No Barking:¹ Legal Pluralism and the
Contrast between Hart’s Jurisprudence and Fuller’s.
Jeremy Waldron²

1. Introduction
The exchange between Lon Fuller and H.L.A. Hart, published in the Harvard Law Review in 1958 covered a whole array of questions in general jurisprudence.³ Yet there were one or two issues that were salient then or have become salient in legal theory since 1958 that they barely touched on. One is the issue of stare decisis; another is the issue of international law.⁴ A third is the topic of legal pluralism.⁵

I must confess that when Peter Cane asked me to speak to about pluralism⁶ in this conference celebrating the 50th anniversary of the Hart-Fuller debate, I was at a bit of a loss as to what he had in mind. As I said, legal pluralism is not one of the things at issue in their debate—indeed, one could fairly say that there is nothing whatsoever on this topic in their Harvard Law Review exchange—nor do modern debates about legal pluralism appear to be part of the legacy of the Hart-Fuller debate. So

¹ “‘Is there any point to which you would wish to draw my attention?’ ‘To the curious incident of the dog in the night-time.’ ‘The dog did nothing in the night-time.’ ‘That was the curious incident,’ remarked Sherlock Holmes.”—Arthur Conan-Doyle, Silver Blaze in THE MEMOIRS OF SHERLOCK HOLMES (1892).
² University Professor, NYU Law School.
⁵ See also William Twining, Schauer on Hart, 119 Harvard Law Review Forum 122 (2006): “Contemporary legal theory needs to tackle issues relating to legal traditions, non-state law, legal pluralism, multiculturalism, human rights, transnational justice, diffusion of law, problems of comparison and generalization, and our collective ignorance of other legal traditions and cultures. Until recently, hardly any of these topics were dreamt of in Hart's legal philosophy or those of most of his followers.” For connections between the issue of trans-national law and the issue of legal pluralism, see also Paul Schiff Berman, Global Legal Pluralism, 80 Southern California Law Review 1155 (2007) and David Kennedy, One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream, 31 N.Y.U. Rev. L. & Soc. Change 641 (2007). I am unable to explore these important connections in the present paper.
⁶ I have assumed he meant legal pluralism. There are some indications in Hart’s Holmes Lecture of the importance of something that might be called moral pluralism. See infra, text accompanying notes 44-5.
much is this so that some jurists have suggested that the Hart-Fuller debate actually skewed the agenda for jurisprudence in unfortunate ways, which we are only now beginning to correct, and that recent emphasis on legal pluralism is part of that process.7

In this paper, I have no intention of scolding Hart and Fuller them for failing to address legal pluralism in 1958. It would be churlish to do so, given the range of topics they did address.8 But it is interesting that they neglected this topic, and--like the dog that didn’t bark in the night--it tells us something about blind spots in both their jurisprudence. So in what follows I want to look at various missed opportunities (for addressing this topic) from the positivist perspective that Hart’s work represents and from the various perspectives that Fuller’s work represents—the “Rule-of-Law” perspective and the anti-positivist position. I am also going to speculate a little about what Hart’s and Fuller’s attitudes to legal pluralism might be expected to be, in light of the positions they took up in their subsequent work.

I suspect that most legal theorists have the following view of this. They assume that H.L.A. Hart and Lon Fuller would be divided on the question of legal pluralism. They assume that Hart, like other legal positivists, would tend to favour a strongly state-centric view of law, leaving little room for genuine legal pluralism. And they assume that Fuller would be much more sympathetic to legal pluralism, partly on account of his anti-positivist commitments and partly on account of some things he said about customary law and about the diversity of legal systems not in the 1958 piece but in The Morality of Law9 and in some of his later writings.

I shall try to show that on both sides this view is a little simplistic. I don’t mean that Hart was a legal pluralist and Fuller wasn’t. But I mean first that, on the Hart side, we need to distinguish between currents in legal positivism that favour legal pluralism (and there are some) and currents in legal positivism that tend to oppose it; we need to understand more carefully how the latter currents—the ones opposed to legal pluralism—are permitted to flow through the distinctive channels of the

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8 As I said at the Cambridge conference on Hart’s Legacy: “The old phrase from the song in the Passover service comes to mind: Daveinu. Had God given us the Torah and not led us into the land of Israel, Daveinu! If God had just done this for us, it would have been enough.9 If Hart had only given us the union of primary and secondary rules, … Daveinu!” (See Waldron, Hart and the Principles of Legality, supra note 4, at 67.)

legal theory that Hart set out in his Holmes Lecture and in *The Concept of Law*,\(^{10}\) and we need to understand the various ways in which the former currents—the currents in the positivist tradition more favourable to pluralism—are blocked. And I mean secondly, on the Fuller side, that we need to understand the pressures put on the idea of legal pluralism by the inner morality of law (which is what Fuller called the principles of legality or the rule of law), which Fuller made so much of, and the ways in the inner morality of law might militate in favour of a monistic rather than a pluralistic legal/political system.

My discussion of Hart is in section 3, and it will be the more laborious and less consequential of the two. In the end, it will turn out that Hart’s conceptual scheme is indeed mildly inhospitable to legal pluralism; but we will have a better understanding of why. The implications for legal pluralism of Fuller’s jurisprudence will be discussed in section 4. That discussion will be equally laborious, but in the end it will generate a more striking result, especially compared to the preconception I have referred to.

### 2. Existence and Evaluation
What I have said in section 1 is introductory, and of course the language I have used so far is amateurish: I have talked in terms of theories favoring pluralism and theories opposed to it—as though legal pluralism were a policy. Anyone who knows the pluralism literature will say that that’s not helpful.

Legal pluralism is usually understood, in the first instance, as a condition or situation in a society. It is a condition or situation that is empirically discernible, i.e. discernible by careful qualitative empirical observation. As my NYU colleague Sally Engle Merry puts it, legal pluralism is “generally defined as a situation in which two or more legal systems coexist in the same social field.”\(^{11}\) Or, as I would put it, “legal pluralism” is a term used mostly to describe and characterize the existence of several distinct legal systems, or perhaps legal sub-systems, within a single independent political community, like a nation-state.

As a social condition or situation, it is in the first instance something that either obtains or does not. It is not a proposal that one opposes or supports. At this descriptive level, then, the first question to be put to a legal theorist is whether his jurisprudence recognizes this category and accommodates this phenomenon, or whether his jurisprudence would insist on characterizing the phenomena that legal

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\(^{11}\) Sally Engle Merry, *Legal Pluralism* 22 LAW & SOCIETY REVIEW 869, at 870 (1988).
pluralists draw attention to in some other way—as either (1) the absence of a legal system (on account of unreconcilled conflict), or (2) the existence of multiple legal systems in the ordinary sense (for example, the sense in which two adjacent countries have separate legal systems), or (3) the existence of ordered complexity within a single legal system (along the lines of the complexity we see in a federal system, like that of the United States for example), or (4) the coexistence of systems of law and positive morality. That’s a question about the categories that a theory uses.

If a legal theory recognizes legal pluralism as a category, there is a further question about how much of it there is in the world. Some confine legal pluralism to cases where European countries established colonies that superimposed their legal systems on pre-existing systems; legal pluralism refers to the existence or legacy of such imperialism. It may apply also to the reverse situation when immigrant groups have established their own communities with their own law, culture, and mores in the metropolis, whether or not this has achieved any degree of official recognition. Other theorists of legal pluralism use a much more generous concept and tend to see the phenomenon everywhere. Leopold Pospisil makes the claim that “every functioning subgroup in a society has its own legal system which is necessarily different in some respects from those of the other subgroups.” What is sometimes called “the new legal pluralism” sees pluralism as a characteristic of every society.

These are empirical/conceptual questions, and in themselves they have no normative aspect. But even if we grant that legal pluralism exists and that we need to be able to accommodate it in our categorial scheme, indeed even if we grant that it is pervasive and perhaps inevitable, there may be interesting normative and/or evaluative questions to raise. And there the language of favoring and opposing legal pluralism may be more apposite.

Let me cite an analogy. Alexis de Tocqueville thought that the rise of democracy, in the sense of equality of conditions, was pervasive and inevitable; still he thought that live and pressing normative issues arose out of this development. Well, similarly with legal pluralism. To the

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12 This formulation from ibid., 871, citing John Griffiths, What is Legal Pluralism?, 24 JOURNAL OF LEGAL PLURALISM 1, at 5-8 (1986).
14 Merry, supra note 11, at 873. See also ibid, at 869: “[G]iven a sufficiently broad definition of the term legal system, virtually every society is legally plural, whether or not it has a colonial past.”
15 Tocqueville insisted that “[t]he gradual development of the principle of equality is … a providential fact. It has all the chief characteristics of such a fact: it is universal, it is lasting, it constantly eludes all human interference, and all events as well as all men contribute to its progress.” He said that the movement which impelled the growth of equality in the countries of Europe and America was “already so strong that it cannot be stopped, but it is not yet so rapid that it cannot be guided. Their fate is still in their own hands; but very soon they may lose control. The first of the duties that are at this time
extent that it exists, is legal pluralism a problem? I mean now a real problem, a problem for a society, not just a problem for jurisprudence. That is one important question—evaluative if not directly normative. And to the extent that it can be channelled or conditioned by official action, what should be done about legal pluralism? (For example, should the state encourage minorities to set up their own legal sub-systems and recognize them when they do? Should the state be solicitous of legal pluralism and refrain from doing anything to undermine it or bring it into disrepute?) That is another set of normative questions.

So we have at least four sets of questions that might be put to H.L.A. Hart (or to Hartian positivism) and to Lon Fuller (or to Fullerian theories of legality or Fullerian versions of natural law):

1. Is legal pluralism a possibility? Does the term “legal pluralism” pick out a recognized jurisprudential category?
2. If it is a possibility, how common is it? Does it arise only under certain conditions, or is it pervasive?
3. To the extent that it exists, is legal pluralism a problem? Is it beneficial or prejudicial to people's lives or the life of their society?
4. What (if anything) should be done to encourage, discourage, channel or condition legal pluralism?

imposed upon those who direct our affairs is to educate democracy, to reawaken, if possible, its religious beliefs; to purify its morals; to mold its actions; to substitute a knowledge of statecraft for its inexperience, and an awareness of its true interest for its blind instincts, to adapt its government to time and place, and to modify it according to men and to conditions. A new science of politics is needed for a new world” (ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Preface).

16 For a typology of possible relations between state law and other forms of law in society, see Miranda Forsyth, A Typology of Relationships between State and Non-State Justice Systems, _JOURNAL OF LEGAL PLURALISM_ 12 (2007)

17 Recent discussions have connected the issue of legal pluralism to the normative philosophy of multiculturalism, responding--often critically--to proposals to promote, legitimize, or clear space for the emergence of separate legal systems (catering, for example, to Muslim groups) in jurisdictions like England and Ontario. See, e.g., Abul Taher, Revealed: UK's first official sharia courts, _THE SUNDAY TIMES_ (London) September 14, 2008, at 2 and Michael Valpy and Karen Howlett, Female MPPs' concerns delay sharia decision; Ontario government urged to go slowly on proposal to allow Islamic tribunals, _THE GLOBE AND MAIL_ (Canada), September 8, 2005, at A8. For discussion in the context of pluralism, particularly about worries that legal pluralism can disadvantage women and sub-minorities in especially family law, because it tends to privilege conservative religious norms see Mitra Sharafi Justice in many Rooms since Galanter: De-Romanticizing Legal Pluralism through the Cultural Defense, _71 LAW AND CONTEMPORARY PROBLEMS_ 139 (2008): “In the 1970s and 80s, a spirit of aggressive celebration permeated the study of legal pluralism. The romantic assumption that nonstate law was more egalitarian and less coercive than state law subtended terms like “people's law” and “folk law.” Shirafi insists that “[t]he cultural defense debate should be read not just as a centerpiece of the multiculturalism discussion, but also as an integral part of the legal-pluralist literature” (ibid., 140), thus importing the normative concerns of the former into what might otherwise have remained the conceptual and analytical concerns of the latter. See also note 101, infra.
The time allocated for this paper is too short to permit me to fully answer all four questions for both theorists. In what follows I shall consider what one might expect to be Hart’s answer to question 1. I will briefly consider what one might expect to be Fuller’s answer to all four questions, though, towards the end of my remarks on Fuller, I will draw the focus specifically on to the implications of Fuller’s inner morality of law for the normative question, question 4.

3. Pluralism and Hart’s Positivism: Conceptual Issues
In the literature on legal pluralism, it is sometimes assumed that H.L.A. Hart’s jurisprudence, as set out in The Concept of Law, is a “legal centralist” 18 theory that understands law in a vertical, top-down manner, and is therefore implicitly hostile to legal pluralism at a conceptual level.

Pluralism presents a model of the legal universe in which legal systems and institutions can conflict and overlap. The classic model of the legal order, advanced by Hart and Kelsen, resembled a pyramid. At the top of the structure was the Grundnorm, or rule of recognition, which served to both legally validate and identify the remaining rules of the system. The pluralist view, in contrast, suggests that there can be several legal orders in a given territory, each of which asserts its supremacy over the others.19

The assumption is that a theory like Hart’s is hostile to the possibilities that legal pluralists envisage or that, hostile or not, it simply cannot accommodate these possibilities in the vertically-structured conceptual framework that it provides for understanding the phenomenon of law. Legal pluralism requires us to recognize as law normative orders that do not acquire their legal character by being ordained from on high by the state; it requires us to recognize law on the ground, so to speak, for example in the form of customary social orderings; and it requires us to recognize such orderings as law even while we leave open the question of their relation to official law promulgated by the state. And it is usually thought that a theory like Hart’s can make no sense of this.

There is indeed something to this assumption—and I shall try to get at it in a moment. But this sort of characterization of Hart’s theory and of its relation to legal pluralism needs to be understood carefully in light of two important points.

18 The term “legal centralist” is taken from Griffiths, supra note 12, at 3.
(a) Alternatives to sovereignty.
The first point is that (as everyone knows) Hart made it a distinctive feature of his jurisprudence to oppose and provide an alternative to the "top-down" jurisprudence of Hobbes, Bentham, and Austin. A major legacy of Hart's jurisprudence—and indeed a major contribution of his Holmes lecture and his exchange with Lon Fuller—was his demonstration of the "threadbare" inadequacy of the command theory of law, and of how much in a legal system is distorted if law is presented as a top-down command.20 Hart criticized the vertical structure of the traditional Austinian model; he insisted that the key to jurisprudence is not the notion of command or the notion of a sovereign,21 but the notion of the members of a group accepting a rule. On the face of it, this seems less hostile to pluralist possibilities than traditional positivist theories, simply because it is less vertically-structured than they are. Instead of sovereign power, it placed a sort of customary practice at the foundation of a legal system.

In theory this means that Hart is in a position to recognize as law the sort of normative orderings that pluralists draw attention to. Having refuted the top-down sovereign-dominated definition of law, he can recognize legal systems wherever we find the appropriate sets of (primary) rules packaged together with (secondary) practices of recognizing rules.22 Law doesn't have to be state law on Hart's account,23 though he does

20 Hart, Positivism and Separation of Law and Morals, supra note 3, at 602-3.
21 Ibid., 603-4.
22 Obscure and tedious footnote: I have heard it said that an additional reason for Hart's failure fully to grasp the possibility of "mixed" systems is his tendency to identify law and state. (See, e.g., Barber, The Rechtsstaat and the Rule of Law, supra note 19, at 450-1 (2003).) This is now not the point about vertical top-down models. It is rather that the conceptual viability of legal pluralism requires us to identify the setting in which multiple legal orderings are supposed to operate in a way that is distinct from any one of them. We say, following Sally Engle Merry, that legal pluralism is "a situation in which two or more legal systems coexist in the same social field," Merry, Legal Pluralism, supra note 11, at 870 (1988), and one rather obvious way of delineating the same single field in which two or more legal systems operate is to say that it is the territory and population subject to a single state. But that seems to presuppose that we can define the territory and population that a state dominates quite apart from "its" (the state's official) legal system. That sounds interesting, but on reflection I don't think it is right: A methodologically viable approach to legal pluralism might describe it as the presence of more than one legal system in a social field occupied or defined by one legal system. To identify the relevant social field, we use the criteria of one legal system—which may or may not be identical with a state—and then we call the situation pluralistic if and only if there is also at least one other legal system operating somewhere in that very field.
23 See also the discussion in Kenneth Einar Himma, Do Philosophy And Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis Of The Concept Of Law, 24 OXFORD JOURNAL OF LEGAL STUDIES 717, 729-30 (2004). Himma is criticizing an argument to the effect that Hart's analysis fails because social life is thick with phenomena that he would not have wanted to call "law." But, as Himma says, assuming that legal pluralism is true, ... then it is a virtue, rather than a vice, that Hart's theory does not pick out only state systems of law."
make the claim that paradigm cases of law will involve some sort of organized coercion.\(^{24}\)

However, Hart very considerably plays down the extent to which law can be characterized as demotic—as a set of practices embedded in shared consciousness of the ordinary members of a social group. He doesn’t rule it out. But he regards it as at best a contingent matter, and he envisages that in normal cases the fundamental secondary rules of a society will be practices shared and participated in by a small élite subset—the “officials”—of the social group they dominate.\(^{25}\) “[W]hat is crucial is that there should be a unified or shared official acceptance of the rule of recognition containing the system’s criteria of validity.”\(^{26}\) In many settings, a great proportion or ordinary people “[will] have no general conception of the legal structure or of its criteria of validity.”\(^{27}\) True, a legal system can hardly be said to exist in a social group, unless the bulk of its members comply with the rules identified as valid by the system’s rule of recognition. But they need not be involved directly as participants in the practices that constitute the rule of recognition. In a pre-legal setting, no rule can exist in a society except as a practice among its members: as Hart puts, it, “[i]f, there, the internal point of view is not widely disseminated there could not logically be any rules.”\(^{28}\) We will discuss this difference in more detail in a moment.\(^{29}\) But, he continues,

where there is a union of primary and secondary rules, … the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them…. In an extreme case the internal point of view … might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; and the sheep

\(^{24}\) Hart, Concept of Law, supra note 10, at 97-8; however, see also his comments at ibid., 217-8, 227-8 and 231-2 (qualifying this claim in respect of international law). For Fuller’s opposition to this view, see Fuller, Morality of Law, supra note 9, at 108-9.


\(^{26}\) Hart, Concept of Law, supra note 10, 111.

\(^{27}\) Ibid., 114.

\(^{28}\) Ibid., 117.

\(^{29}\) Infra text accompanying notes 56-60.
might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.30

Now, this point may be of greatest importance, and the “slaughterhouse” warning that Hart sound may be at its most urgent, when we are talking the bamboozled population dominated by a unified legal system associated with a highly organized bureaucratic state.31 But in principle, the same point could apply to a pluralistic situation as well. As Roger Cotterrell points out, there is no particular reason to identify the officials who accept a rule of recognition as state officials.

Nothing in Hart’s books seems to indicate that “officials” for this purpose must be state officials: certainly the judges of an international tribunal and perhaps the priests of a religious group [or] the elders of a cultural or ethnic group … could qualify. Each of these kinds of group or association could thus have a kind of law of its own according to its members’ concept of law.32

So, in theory, all this is compatible with legal pluralism. But its underlying spirit is far removed from the spirit of pluralist jurisprudence. And one has to say honestly that Hart was simply not interested in the fact that—with a bit of pushing and shoving—his theoretical framework could accommodate pluralist possibilities.33

(b) Taking customs seriously.34
I said there were two important points which might qualify the allegedly top-down character of Hart’s jurisprudence and therefore mitigate its

30 Hart, Concept of Law, supra note 10, at 117.
31 See also the discussion in Jeremy Waldron, All We Like Sheep, 12 Canadian Journal of Law and Jurisprudence 169 (1999).
32 Roger Cotterrell, Law, Culture and Society, p. 37.
33 Simon Roberts, After Government? On Representing Law Without the State, 68 Modern Law Review 1, at 10 (2005) says that “any claim that Hart encourages us to think about law as something other than the law of a centralised polity would be misleading.” If one puts huge emphasis on “encourages,” then Roberts’s claim is more or less right. Hart is evidently not driven by any urgent concern that we should rivet our attention on non-centralized non-state law. Still, Roberts’s claim is mostly silly, particularly as it seems to overlook Hart’s discussion of international law in Chapter Ten of The Concept of Law.
34 The notion that legal positivism is essentially statist is probably a mistake. Legislation is not the only form of positive law. Customs and customary law, too, can be characterized in positivistic terms, understood in terms of convention, approached on the basis of a separation between law and (critical morality), and so on. See Jeremy Waldron, Law and Disagreement 46-7 (1999). See also Donald R. Kelley, The Human Measure: Social Thought in the Western Legal Tradition (1990).
hostility to pluralism. The first point was about secondary rules as alternatives to sovereignty. The second point is that Hart did actually insist on the integrity of custom as a form of law and refuted reductionist accounts of custom that presented customs as law only on account of their tacit adoption by a sovereign. Hart’s position is that custom can be officially “recognized” as a form of law without its being the case that the recognition confers the status of law upon it. There is, he says, no absurdity “in the contention that, when particular cases arise, courts apply custom … as something which is already law and because it is law.”

This is not indeed a feature of Hart’s argument in the Holmes Lecture, but it is emphasized early on and at some length in The Concept of Law. And it appears to leave Hart some room to accommodate the existence of forms of law besides law ordained by the state.

Besides the point that the rule of recognition is kind of like a custom, there are two other ways in which customs might figure in a theory like Hart’s. (i) Custom may figure as a form of law or a source of law recognized in a modern well-organized municipal legal system. (ii) Customs may figure as the building blocks of legal orderings that differ so much in form and character from a modern well-organized municipal legal system that they are described as “informal law” or (more or less pejoratively) as primitive law. In both cases, Hart makes moves that tend to be conceptually rather unaccommodating so far as legal pluralism is concerned.

(i) Legally-recognized customs. Hart observes that “[c]ustom in the modern world is not a very important ‘source’ of law.” It is usually subordinate to statute law, he says, and his discussion of that point makes it clear that his interest in custom as a form of law does not really extend beyond situations where custom is fully integrated into a state-dominated legal system--integrated in the sense that there are clear principles for its subordination as well as for its recognition. Even though the legal status of custom is not necessarily created by the sovereign’s (tacit) command, still legal customs are subject to the system’s overarching rule of recognition, and that rule will determine what the relation is between custom and other forms of law such as statute and precedent.

The idea that certain customs are recognized (by a rule of recognition) as having legal status suggests that others may not be. And

35 Hart, Concept of Law, supra note 10, 46.
36 Ibid., 44-9.
37 Ibid., 45.
38 Ibid., 95 (on the provision that a rule of recognition is likely to make for the subordination of some forms of law to others).
this is what Hart says: “The meaning and good sense of the denial that custom, as such, is law lie in the simple truth that, in any society, there are many customs which form no part of its law.” 39 Some such customs (not all) will be best regarded as parts of positive morality—i.e., of “the social phenomenon often referred to as ‘the morality’ of a given society or the ‘accepted’ or conventional’ morality of an actual social group” 40— which Hart discussed at great length in §2 of Chapter 8 of The Concept of Law, 41 and which he was anxious to distinguish from law, just as he was anxious to distinguish critical morality from law (in the so-called Separability Thesis). 42 What he says about positive morality in Chapter 8 is extremely interesting—particularly in the way he contrasts it with law in point of its particular normative character, its connection (or lack of connection) with sanctions, and its immunity from deliberate change. The last two points—sanctions and change—I will come back to in a moment. For now, what is interesting is that Hart has not simply suggested that certain customs may fall beyond the pale of law; he has done a certain amount of analysis to elaborate and explain other categories for understanding, among which “positive morality” is prominent.

True, Hart’s notion of positive morality is articulated in a way that is most appropriate for a socially homogenous society, such as England might have seemed to be in 1961. When he talks of non-legal customs, his example is men doffing their hats to ladies, 43 and when he talks of positive morality, he seems to assume that a society with one legal system will have one body of positive morality too. I have always found it irritating that Hart does not explicitly contrast the unity and systematicity of law in a given society with the diversity of moralities practised among its members and that he fails to highlight the disagreements and dissensus that their critical moralizing is likely to generate. 44 He came close to emphasizing this sort of moral pluralism and dissensus in 1958 when, in his discussion of the distinction between law as it is and law as it ought to be, he emphasized that often there are multiple “oughts”: “The distinction should be between what is and what from many different points of view ought to be.” 45 Unfortunately what he had in mind was not pluralism in

39 Ibid., 44.
40 Ibid., 169.
41 Ibid., 169-80.
42 Ibid., 185-6; for the term “Separability Thesis,” see Coleman or whoever.
43 Ibid., 44.
44 Cf. WALDRON, LAW AND DISAGREEMENT, supra note 34.
45 Hart, Positivism and Separation, supra note 2, 613 (my emphasis).
any social sense but something like the difference (even in the mind of a single individual) between the “ought” associated with morality and the “oughts” associated with prudence, efficiency, etc.

(ii) Systems of Customary Law. Hart is certainly interested in the distinction between “developed” legal systems (with secondary rules and institutions) and “primitive” social systems of pure custom, unaccompanied by law. He presents his own theory in the context of a story about the development of the latter into the former. And, as a developmental story would suggest, he acknowledges that there must be intermediate cases; indeed in an endnote that references Diamond, Malinowski, and others, he suggests that there may not be any pure cases of social systems without secondary rules. Certainly he appears willing to leave many such societies as intermediate cases where it is simply unclear whether the term “law” applies. Hart is by no means dogmatic in his distinction between law and not-law, either in this case or in other marginal cases such as (in Hart’s view) international law. I labor this point because it is sometimes thought to be an important difference between a theory like Hart’s and theories of legal pluralism that the former gives us a sharp distinction between law and non-law whereas the latter rely on a blurred or equivocal distinction. I think this is wrong, and that in this respect at least Hart’s jurisprudence is reasonably accommodating to the blurrings and hesitations that modern legal pluralism involves.

The developmental story that Hart tells may indicate that he thinks that the growth of developed law, with clear secondary rules and institutions, is a good thing, and that it is bad for societies to remain at the primitive stage. As Green has suggested, the story presented in Chapter

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47 HART, CONCEPT OF LAW, supra note 10, at 291.

48 Ibid., 156.

49 Ibid., 227-31.


51 I know this sentence sounds ironic or sarcastic. It is not intended to be. Blurrings and hesitations in complex social theory are often good things.

52 Many legal pluralists reject “the notion that custom is a form of primitive law that will gradually develop into state law,” Merry, supra note 11, at p. 875 citing Stanley Diamond, The Rule of Law versus the Order of Custom, 38 SOCIAL RESEARCH 42 (1971). As will be clear from what follows, I don’t think Hart presented this transition as unequivocally normative; it was used in his book just to explicate the character and function of fundamental secondary rules.
5 of The Concept of Law reads like Whig history:\(^{53}\) a primitive society
runs into certainty difficulties (uncertainty, inflexibility, and inefficiency),
and the emergence of secondary rules is the progressive solution to those
difficulties.\(^{54}\) But Green is right: it only reads like that if you ignore the
other things Hart says about this process, things that are actually quite
chilling:

Reflection on this aspect of things reveals a sobering truth: the step
from the simple form of society, where primary rules of obligation
are the only means of social control, into the legal world with its
centrally organized legislature, courts, officials, and sanctions
brings its solid gains at a certain cost. The gains are those of
adaptability to change, certainty, and efficiency; and these are
immense; the cost is the risk that the centrally organized power
may well be used for the oppression of numbers with whose
support it can dispense, in a way that the simpler regime of primary
rules could not.\(^{55}\)

The point is partly about the alienation that the growth of
specifically legal institutions involves.\(^{56}\) The transition that Hart imagines
between a pre-legal and a legal society involves not only the introduction
of a new type of rule—secondary rules, such as rules of change and rules
of recognition—but with it the introduction of a new type of rule-
mentality and new types of rule-related role and expertise, which
radically transform the relation between a people and the more
importance practices of their society. In a “pre-legal” society—to the
extent that one can use that term\(^{57}\)—rules are not supposed to have any
presence in society apart from their being practiced and their having a
shared normativity—their “internal aspect”—in the minds and actions of
those who practice them.\(^{58}\) Maybe people say or chant something as they

\(^{53}\) Green, supra note 32, 1698.

\(^{54}\) HART, CONCEPT OF LAW, supra note 9, at 91-7.

\(^{55}\) Ibid., 202. See also ibid., 201, where Hart suggest that the organized power of a “developed” legal
system “may be used to subdue and maintain, in a position of permanent inferiority, a subject group
whose size, relatively to the master group, may be large or small, depending on the means of coercion,
solidarity, and discipline available to the latter, and the helplessness or inability to organize of the
former. For those thus oppressed there may be nothing in this system to command their loyalty but only
things to fear. They are its victims, not its beneficiaries.” For discussion, see Waldron, All We Like
Sheep, supra note 31, and Green, supra note 46, 1701-2 and 1704.

\(^{56}\) What follows in the next few paragraphs is adapted from Waldron, All We Like Sheep, supra note 31,
at 177-9.

\(^{57}\) See supra text accompanying notes 48-51.

\(^{58}\) HART, CONCEPT OF LAW, supra note 10, at 88-91.
practice the rule, but they are not conceived to have a verbalized rule-
book existence apart from their presence in conduct and attitude. 59

To say that rules have this immediate presence in the lives of those
subject to them, doesn’t rule out the possibility that the “primitive” rules
may be cruel, repressive, pointless, or exploitative. Still, the development
of law may portend something even worse. Law cannot develop among a
people unless primary rules change their mode of social existence. For
secondary rules to evolve, it must be the case that primary rules are
changing their character, becoming increasingly manipulable apart from
their implicit presence in the conduct and attitudes of those whose lives
they govern. Gradually, primary rules become detached from ordinary
social practice in a way that allows them to be contemplated and
discussed, in social or political deliberation, as possible objects of
deliberate change or as possible objects of explicit interpretation. As
secondary practices of deliberation, interpretation and rule-change
become established in the community, both those practices and the
primary rules they validate may begin to seem increasingly distant from
ordinary people's ways of life. Unfortunately, this alienation of (newly)
changeable rules from the practices that previously embodied them
presumably does not mean that the rules have diminished in their
effectiveness as a basis for regulating social life. Instead, the introduction
of secondary rules implies a difference in the way that primary rules
impact on the lives of ordinary people. The primary rules can now be
enforced, in a way that more than makes up for the loss of their intimate
connection with practice. (This accords with the development of
secondary rules of enforcement and the specialist executive apparatus
associated with the development of law.) The upshot is—as I said—that
primary rules come to have a presence in the lives of those subject to
them that is quite different from their role in pre-legal society. On the one
hand, ordinary people will not necessarily have the intimate familiarity
with the rules that they used to have: they will be, in that sense, alienated
from the rules. And the rules will begin to impact on their lives as much
through the work of a dedicated apparatus of coercion as through the
normative to-and-fro of a shared internal attitude, perhaps even more so.

I mention all this to drive home the point that Hart’s attempt to
draw some distinction—even a blurred and hesitant distinction—between
the sort of legal system that positivists are supposed to privilege and the

59 Hart’s debt to Peter Winch and Ludwig Wittgenstein is well known in this regard. Both of these
thinkers emphasized the importance of implicit practice and non-formulaic rule-following. See PETER
WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 57 ff. (1958); for an
acknowledgment of the connection, see HART, CONCEPT OF LAW, supra note 9, at 289. See also
81ff. and 88 (paras. 201ff. and 241).
sort of normative order that pluralists are interested in is not associated with the denigration of the latter as problematic. He—as much as the pluralists—sees customary law as just a different kind of normative order from the formal official law of a “developed” legal system. Both kinds of normative order have their advantages; both have their dangers.

What one doesn’t get from Hart, however—and this is what the legal pluralist should object to—is a useful sense of what things are like when the two kinds of order (or elements of the two kinds of order) exist side-by-side in a given social setting. There must be such cases on Hart’s account; the dynamics of the story require it, at least for an intermediate stage. But the impression one gets from what Hart says in The Concept of Law is that the emerging rule of recognition will set about systematising things pretty smartly, so that one will not get much more in the way of customary law/official law coexistence than we find in the legal systems discussed above under heading (i). This, I think, is a product of Hart’s tendency to exaggerate the unity of modern legal systems, i.e. to exaggerate how well-organized they tend to be. It means that one of the most intriguing aspects of modern law-- its tendency to generate conflict among its provisions and dissensus among practitioners as to what, in net terms, it requires--is downplayed in Hart’s account.

By contrast with Hart, legal pluralists are extremely interested in this dissensus aspect of law. And they are by no means alone in this. In their different ways, Dworkinians are also preoccupied with this aspect, and so too are practitioners of Critical Legal Studies (assuming there are any left).

4. Pluralism and Lon Fuller’s Jurisprudence
I have several different things to say about Lon Fuller’s relation to legal pluralism. Some are about the empirical and conceptual structure of his jurisprudence. But I think the most interesting things I have to say concern the relation between legal pluralism and the normative implications of his theory of the inner morality of law. This latter discussion is located in sub-section (f) below.

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60 Hart, Concept of Law, supra note 10, at 95.
61 I am grateful to John Gardner for this point. See also Joseph Raz, Practical Reason and Norms 147 (New edition, 1999), for an argument against Hart’s implicit assumption that a given legal system has only one rule of recognition.
62 For Dworkin’s interest, see Ronald Dworkin, Law’s Empire (1986), on disagreement about law and on the principle of integrity as a response to the tendency of law to produce a non-unified patchwork. (See also Jeremy Waldron, The Circumstances of Integrity, 3 Legal Theory 1 (1997).) For the Crits, see, e.g., Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harvard Law Review 1685, at 1690 and 1774 ff. (1976).
(a) Fuller on custom
In his book, Law, Culture and Society, Roger Cotterrell observes that “[s]ome jurists … have found no difficulty and much value in adopting a pluralistic view of law. They have wished to benefit from a sociological broadening of lawyers’ perspectives.”63 Lon Fuller is one of the jurists he cites in this passage. He does so not on account (or not directly on account) of anything Fuller said in the exchange with Hart that we are celebrating at this conference; the only thing there that would make one think he was sympathetic to pluralism is his general opposition to the sort of positivist jurisprudence that (as we have just seen) appears uninterested in, and is widely regarded as hostile to, legal pluralism. Cotterrell identifies Fuller as a pluralist on account of some articles that Fuller published in the late 1960s.

In an essay entitled “Human Interaction and the Law,” Fuller criticized the neglect of customary law in contemporary jurisprudence, insisting that “we cannot understand ‘ordinary law’ (that is, officially declared or enacted law) unless we first obtain an understanding of what is called customary law.”64 One of the things this understanding would reveal, said Fuller, was the relation between law and social environment: “[L]aw and its social environment stand in a relation of reciprocal influence; any given form of law will not only act upon but be influenced and shaped by, the established forms of interaction that constitute its social milieu.”65 And he made similar claims in a number of other papers, criticizing modern jurisprudence for what he called “a grotesque caricature of what customary law really means in the lives of those who govern themselves by it.”66

This emphasis on custom is certainly hospitable to legal pluralism, particularly the kind of pluralism that emphasizes the roots of law in social mores and discerns multiple legal orderings even in advanced modern legal systems.

(b) Fuller on the transition from custom to enacted law.
That said, however, it is worth noting that Fuller was far from an enthusiast for the persistence of customary legal systems. In one of the articles I have alluded to, there was a section entitled “Establishing the

63 Cotterrell, supra note 32, 37.
65 Ibid., 27.
Rule of Law among Peoples who are not Accustomed to Thinking of Law as Something Made or Enacted,” where Fuller discussed the transition from customary law to modern law. He said:

[T]he task of the new nation … is to bring under a single system of rules peoples who have previously been divided legally by tribe, dialect, skin color, caste, occupation and place of residence. Where previously there may have been almost as many legal systems as there were cultural divergencies within the population, the new nation must establish as rapidly and effectively as it can, a common legal order for all its citizens. This is a tremendous undertaking.

He actually criticized those who suggested not trying to undertake this at all, i.e. those who suggested that new nations should “stick by their rules of customary law and forego any venture into the unfamiliar field of enacted law.” Such suggestions were hopeless, he maintained, because customary law, being a system for “intimate face-to-face relations” could not be expected to rise to the challenge of more distant and impersonal dealings. In this context, his insistence that we have to understand custom is so that we can grasp the scale and depth of the problem involved in its supersession. I don’t think this attitude of Fuller’s should be congenial to a legal pluralist.

(c) Fuller on “miniature legal systems” in modern societies
As I said a moment ago, legal pluralists would probably be more attracted to Fuller’s remarks on the role of custom and clusters of custom in the life of a modern society. In “Human Interaction and the Law,” he said that we should be interested in “not only the legal systems of states and nations, but also the smaller systems—at least ‘law-like’ in structure and function—to be found in labor unions, professional associations, clubs, churches, and universities.” He called these “miniature legal systems,” and what he said about them indicated considerable sympathy for the project of modern legal pluralism.

So, for example, in The Morality of Law, when Fuller discussed what he called “multiple systems” (“the existence of more than one system of law governing the same population, the main example he gave

67 Fuller, The Law's Precarious Hold, supra note 66, at 537.
68 Ibid., 542.
69 Idem.
70 Fuller, Human Interaction, supra note 64, at 1.
71 Idem.
was the co-existence of state law and the parietal “laws” administered by a college.\textsuperscript{72} This may not be the sort of example that more ethnically-attuned pluralists have had in mind, but what Fuller said about it was certainly congenial to pluralism’s abstract project. Ordinary linguistic usage is not determinative, he said; we should consider the impact that bad jurisprudence has had upon it.\textsuperscript{73} We should extract from “law,” he said, “any connotation of the power or authority of the state.” If law is the enterprise of subjecting human conduct to rules, “then this enterprise is being conducted, not on two or three fronts, but on thousands.”\textsuperscript{74} Any attempt to avoid pluralism by analyzing the parietal rules example within the categories of contract rather than as one of several bodies of law operating in society is both question-begging and obfuscat[ing].\textsuperscript{75} A sociologist might study the administration of parietal rules as law “for the insight he might thus obtain into the processes of law generally.”\textsuperscript{76} In modern life, these miniature legal systems may be as important to people as state law: the “imperfectly achieved systems of law within a labor union or a university may often cut more deeply into the life of a man than any court judgement ever likely to be rendered against him.”\textsuperscript{77} And so on.

(d) Fuller on communities of interpretation
Pluralists are of course interested in the interaction (and possible conflict) between “subordinate” and official state-sponsored normative orders. Fuller was too, though at times the mode of his interest was slightly different from the pluralists’. He was interested in ways in which attention to “miniature legal systems” or low-level normative orderings might actually be of service to the dominant official state-sponsored legal system, and ways in which the dominant official state-sponsored legal system might be harmed or frustrated by neglecting them.

And here—at last!!—we come to something that was actually present in the 1958 exchange. In his response to Hart, Fuller considered how important it is for judges interpreting legislation to be aware of the

\textsuperscript{72} FULLER, MORALITY OF LAW, supra note 9, at 125-9.
\textsuperscript{73} Ibid., 125, 126-7, and 129.
\textsuperscript{74} Ibid., 124. See also Hart’s account of this in his review of Fuller’s book: H.L.A. Hart, Book Review: The Morality of Law by Lon L. Fuller, 78 HARVARD LAW REVIEW 1281 (1965), at 1281.
\textsuperscript{75} FULLER, MORALITY OF LAW, supra note 9, 127-9. Fuller has in mind monists who would say that the parietal rules are not a distinct miniature legal system, but rather the terms of a contract (between student and college) recognized by the overarching state-sponsored legal system.
\textsuperscript{76} Ibid., 125.
\textsuperscript{77} Ibid., 129.
practices and norms of the community that the legislature purported to regulate:

Let us suppose the case of a trial judge who has had an extensive experience in commercial matters and before whom a great many commercial disputes are tried. … [O]ur judge has of course the duty to follow the law laid down by his supreme court. Our imaginary Scrutton has the misfortune, however, to live under a supreme court which he considers woefully ignorant of the ways and needs of commerce. To his mind, many of this court's decisions in the field of commercial law simply do not make sense. … So far as his problem arises from the use of particular words, he may well find that the supreme court often uses the ordinary terms of commerce in senses foreign to actual business dealings. If he interprets those words as a business executive or accountant would, he may well reduce the precedents he is bound to apply to a logical shambles.78

The immediate force of this point in Fuller’s account is that the judge in question “can never achieve a satisfactory resolution of his dilemma unless he views his duty of fidelity to law in a context which also embraces his responsibility for making law what it ought to be?”79 But for a discussion of pluralism, the immediate point is that he cannot approach that task without sensitivity to the normative orderings of the commercial world, which may well not coincide with the normative orderings sponsored directly by the state and its courts.

It is not the most explicit or sustained endorsement of pluralism in the history of jurisprudence, however, and Fuller quickly spoils the effect in a later section of “Positivism and Fidelity to Law,” by saying that what Hart’s approach to interpretation and the resolution of had cases neglects is not attention to the norms and mores of subordinate communities but attention to legislative purpose.80 Indeed he suggests that to interpret a word in a statute regulating (say) administrative practice in medicine or schools,

we do not proceed simply by placing the word in some general context, such as hospital practice, town planning, or education. If this were so, the “improvement” in the last instance might just as well be that of the teacher as that of the pupil. Rather, we ask

78 Fuller, Positivism and Fidelity to Law, supra note 3, 646-7.
79 Ibid., 647.
80 Ibid., 661-9.
ourselves, What can this rule be for? What evil does it seek to avert? What good is it intended to promote?

Here the perspective that requires attention appears to be the perspective of the central regulator, not that of the community being regulated.

(e) Fuller on the separation of law and (positive) morality

Beyond these particular hints and evasions, is there anything more general in Fuller’s opposition to legal positivism that would tend to favour legal pluralism. Fuller is anxious in his 1958 response and in all his work to blur the allegedly sharp line between law and morality. This might mean that, sociologically speaking, he will find it easier than Hart did to recognize entities in between state law, on the one hand, and something like Kantian morality, on the other. Fuller’s comments elsewhere about “miniature legal systems,” systems that were “at least ‘law-like’ in structure and function” bear this out. He thought a contrast between law and morality was often simplistic. In positivist jurisprudence, he complained,

the word “morality” stands indiscriminately for almost every conceivable standard by which human conduct may be judged that is not itself law. The inner voice of conscience, notions of right and wrong based on religious belief, common conceptions of decency and fair play, culturally conditioned prejudices--all of these are grouped together under the heading of “morality” and are excluded from the domain of law. For the most part Professor Hart follows in the tradition of his predecessors. When he speaks of morality he seems generally to have in mind all sorts of extralegal notions about “what ought to be,” regardless of their sources, pretensions, or intrinsic worth.

And elsewhere he also protested that

much that is written today seems to assume that our larger society is enabled to function by a combination of the individual’s moral sense and social control through the threatened sanctions of state-made law. We need to remind ourselves that we constantly orient

\[81\] Remember, however, that we have seen already how flexible Hart’s theory can actually be in this regard: see supra text accompanying notes 48-51.

\[82\] Fuller, Human Interaction, supra note 64, at 1. See supra text accompanying notes 70-1.

\[83\] Fuller, Positivism and Fidelity to Law, supra note 3, 635.
our actions toward one another by signposts that are neither set by
‘Morals,’ in the ordinary sense, nor by words in lawbooks.\textsuperscript{84}

This protest against the over-use of the term “morality” complements his
own willingness to be quite expansive in his use of the word “law,” but--
more than that--to just deny the utility of both the alleged separation
between the two and the idea that a dichotomy, as opposed to a whole
array of categories, is what we most need in this area.

\textbf{\textit{\textbf{(f) Fuller, pluralism, and the inner morality of law}}}

I said earlier that the distinction between law and morality (and Fuller’s
blurring of it) can be understood (i) as a distinction between two positive
systems of practised norms (positive law and positive morality) or (ii) as
a distinction between law and legal judgements, on the one hand, and
critical moral judgments on the other. What we have just been discussing
is (i). But plainly Hart cared most about (ii)—for example, in his famous
definition of legal positivism: “the simple contention that it is by no
means a necessary truth that laws reproduce or satisfy certain demands of
morality.”\textsuperscript{85} And I think Fuller did also: the bulk of his energies both in
the 1958 article and in The Morality of Law were devoted to a denial or
qualification of distinction (ii).

Fuller’s position was that any claim about the strict separability of
law and morality in the second sense was doomed to founder upon the
fact that the enterprise of law and law-making already embodied certain
moral principles in and of itself, principles which in turn were connected
to wider moral concerns. “Law,” he said, “contains … its own implicit
morality,”\textsuperscript{86} which we find in principles such as those prohibiting
retroactivity and purely \textit{ad hoc} adjudication and principles requiring
publicity, generality, and coherence in the laws. And these principles
have “external moral significance as well. For example, Fuller says, if he
or Professor Hart found themselves to be members of a despised minority,
they might think themselves safer if the community in which they were
despised was a community ruled by law (rather than by some other mode
of governance).

If we felt that the law itself was our safest refuge, would it not be
because even in the most perverted regimes there is a certain
hesitancy about writing cruelties, intolerances, and inhumanities
into law? And is it not clear that this hesitancy itself derives, not

\textsuperscript{84} Fuller, \textit{Human Interaction}, supra note 64, at 36.
\textsuperscript{85} \textit{HART, CONCEPT OF LAW}, supra note 10, 185-6.
\textsuperscript{86} Fuller, \textit{Positivism and Fidelity to Law}, supra note 3, 645.
from a separation of law and morals, but precisely from an identification of law with those demands of morality that are the most urgent and the most obviously justifiable, which no man need be ashamed to profess?87

This is not the place to embark on an evaluation of Fuller’s thesis of the inner morality of law (nor of the intellectual respectability of Hart’s peremptory dismissal of it).88 The question is: how does this aspect of Fuller’s jurisprudence relate to his sympathy (or otherwise) for legal pluralism?

The first thing to note is that Fuller believed the inner morality of law might apply as much to subordinate legal systems—the miniature legal systems of professions, labor unions, and colleges—as to a large-scale official legal system. We should be prepared to ask, e.g. of the college’s parietal rules in our earlier example, “Did the school in creating and administering its parietal rules respect the internal morality of law?”89 And just as Fuller did not flinch from saying that an official state-level system of governance “which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system,”90 so too he presumably would not flinch from saying that certain small-scale orderings might fail the test of law’s internal morality as well.91 He would refuse to recognize them as law, not because they were insufficiently official or coercive, but because they were insufficiently moral (in the sense of the inner morality of law).

An even more interesting issue arises when we consider the application of law’s internal morality, not just to the official state-sponsored legal system and not to the miniature legal systems one by one, but to the whole “big picture” of law in a pluralistic setting. The values lying behind the inner morality of law require that we consider this also:

87 Ibid., 637.
88 But see Waldron, Hart and the Principles of Legality, supra note 4 and also Jeremy Waldron, Positivism and Legality: Hart’s Equivocal Response to Fuller, forthcoming 83 NEW YORK UNIVERSITY LAW REVIEW (2008), presently available at http://www.law.nyu.edu/conferences/hartfuller/readings/index.htm

89 FULLER, MORALITY OF LAW, supra note 9, 126. By the way, see Diamond, The Rule of Law versus the Order of Custom, supra note 52, at 45-6, for the claim that Nazi governance undermined local German custom. This is not a claim that Fuller made and he certainly would have dissented from Diamond’s formulation, which was that it was the excessive legalism of the Nazis that had this effect.

90 Fuller, Positivism and Fidelity to Law, supra note 3, 660.
91 On a related matter, he was certainly willing to concede that some aspects of state governance might not have a legal character, indeed that they ought not to have such a character. He says this, towards the end of his book about economic management in the United States: see FULLER, MORALITY OF LAW, supra note 9, at 170-7.
inasmuch as the inner morality of law is concerned about the dignity and freedom of a person confronted with legal demands, and inasmuch as a given person may be impacted by several legal systems (or thousands of them) in a pluralistic setting, we have to be willing to look to how the inner morality of law applies to the overall situation of people who actually have to face these multiple demands.

And here at last I think we begin to see that there may be some normative tension between Fuller’s legal pluralism, such as it is, and his thesis of law’s inner morality. One way of understanding Fuller’s inner morality of law—indeed one way of understanding the Rule of Law or principles of legality—is that they serve the function of keeping the law “in good shape” so far as the formal and procedural ways in which it impacts individual freedom and dignity are concerned. A case can be made that a pluralistic situation is in fact characteristically not one in which law in a society is “in good shape.”

One obvious aspect of this is the possibility of contradictory demands. Non-contradiction is one of Fuller’s eight principles of the internal morality of law. It is important to see that this is not a technical matter: Fuller thinks that freedom and dignity are impaired when an individual faces contradictory demands. In a single legal system the problem of inconsistency is managed by principles such as lex posterior derogat priori; but it is not clear how this can work in a setting where multiple systems are in play. Fuller's jurisprudence, then, seems to imply that legal pluralism should be seen as something of a problem in this regard. Fuller acknowledges this when he concedes that “[p]ractical difficulties can arise when there is a real rub between systems,” and he implies that the problem has to be solved by somehow making the overall legal setting more “systematic” by setting out clear “boundaries of competence or rules of over-arching adjudication.” This amounts in effect to trying to reduce the extent of genuine pluralism, and normatively, it counsels against any policy that would seek to promote pluralism in a society. True, conflict between systems is not inevitable and it may be managed informally:

Historically dual and triple systems have functioned without serious friction and when conflict has arisen it has often been solved by some kind of voluntary accommodation. This happened

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92 Ibid., 162.
93 Cf. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 272 (1980), saying that “the Rule of Law” is “[t]he name commonly given to the state of affairs in which a legal system is legally in good shape.
94 FULLER, MORALITY OF LAW, supra note 9, 39 and 65-70.
95 Ibid., 124.
in England when the common law courts began to absorb into their own system many of the rules developed by the courts of the law merchant though the end of this development was that the merchants’ courts were finally supplanted by those of the common law.96

But again, this formulation seems to suppose that in the end the problem will be solved by greater systematicity, institutionally if not at the level of the rules themselves.

I think something similar has to be said about Fuller’s eighth principle of the inner morality of law: congruence between law on the books and official action.97 Clearly it can be applied to miniature legal systems one by one: they must take care that their officials (if they have officials) actually follow the rules that are communicated to their constituents.98 But there is a problem too with regard to the enforcement and administration of conflicting standards in society generally. In a legally pluralistic society, the ordinary person may find himself at the mercy of cross-cutting enforcement by rival gangs of “judges” and “officials,” and that may have just as much impact on his dignity and freedom (probably much more) than problems of incongruence within a single legal system.99

I emphasize these points about congruence and consistency, and the ways they might motivate a negative response to legal pluralism (inasmuch as legal pluralism is something one can do anything about), because they help us see that the repudiation of a vertical top-down command theory of law is by no means wholly congenial to legal pluralism. Fuller’s position is that we cannot see the point of principles like consistency or congruence until we begin to understand law as a more-or-less horizontal enterprise of reciprocity between law-maker and law-subject.100 But once we do espouse a conception of law that emphasizes reciprocity, then instead of sitting back and enjoying the colourful diversity and dissensus of legal pluralism, we will begin to understand why every participant in every legal enterprise in a given society has reason to try to reduce the number and extent of incompatible problems.

96 Idem.
97 Ibid., 39 and 81-91.
98 For the “officials” of small-scale legal systems, see the passage by Roger Cotterrell cited, supra, in text accompanying note 32.
99 See also the discussion of this problem of cross-cutting enforcement and the demand for coherence in Jeremy Waldron, Kant’s Legal Positivism, 109 HARVARD LAW REVIEW 1535 at 1539-40 and 1556-62 (1996).
100 See FULLER, MORALITY OF LAW, supra note 9, at 192-5.
demands that a pluralistic situation gives rise to and to try to reduce also the amount of disparate actions in the way of enforcement and administration that the presence in a single society of multiple legal systems is likely to generate.

The last thing I want to say in this regard is to point out the implications of Rule-of-Law principles of generality and legal equality so far as legal pluralism is concerned. When people have expressed alarm about the prospects of shari'a courts being set up in (say) England or Ontario or about the admission of “cultural defenses” to criminal charges, some of that alarm has been about substantive matters: for example, the impact that shari'a might have on the position of Muslim women or about the way in which cultural defenses might legitimize domestic violence or sexual abuse. But some of the concerns have been more abstract, concerns about legal equality or a concern that the law should be the same for all in a given society. It is a venerable theme in the Rule-of-Law tradition. When we talk about the Rule of Law, said Dicey in 1885, we mean

not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

Our belief in the Rule of Law commits us to the principle that the law should be the same for everyone: one law for all and no exceptions. "In England," said Dicey, "the idea of legal equality, ... of the universal subjection of all classes to one law" is key to the way we interpret the Rule of Law.

This notion of legal equality is not exactly what Lon Fuller means when he talks of generality as the first principle of the inner morality of law, but it is connected with it. He was mostly interested in what he called “the obvious truth that the citizen cannot orient his conduct if what

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103 This paragraph is adapted from Jeremy Waldron, One Law for All: The Logic of Cultural Accommodation, 59 WASHINGTON AND LEE LAW REVIEW 3 (2002).

104 FULLER, MORALITY OF LAW, supra note 9, 39 and 46-9.
is called law confronts him merely with a series of sporadic and patternless exercises of a state power.”  

But he did glimpse the connection between generality and the formal justice of treating like cases alike, and just like H.L.A. Hart, he toyed with the idea that this might presage an important connection, at a very abstract level, between the idea of law and the idea of justice. 

My point in the present context is that this justice- or fairness-related virtue of law is liable to be lost in circumstances where different members of the same society are dealt with according to different legal systems on the basis of different sets of norms. It will not help to say that those subject to a given legal system or sub-system are being dealt with on the basis that “like cases are to be treated alike” by the lights of that system or sub-system. For they will be neighbors or colleagues or customers or competitors (or just fellow citizens) of those who are being treated by other standards and it is inevitable—given that, on the pluralist account, these rival systems are supposed to be operating in the same social field—that these discrepancies will seem unfair and invidious. Those who see them in this way, or those who have not deafened themselves to this complaint in the name of their social-theoretic commitment to the delights of “diversity,” will understand the worry and, to the extent that they can do anything about it, they might want to commit themselves to opposing or reducing or mitigating the legal pluralism of their society.

5. Conclusion.

One of the things I have tried to do in this paper is dispel the impression that it is the so-called vertical or top-down character of their jurisprudence that makes it difficult for legal positivists like H.L.A. Hart to apprehend the delights of legal pluralism.

Hart did acknowledge and leave room for some of the possibilities that legal pluralism draws attention to. To the extent that he is uninterested in these possibilities, it is not because of the vertical structure of his theory. For one thing Hart’s jurisprudence is not, straightforwardly, a top-down theory. For another, his lack of interest in pluralism is really a product of his not thinking that the facts that

105 Ibid., 110.
107 [Note to self: maybe use this to complement the “refugee camp” analogy in Storrs 2.]
pluralism draws attention to are very important. He is just not as excited about those possibilities as they are.\textsuperscript{108}

Fuller is interested in the possibilities that legal pluralism draws attention to, particularly so far as they relate to the legal and social complexity of modern societies. But in his case, too, I think this interest is independent of whether jurisprudence is conceived in top-down terms. Indeed, the abandonment of top-down jurisprudence is cited by Fuller as a basis for his adoption of principles that—as it turns out—are actually quite hostile to pluralism, principles that regard it as a matter of concern and dismay when people are subject to disparate and incompatible legal demands, vulnerable to the cross-cutting administrative, judicial and enforcement efforts of rival groups of “official,” and dealt with unequally on the basis of disparate norms and procedures that make a mockery of generality, legal equality, and the idea that like cases should be treated alike.

\textsuperscript{108} [If I said what I really thought, I would add:
\ldots and their excitement is partly born of a conviction that legal pluralism might discredit Hart’s jurisprudence, which they regard as an unhealthy orthodoxy in jurisprudence. (See, e.g., Roberts, After Government, supra note __, at 10: “The Concept of Law is best read as a Swan Song, one great, late attempt to perfect a long dominant way of looking at law, rather than the radical departure it is sometimes presented as.”) This kind of brings us full circle, and I am not sure who emerges from it with less credit.]