in Ralph Raico, *Classical Liberalism in the Twentieth Century*, (Fairfax, Virginia: Institute for Humane Studies, 1986/7).
20. "But it is well-nigh impossible to preserve lasting peace in a society in which the rights and duties of the respective classes are different. Whoever denies rights to a part of the population must always be prepared for a united attack by the disenfranchised on the privileged. Class privileges must disappear so that the conflict over them may cease." Ludwig von Mises, *The Free and Prosperous Commonwealth*, (Princeton: D. van Nostrand, 1962), p. 28; cited by William Baumgarth, "Ludwig von Mises and the Justification of the Liberal Order" in Laurence S. Moss ed., *The Economics of Ludwig von Mises: Towards a Critical Reappraisal*, (Kansas City: Sheed and Ward Inc., Institute for Humane Studies, 1976): pp. 79-99, pp. 90-91. See also Mises's "The Clash of Group Interests", reprinted in Richard M. Ebeling ed., *Money, Method, and the Market Process: Essays by Ludwig von Mises*, (Norwell, Massachusetts: Kluwer Academic Publishers, Praxeology Press of the Ludwig von Mises Institute, 1990): pp. 202-214.
21. Fuller, *The Morality of Law*, p. 12.
22. Nolan, *Is Law As It Ought To Be?*, p. 21.
23. *Ibid*, p. 21.
24. Mises, *The Free and Prosperous Commonwealth*, pp. 85-86; cited by Baumgarth, "Ludwig von Mises and the Justification of the Liberal Order", pp. 96-97. See also the economic arguments supporting this proposition in F. A. Hayek, "The Use of Knowledge in Society", (Menlo Park, California: Institute for Humane Studies, 1977; [revised and reprinted from *The American Economic Review*, Vol. 35, No. 4, Sept 1945]); and his *The Fatal Conceit: The Errors of Socialism*, Vol. 1, of W. W. Bartley III ed., *The Collected Works of F. A. Hayek*, (Chicago: University of Chicago Press, 1988). See also Richard Ebeling's "Introduction", to *Money, Method, and the Market Process: Essays by Ludwig von Mises*, for references to Mises' arguments in this connection. These economic arguments are also taken up by Ayn Rand in her essay "The Anti-Industrial Revolution", printed in her *The New Left: The Anti-Industrial Revolution*, (New York: New American Library, Inc., 1975; [1971]): pp. 127-151.
25. Nolan, *Is Law As It Ought To Be?*, p. 21.

II THE MORALITY OF LAW

(A) The Two Moralities

1. Fuller, *The Morality of Law*, p. 162.
2. *Ibid*, p. 162.
3. *Ibid*, p. 5.
4. *Ibid*, pp. 5-6.
5. See Adam Smith, *The Theory of Moral Sentiments*, 1, 442; cited by Fuller, *ibid*, p. 6.
6. Fuller, *The Morality of Law*, p. 30.
7. *Ibid*, p. 13.
8. *Ibid*, p. 9.
9. *Ibid*, p. 9.

(B) The Internal Morality of Law

26. Emphasised by Hart in concluding his "Review", p. 1295.
27. *Ibid*, p. 1295.
28. Fuller, *The Morality of Law*, pp. 245-253.
29. Driving the moral urgency of Fuller's fictitious example was the very real problem faced in the wake of the overthrow of the Nazi regime at the end of World War II. Today, similar demands are being voiced across Eastern Europe for the "stooges" of the secret police forces of the, now deposed, Communist ruling elites to be brought to trial.

30. The idea of lynching, or at least popular justice, seems overlooked as a solution to some extent by Fuller. Yet, as he explains,

[i]f we accept the view that the central purpose of law is to furnish baselines for human interaction, it then becomes apparent why the existence of enacted law as an effectively functioning system depends upon the establishment of stable interactional expectancies between lawgiver and subject. On the one hand, the lawgiver must be able to anticipate what the citizenry as a whole will accept as law and generally observe the body of rules he has promulgated. On the other hand, *the legal subject must be able to anticipate that government will itself abide by its own declared rules.* ... A gross failure in the realisation of either of these anticipations — of government toward citizens and of citizens toward government — can have the result that the most carefully drafted code will fail to become a functioning system of law.

(Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, edited with an introduction by Kenneth I. Winston, (Durham, N. C.: Duke University Press, 1981): pp. 235-236; cited by Benson, *The Enterprise of Law*, pp. 320-321.) (emphasis added by Benson.)

Now, with the collapse of the regimes in Eastern Europe, apart from their massively dislocated economies, their main problem is the perverted legal systems. A sufficient breakdown “must — if we are to judge the matter with any rationality at all — release men from those duties that had as their only reason for being, maintaining a pattern of social interaction that has now been destroyed.” (Fuller, *The Morality of Law*, p. 22.) It is in this context that a review of the role of vigilance committees in similar historical situations is most useful. With the collapse of public law, Benson, in “Violence and Vigilante Justice in the American West” (Appendix to Chap. 12, “The Legal monopoly on Coercion”, *The Enterprise of Law*, pp. 312-321.), documents how much was achieved by widely supported vigilante committees that were remarkable in their restraint and respect for due process and other procedural concerns. Animating them was the desire to preserve the social bond by enforcing minimum conceptions of social duty (in particular they expelled from California individuals convicted of crimes elsewhere and convicts from Australia) and in striking at political corruption.

31. Fuller, *The Morality of Law*, p. 39.
32. See his excellent “Five Minutes of Legal Philosophy”, translated by Stanley L. Paulson; reprinted in Feinberg and Gross, *Philosophy of Law*, pp. 103-104; (published originally in *Rhein-Neckar-Zeitung*, 12/8/45; republished in the 8th edition of Radbruch’s *Rechtsphilosophie*, ed. by Erik Wolf and Hans-Peter Schneider (Stuttgart: K. F. Koehler Verlag, 1973) pp. 327-29). Other references to Radbruch’s ideas can be found in Fuller’s “Positivism and Fidelity to the Law — A Reply to Professor Hart”, 71 *Harvard Law Review* 630-72 (1958); (reprinted in Feinberg and Gross, *Philosophy of Law*, pp. 81-102, in notes 19 and 25, p. 102. In his article Fuller also notes that all three (Radbruch, Hart, and himself) favoured retrospective legislation to solve the “Problem of the Grudge Informer”, but for necessarily different reasons.
33. Fuller, *The Morality of Law*, p. 41.
34. *Ibid.*, p. 43.
35. Albert Jay Nock, “The State”, the *Freeman*, June 13 and June 20, 1923, (reprinted in Charles H. Hamilton ed., *The State of the Union: Essays in Social Criticism by Albert Jay Nock*, (Indianapolis: LibertyPress, 1991): pp. 222-9).
36. See my paper, *The Right to Revolution: Toleration, Liberty and the State in the Thought of John Locke’s Thought and the Early Liberals*, Libertarian Heritage No. 11, Libertarian Alliance, London, 1994, for an extensive elaboration of this theme.
37. For, “[i]f we view the law as providing guideposts for human interaction, we shall be able to see that any infringement of the demands of legality tends to undermine men’s confidence in, and their respect for, law generally.” (Fuller, *The Morality of Law*, p. 222.)
38. *Ibid.*, p. 94.

39. Summarised by Fuller, *ibid.* See note 10, “Introduction”, above for references.

40. *Ibid.*, p. 25.

(C) The Positivist Quest and Hart’s Review

41. This section draws upon Summers’ excellent discussion in “The Differentiation of law from non-law”, chap. 4, *Lon L. Fuller*, pp. 42-61.
42. Lon L. Fuller, *The Law in Quest of Itself*, (Evanston, Ill.: Northwestern University Press, 1940; [Boston, Massachusetts: Beacon Press, 1966]); cited by Summers, *ibid.*, p. 42.
43. F. A. Hayek, *The Counter-Revolution of Science: Studies in the abuse of Reason*, (Indianapolis: LibertyPress, 1979; [Glencoe, Ill.: The Free Press, 1952]).
44. Hart, “Review”, pp. 1281-1296.
45. Summers, *Lon L. Fuller*, p. 42.
46. Hart, “Review”, p. 1281.
47. *Ibid.*, p. 1284.
48. *Ibid.*, p. 1285.
49. *Ibid.*, p. 1286.
50. *Ibid.*, p. 1287.
51. Fuller, *The Morality of Law*, p. 203.
52. Hart, “Review”, pp. 1292-93.
53. *Ibid.*, pp. 1292-93.
54. H. L. A. Hart, *The Concept of Law*, (Oxford: Oxford University Press, 1961).
55. *Ibid.*; excerpted and reprinted in Feinberg and Gross, *Philosophy of Law*, p. 61.
56. Hart, “Review”, p. 1293.
57. Hart, “Separation of Law and Morals”; reprinted in Feinberg and Gross, *Philosophy of Law*, p. 67.
58. See note 30, “The Morality of Law”, above for references to vigilantism.
59. Benson, *The Enterprise of Law*, p. 322; see also Fuller, *The Principles of Social Order*, p. 195.

III CUSTOMARY LAW AND THE LAW MERCHANT: ELABORATING FULLER’S PROCEDURAL NATURAL LAW THEORY

1. Adam Ferguson, *An Essay on Civil Society*, (Edinburgh: Edinburgh University Press, 1966): p. 122; cited by Norman P. Barry in his bibliographical essay, “The Tradition of Spontaneous Order”, *Literature of Liberty: A Review of Contemporary Liberal Thought*, Vol. V, No. 2, Summer 1982, pp. 7-58: p. 24.
2. For, “[l]anguage, religion, law, even the state itself, and to mention a few economic social phenomena, the phenomena of markets, of competition, of money, and numerous other social structures are already met with in epochs of history where we cannot properly speak of purposeful activity of the community as such directed at establishing them. Nor can we speak of such activity on the part of the rulers.” (Carl Menger, *Investigations into the Method of the Social Sciences with Special Reference to Economics*, with a new introduction by Lawrence H. White, ed., Louis Schneider, Trans., Francis J. Nock, (New York and London: New York University Press, 1985; [1883]): p. 146.)

(A) The Medieval Law Merchant

3. See Bruce L. Benson’s “The Spontaneous Evolution of Commercial Law” and his *The Enterprise of Law* for a historical and theoretical discussion of the Law Merchant.
4. Lon L. Fuller, *The Principles of Social Order*, p. 213; cited by Benson, *ibid.*, p. 643.

(B) Customary Law

5. Hayek, *Law, Legislation and Liberty*, Vol. 1, pp. 96-97.
6. *Ibid.*, Vol. 1, p. 97.

7. Benson, "The Spontaneous Evolution of Commercial Law", p. 645.
8. Fuller, *The Morality of Law*, p. 23.
9. *Ibid*, p. 23.

(C) The Evolution of Customary Law

10. See Benson, "The Spontaneous Evolution of Commercial Law", p. 650.
11. *Ibid*, p. 648.
12. Fuller, *The Morality of Law*, p. 233.
13. For further discussion see Hayek, Law Legislation and Liberty; Leoni, freedom and the Law; Palmer and Liggio, "Freedom and the Law: A Comment on Professor Aranson's Article"; and especially Benson, The Enterprise of Law, in this respect. As Leoni, in Freedom and the Law, remarks:
No free-trade system can actually work if it is not rooted in a legal and political system that helps citizens to counteract interference with their business on the part of other people, including the authorities. But a characteristic feature of free-trade systems seems also to be that they are compatible, and probably compatible only, with such legal and political systems as have little or no recourse to legislation, at least as far as private life and business are concerned. On the other hand, socialist systems cannot continue to exist without the help of legislation. (p. 103.)
14. Benson, "The Spontaneous Evolution of Commercial Law", p. 650.
15. *Ibid*, p. 650.
16. Fuller, *The Morality of Law*, pp. 44-45.

(D) Consent — The Foundation of Customary Law

17. Benson, "The Spontaneous Evolution of Commercial Law", p. 657.
18. Benson notes that a similar situation prompted the emergence of the 'rent-a-judge' system in California:

An 1872 California statute states that individuals in a dispute have the right to have a full court hearing before any referee they might choose. In 1980 there was a 70,000 case public court backlog in California with a median pre-trial delay of 50 and one-months. Thus, it is not too surprising that two lawyers who wanted a complex business case settled quickly 'rediscovered' the statute; they found a retired judge with expertise in the area of the dispute, paid him at attorney's fee rates and saved their clients a tremendous amount of time and expense. (Benson, *ibid*, p. 657.)

See also in this respect, Gary Pruitt, "California's Rent-a-Judge Justice", *Journal of Contemporary Studies*, Spring 1982, pp. 49-57; cited and discussed by Benson, *ibid*, pp. 657-658.

19. William C. Wooldridge, Uncle Sam, the Monopoly Man, (New Rochelle, New York: Arlington House, 1970); cited by Benson, "The Spontaneous Evolution of Commercial Law", p. 649.

(E) Customary Law as Procedural Natural Law

20. Benson, *ibid*, p. 649.
21. Harold J. Berman, *Law and Revolution: The Formation of Western Legal Tradition*, (Cambridge, Massachusetts: Harvard University Press, 1983): p. 343; cited by Benson, *ibid*, p. 649.
22. Fuller, *The Morality of Law*, p. 23.
23. Benson, "The Spontaneous Evolution of Commercial Law", p. 649.
24. Benson, *The Enterprise of Law*, p. 21; from Benson, "Enforcement of Private property Rights in primitive Societies: Law Without Government", *Journal of Libertarian Studies*, 9 (Winter, 1989): pp. 1-26; wording from Tom W. Bell, "Polycentric Law", p. 4.

Two items I did not have to hand when writing this paper, which are especially relevant to Fuller's conception of customary law, were:

Lon L. Fuller, *Anatomy of The Law*, New York, Frederick A. Praeger, 1968, see especially Part II, "The Sources of Law", pp. 43-119.

Lon L. Fuller, "Human Interaction and the Law", in *Principles of Social Order*, pp. 211-246.

IV CONCLUSION

1. Fuller, *The Morality of Law*, p. 186.
2. See Benson, "Comment: The Lost Victim and the Failure of the Public Law Experiment" and *The Enterprise of Law*; and Leonard P. Liggio, "The Market for Rules, Privatization, and the Crisis of the Theory of Public Goods", *George Mason University Law Review*, Vol. 11, No. 2, (Winter, 1988): pp. 139-150; from a symposium: *Constitutional Protections of Economic Activity: How They Promote Individual Freedom*.
3. Benson, "Comment: The Lost Victim and the Failure of the Public Law Experiment", p. 399.
4. Gustave de Molinari, *The Production of Security*, p. 277 (J. Mullock trans. 1977); cited by Benson, *ibid*, p. 419.
5. See Terry L. Anderson and P. J. Hill, "An American Experiment in Anarcho-Capitalism: The Not so Wild, Wild West", *Journal of Libertarian Studies*, Vol. 3, No. 1, (1979): pp. 9-29.
6. *Ibid*; Benson, *The Enterprise of Law*, "Legal Evolution in Primitive Societies", *Journal of Institutional and Theoretical Economics* (JITE), Vol. 144, No. 5, (December, 1988): pp. 772-788, "Enforcement of Private property Rights in Primitive Societies: Law Without Government", *Journal of Libertarian Studies*, 9 (Winter, 1989): pp. 1-26, "An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian Law", *The Review of Austrian Economics*, Vol. 5, No. 1, (1991): pp. 65-89; (author's proof copy); and Tom W. Bell, "Polycentric Law".
7. Benson, "The Spontaneous Evolution of Commercial Law"; and Leonard P. Liggio, "The Market for Rules, Privatization, and the Crisis of the Theory of Public Goods".
8. Harold J. Berman, *Law and Revolution*, p. 11; cited by Liggio, *ibid*, p. 147.

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- , "Legal Evolution in Primitive Societies", *Journal of Institutional and Theoretical Economics* (JITE), Vol. 144, No. 5, (December, 1988): pp. 772-788.
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- , *The Enterprise of Law: Justice Without the State*, (San Francisco: Pacific Research Institute, 1990).

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- , “An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian Law”, *The Review of Austrian Economics*, Vol. 5, No. 1, (1991): pp. 65-89; (author's proof copy).
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