

## AN UNOBEYABLE LAW IS NOT A LAW: LON FULLER'S "DESIDERATA" RECONSIDERED

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### ABSTRACT

*In this Article, I discuss the question of Lon L. Fuller's proper placement within the outline of legal theory, particularly the extent to which he can be viewed as defending a kind of natural law tradition. In considering this question, I advance three closely related claims about Fuller's conception of the rule of law. First, I claim that his eight "desiderata" are formal features of a legal system, and I rebut a recent argument by Professor John Gardner, who suggests that modality, rather than formality, better describes the rule of law. Second, I claim that the formal desiderata can be viewed as both inclusion conditions by which, per Fuller, law can be identified, and as standards by which law so identified may be judged. In other words, the rule of law for Fuller is not merely a set of standards but is also part of his concept of law in that a certain threshold compliance with the rule of law is necessary for a form of social ordering to qualify as law at all. I answer Hart's "instrumentalist" attack on Fuller, claiming that, though law may be "compatible with very great iniquity," as Hart asserts, there are particular iniquities law tends to cabin and subdue. Finally, I argue that the eight desiderata can plausibly be subsumed under the heading of Fuller's sixth desideratum, that law not be impossible to obey. The latter desideratum deserves pride of place because it underscores what is central to Fuller's concept of law more generally, namely, the inherent assumption of and respect for what Professor Kristen Rundle has recently described as the dignity and responsible human agency of those subject to law. I conclude that Fuller differs from natural law theorists insofar as his formal concept of rule-of-law-compliant law is largely indifferent to the justness of law's substantive aims but that, contra positivism, Fuller views law as a system of social ordering in which certain moral choices have already been made – choices reflected in the tendency of the desiderata to promote justice and respect for the citizen subject to law.*

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## INTRODUCTION

Consider the ancient maxim *lex iniusta non est lex*: an unjust law is not a law.<sup>1</sup> Norman Kretzmann has suggested that no fewer than Plato, Aristotle, Cicero, Augustine, and Aquinas would all endorse some version of this fraught proposition,<sup>2</sup> and yet seemingly few today would accept it without qualification. But why not? True, it appears to assert that a kind of law is not a kind of law — a contradiction. But, as David Lyons has pointed out, we shouldn't let the odd syntax trouble us very much, at least not unless we are also troubled by sentences like "a counterfeit dollar is not a dollar."<sup>3</sup> Still, Kretzmann thinks the "counterfeit dollar" analogy imperfect "because a counterfeit dollar is not a dollar in *any* respect."<sup>4</sup> The *non-est-lex* proposition, by contrast, is reserved for (putative) instances of law that satisfy all of law's non-evaluative inclusion conditions, failing only with respect to an evaluative condition, namely, that law be just.<sup>5</sup> It suggests not so much a *counterfeit* of law as a *perversion*<sup>6</sup> and in this respect strikes us as a kind of dismissive hyperbole akin to the phrase "You're no son of mine!", which of course lacks all invective force except against the speaker's son.<sup>7</sup>

To the modern observer, the obvious problem with the more literal interpretation of the *non-est-lex* proposition is that it conflates a statement of fact with one of value, or, in Hume's familiar formulation, an

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1. Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience*, 33 AM. J. JURIS. 99, 101 (1988).

2. *Id.*

3. *Id.* at 105 (quoting DAVID LYONS, *ETHICS AND THE RULE OF LAW* 62 (1984)).

4. *Id.* at 105.

5. *Id.*

6. *Id.*

7. *Id.* at 103.

is with an *ought*.<sup>8</sup> An idea that has continuing resonance today, traceable, with some precursors, to the early legal positivism of John Austin, is that law is but a system of orders issued by the sovereign and backed by sanctions and that, as such, law simply has no evaluative inclusion conditions, only factual ones; the question of what the law *is* is separate from the question of what it ought to be.<sup>9</sup> This concept of law has of course received significant refinement, most importantly from H.L.A. Hart, who observed that Austin's order-*cum*-sanction (or *command*) model fails to account for several of law's distinguishing features, such as its continuity across successive sovereigns, its persistence through time, and its *normativity*, or tendency to induce a sense of obligation in those subject to it.<sup>10</sup> Rather than view law as a system of commands, Hart proposed a model of *rules*: primary rules that govern conduct; and secondary rules that tell us what the primary rules are, how to change them, and how and by whom they are to be enforced.<sup>11</sup> Significant though they are, Hart's refinements leave largely intact Austin's "separability" thesis. In Hart's own words, there is "no necessary connection" between law and morality;<sup>12</sup> an unjust law is still very much a law.

At one extreme, then, we find the natural law doctrine of the ancients from Plato down to Aquinas, and at the opposite we find Austinian positivism. Between these two positions, but not very far to left of Austin, is Hart's moderating view of the command theory that does so little to moderate the separability thesis. With these reference points in mind, where along this continuum might we locate the legal theory of Lon Fuller? One temptation has been to place him roughly in the same column as the ancients – to interpret him as holding, in essence, that some law-like systems or decrees are simply "too unjust" to be dignified with the name of law. Fuller himself disavowed this position, expressing frustration with those – he thought them numerous – who imputed it to him.<sup>13</sup> But if this wasn't Fuller's position, what was?

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8. DAVID HUME, A TREATISE OF HUMAN NATURE 293–302 (David Fate Norton and Mary J. Norton, eds., Oxford University Press 2000) (1739).

9. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184 (Prometheus Books 2000) (1832) ("The existence of law is one thing; its merit or demerit is another.").

10. See H.L.A. HART, THE CONCEPT OF LAW 50–78 (2d ed. 1994).

11. *Id.* at 79–99. For purposes of this Article, I omit discussion of Hart's other important insights into the concept of law, such as the fact that many laws are "power-conferring" rather than "duty-imposing" rules. *Id.* at 27–33.

12. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601 n.25 (1958).

13. See KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER 72 (2012).

I believe Fuller can be read as making a more nuanced and more defensible claim. In much the way that Hart thinks the unalloyed commands of an Austinian sovereign fail to capture our intuitions about the imperatives imposed by what we call law, so too does Fuller think salient features of law as it is generally understood are missing from Hart's account. Among these are the formal features ordinarily classified under the heading of "the rule of law," which Fuller famously enumerated as law's "desiderata" in his allegory of King Rex and the "Eight Ways to Fail to Make Law."<sup>14</sup>

In this Article, I defend three closely related claims about Fuller's conception of the rule of law and its relationship to his concept of law more generally. In Part I, I claim that the eight desiderata are best thought of as *formal* features of a successful legal system.<sup>15</sup> This proposition is hardly original; numerous others have made a similar claim, albeit often only in passing.<sup>16</sup> But even where the proposition has received sustained defense in the literature, its defenders have been perhaps insufficiently specific about what is meant by "formality" in this context. Such is the basis for a recent argument by Professor John Gardner, who suggests that modality, rather than formality, better describes the rule of law.<sup>17</sup> Much of Part I is devoted to answering Gardner's argument against viewing the rule of law as a matter of form. The importance of establishing the formality of the desiderata is that it helps differentiate Fuller from the type of natural law theorist who would invite an open-ended inquiry into the justness of law's substantive aims.

Continuing along this line, in Part II I claim that the formal desiderata can be viewed as both *inclusion conditions* by which, per Fuller, law can be identified, and as *standards* by which law so identified may be judged.<sup>18</sup> In other words, the rule of law is not merely a set of standards but is also part of Fuller's *concept* of law in that a certain threshold compliance with the rule of law is necessary for a form of social ordering to qualify as law at all. Once again, this claim is not new: Professor Jeremy Waldron has defended his own version of this claim at some length.<sup>19</sup> The claim matters here because it resolves a

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14. See LON L. FULLER, *THE MORALITY OF LAW* 33-38 (rev. ed. 1969).

15. See *infra* notes 25-67 and accompanying text.

16. See, e.g., JOSEPH RAZ, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW* 210, 214 (1979).

17. JOHN GARDNER, *The Supposed Formality of the Rule of Law*, in *LAW AS A LEAP OF FAITH* 195, 205-11 (2012).

18. See *infra* notes 68-99 and accompanying text.

19. Jeremy Waldron, *The Concept and the Rule of Law*, 43 *GA. L. REV.* 1, 5 (2008).

sort of dilemma that arises from the famous debate between Hart and Fuller, and by Hart's observation that Fuller's desiderata are, like a "morality of poisoning,"<sup>20</sup> "compatible with very great iniquity."<sup>21</sup> In this Part, I conclude that, while there indeed exist great iniquities with which a Fullerian system may be compatible, Fuller is best understood as holding that a very particular set of iniquities characterizes non-legal or failed-legal modes of social ordering and that these iniquities are subdued within a system of what we call law. Once again, not just any unjust substantive aim will disqualify putative law as law, but, among law's formal properties, properly understood, are certain formal features that are indeed concerned with eschewing certain injustices.

In Part III I consider an aspect of the desiderata that has been remarked upon very frequently in passing but largely neglected as a standalone subject for analysis: the fact that most of the desiderata can plausibly be subsumed under the heading of Fuller's sixth desideratum, that law not be impossible to obey.<sup>22</sup> Fuller himself acknowledges this possibility but brushes it aside in a footnote as being too reductive for his purpose of differentiating among the various particular ways in which law might fail.<sup>23</sup> But where Fuller's purpose is to differentiate, mine is to explore the common theoretical underpinnings that best explain his different desiderata. At first blush this line of inquiry may strike some as orthogonal to my larger point about Fuller's position along the legal-theoretical spectrum between positivism and natural law. And it is true that, despite this Article's title, I do not propose a simple heuristic whereby law can be picked out solely by reference to its obeyability. On the contrary, as with the other desiderata, obeyability is a floor, not a ceiling, and the value in exploring it is mostly negative, stemming from the fact that its breach most potently exemplifies what Fuller would view as a failure of law, especially within an ostensibly law-like system. Drawing on scholarship by Professor Kristen Rundle, I argue that the obeyability desideratum, above all, has the most conspicuous implications for what is central to Fuller's concept of law more generally, namely, the assumption of and respect for the dignity and responsible human

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20. H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1286 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)).

21. HART, *supra* note 10, at 206-07.

22. FULLER, *supra* note 14, at 70.

23. *Id.* at 70 n.29.

agency of those subject to law.<sup>24</sup> And, unlike the *non-est-lex* proposition of natural law, there is nothing either incoherent or hyperbolic about the proposition that a (putative) law that cannot be obeyed is best thought of as no law at all.

### I. ON THE FORMALITY OF FULLER'S DESIDERATA

Lon Fuller's *The Morality of Law* contains one of the best known figures in the canon of legal theory. In the allegory of King Rex and the "Eight Ways to Fail to Make Law," the hapless king and would-be legal reformer cycles through several clumsy attempts at becoming an effective lawgiver to his kingdom, each attempt suffering from some grave defect or deficiency that Rex fails to anticipate.<sup>25</sup> Corresponding to Rex's eight failures, Fuller lays out eight "desiderata" that he believes a system of laws must minimally possess in order to oblige the obedience of citizens.<sup>26</sup> These desiderata together constitute what Fuller calls the "internal morality" or "inner morality"<sup>27</sup> of law, and their existence allegedly refutes positivism's central thesis that there is "no necessary connection" between morality and law.<sup>28</sup> The eight desiderata state that law should consist of rules that are (1) general;<sup>29</sup> (2) published or promulgated;<sup>30</sup> (3) ordinarily prospective in their application;<sup>31</sup> (4) clear and not unduly vague;<sup>32</sup> (5) self-consistent, not contradicting one another;<sup>33</sup> (6) capable of being obeyed;<sup>34</sup> (7) relatively stable over time;<sup>35</sup> and (8) applied and enforced by officials in a manner that is congruent with their content as promulgated.<sup>36</sup> Together, these eight desiderata are commonly referred to as Fuller's conception of the rule of law.<sup>37</sup>

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24. See generally RUNDLE, *supra* note 13.

25. See FULLER, *supra* note 14, at 33-94.

26. *Id.* at 46-91.

27. *Id.* at 42-43.

28. Hart, *supra* note 12.

29. FULLER, *supra* note 14, at 46-49.

30. *Id.* at 49-51.

31. *Id.* at 51-62.

32. *Id.* at 63-65.

33. *Id.* at 65-70.

34. *Id.* at 70-79.

35. *Id.* at 79-81.

36. *Id.* at 81-91.

37. See, e.g., RAZ, *supra* note 16 and Waldron, *supra* note 19. There is some room for disagreement about this proposition. Fuller himself does not refer to his desiderata as "rule of law" principles, instead adhering to his "internal morality" formulation, which some have taken to mean that Fuller thinks the desiderata are necessary but insufficient conditions for the rule of

In a recent essay entitled "The Supposed Formality of the Rule of Law," Professor John Gardner disputes other scholars' contention that Fuller's desiderata concern the rule of law's *form*.<sup>38</sup> In particular he takes issue with the account of Professor Paul Craig, whose argument for "formal conceptions" of the rule of law serves as Gardner's foil and as the starting point for his essay.<sup>39</sup> Although Craig's formal conceptions are not identical to Fuller's desiderata, they do bear certain conspicuous resemblances, such that the two theories of the rule of law may be treated together, at least insofar as the question of formality is concerned. For ease of reference, I begin with the quotation from Craig to which Gardner responds in his essay:

Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself.<sup>40</sup>

Gardner has difficulty with this formulation. His difficulty is that "formal conception" is defined only negatively, "by what [it] does *not* address" and that what it does not address is itself under-defined: the "actual content of the law itself."<sup>41</sup> In Gardner's view, the use of "formal" here "cries out for explanation."<sup>42</sup>

Nothing in my Article depends on whether, or to what extent, Gardner faithfully represents Craig's position, but fairness to Craig bids me mention that one might reasonably differ with Gardner's assessment of Craig's thoroughness of explication here. First, I believe Craig does *not* define formal conceptions only negatively, for what

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law, that "they tell us only what, in [Fuller's] view, the law itself must be like if [the rule of law] is to obtain." GARDNER, *supra* note 17, at 195. As nothing in this Article depends on the correct resolution of this question, for convenience I follow what I believe to be the convention of referring to the desiderata as Fuller's conception of the rule of law.

38. GARDNER, *supra* note 17, at 197-98 (citing RAZ, *supra* note 16, at 218 n.7 and Waldron, *supra* note 19, at 8). Gardner also references the then-forthcoming RUNDLE, *supra* note 13 (quoting dust-jacket matter).

39. Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467, 467 (1997). Gardner makes clear that Craig's framework applies to Fuller only indirectly, by way of Raz, but notes that this makes no difference for his (Gardner's) purposes.

40. GARDNER, *supra* note 17, at 198 (quoting Craig, *supra* note 39, at 467).

41. *Id.*

42. *Id.* at 201.

are proper promulgation, clarity, and prospectivity if not affirmative attributes that, as Craig asserts, are matters of form? But, second, where negative definition is relied on, it's not clear why we should find it unhelpful or a ground for criticism. Immediately following the above-quoted passage, Craig continues: "[Formal conceptions] are not concerned with whether the law was . . . a good law or a bad law, provided that the formal precepts of the rule of law were themselves met."<sup>43</sup> True, this tells us something Craig thinks form is *not* about (and is therefore perhaps negative in the sense that worries Gardner), but it's a very important something: whether the content of the law is good.

To appreciate why this distinction matters, it is worth fleshing out the argument for why the positivist separability thesis has any appeal in the first place. Its appeal is at once conceptual and practical. As a conceptual matter, the question of whether a certain decree is or is not "the law" is one whose answer seems reasonably susceptible to objective ascertainment by reference to certain formal or procedural characteristics. Did the speaker sign the bill in the presence of the House? Did the governor sign the enrolled version? And so on. In short, the question is whether the putative law satisfies what Hart has called the "rule of recognition" for the relevant community.<sup>44</sup> In contrast, the question of whether the decree is *just* is far more complicated; if not strictly subjective, it may nevertheless depend on one's conception of an *essentially contested concept*.<sup>45</sup> I might believe that wealth inequality in society represents a failure of distributive justice and favor a progressive marginal income tax as a corrective.<sup>46</sup> You might believe every bit as strongly that it is unjust for the law to discriminate among parties on the basis of their relative wealth and might for that reason favor a flat capitation. Whatever the shape of our community's tax code, one of us is likely to deem it unjust. For either of us to condition law's lawfulness on its justness, then, would not only make a (relatively easy) question of fact turn on a (possibly intractable) question of value, but would also lead us to impute a kind of lawlessness to governments that implement policies with which

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43. Craig, *supra* note 39, at 467.

44. HART, *supra* note 10, at 100-10.

45. See generally W.B. Gallie, *Essentially Contested Concepts*, in 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1956) (describing essentially contested concepts as those "not resolvable by argument of any kind, [but] nevertheless sustained by perfectly respectable arguments and evidence").

46. Fuller himself uses "progressive taxation" as an example belonging to the external morality. FULLER, *supra* note 14, at 96.



we disagree—a rhetorical posture that is rather ill-conducive to the maintenance of civil discourse. Sensitivity to this problem may explain why, in practice, the imputation is usually reserved for extreme cases such as, most famously, Radbruch’s indictment of the Nazis.<sup>47</sup> As with the disowning of a son, the *non-est-lex* proposition, even as rhetorical hyperbole, should not be deployed lightly.

Craig is acutely aware of the conceptual problem and of the risk of collapsing fact into value that arises when the concept of law is made to turn on the concept of justice. He begins his analysis with a quotation from Professor Joseph Raz addressing this very point.

If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.<sup>48</sup>

All this seems clear enough, but Gardner finds Craig’s phrase “actual content of the law itself” to be under-defined. Let’s return to his unpacking of it.

Gardner begins by pruning the latter phrase down to “the content of the law” and proceeds to consider whether it is true of the desiderata that they do not address themselves to content, concluding that for most of them it is not:

The form of something is often quite naturally contrasted with its content. The content of a cake is one thing (sponge, jam, etc) [sic] and its form another (cylindrical, tiered, etc). The content of a book is one thing (jokes, short stories, etc) and its form (hardback, e-book, etc) is another. . . . The problem [with Craig’s analysis] is that . . . there is not much that is ‘formal’ about Fuller’s interpretation of the rule of law. . . . For most of Fuller’s desiderata . . . *do* ‘pass judgment’ on the content of the law.<sup>49</sup>

“True,” Gardner concedes, “a law that goes unpromulgated,” for example, “need not have different content from its open counterpart.”<sup>50</sup> But, he continues, “a law that it is impossible for people to

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47. See Gustav Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht* [Statutory Lawlessness and *Supra-Statutory Law*], 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105 (1946) (Ger.), translated in 26 OXFORD J. LEGAL STUD. 1 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006).

48. Craig, *supra* note 39, at 468 (quoting RAZ, *supra* note 16, at 211).

49. GARDNER, *supra* note 17, at 199.

50. *Id.*

obey needs to have its content changed if it is to become possible for people to obey it.”<sup>51</sup> “Likewise,” he continues, “at least one of two mutually inconsistent laws needs to have its content changed if they are to be rendered consistent with each other.”<sup>52</sup> Thus has Gardner addressed three of the eight desiderata, quickly dispatching the latter two—obeyability and consistency. Before proceeding to consider his treatment of the others, let’s have a closer look at his reasoning on these first few. As I have no quarrel with Gardner on the issue of promulgation, I begin by examining his treatment of the “obeyability” desideratum.

A suppressed premise here seems to be that a putative form is not a form if it can be shown that the putative form cannot be changed without also changing the content. Let’s call this the *changeability* thesis. Of course, one problem with this premise is that it begs the question of what constitutes legal “content.” In using Craig’s allegedly negative definition of “form,” and in declining to state what he thinks it means for something to be content, Gardner leaves the reader to infer the meanings of these terms from examples, of which he furnishes two: cakes and books. In each example the changeability thesis holds, and the putative form can indeed be changed without changing the content: The same chocolate cake batter we used to make cupcakes can be poured into a Bundt pan; the text of the Constitution as it appears on the parchment in the National Archives in Washington, D.C., can be reprinted on a pocket-sized pamphlet. But the transplantation of form-and-content distinctions from the realm of physical, three-dimensional articles to the domain of law is an awkward one, as these examples begin to illustrate. Does Gardner mean to suggest that legal content is mere *linguistic* content, so that, as with the hard-back/e-book example, the only sort of thing that would count as a content-neutral change in form would be, say, to render the text of the South Western Reporter Third in electronic format on Westlaw? We’ll see in a moment that Gardner’s concept of form is not so narrow, but the point is that Gardner’s concept is at least as under-specified as Craig’s, and we are well-advised to be alert to the possibility of equivocation.

For the moment, let’s assume we agree on what constitutes legal content and that it resembles linguistic content. In testing the suppressed premise, then, we might ask whether it is true of an utterance that one may always change its form without changing its content.

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51. *Id.* at 199.

52. *Id.*

Consider an utterance in the imperative mood, say, "Pass the salt." One way of describing an utterance of this kind is as an instance of a *grammatical form* of utterance, namely, the imperative-mood form. And while it is easy to see how this form might have limitless varieties of potential linguistic content (for example, "Pass the pepper," "Turn left at the next intersection," "Honour thy father and mother," etc.), it is harder to see how to change the form without also thereby modifying the content, if only at the level of sub-sentential implication. Consider the indicative utterance, "I wonder if you wouldn't mind passing the salt," for example. It seems intended to bring about the same result as its imperative counterpart, as does the interrogative, "Could you pass the salt?", but we can easily imagine situations in which it would matter a great deal to a speaker which form she chose. Can these three utterances be said to have identical content?

The foregoing question is not strictly rhetorical—I can imagine intuitions differing here. I believe the three utterances have different content, but I don't have too firm a conviction. Even if one insists that these three forms of utterance have substantially identical content, however, other examples await. Let us reconsider Gardner's example of books. In addition to their physical form, discussed by Gardner (hardcover, e-book), books can also be classified by literary genre—novel, poetry, biography, etc. It is not at all unusual to hear such genres referred to as *forms*, as in "Galileo cast his argument *in the form of* a dialogue." How might one take something that is "in the form of" a sonnet and change its form without upsetting its content? It seems fair to say we have a changeability problem here. For if something cannot be a form unless it can be changed without thereby changing its content, then grammatical forms possibly cannot be forms, and literary forms certainly cannot be. If we agree that those things are forms and that they cannot be changed without changing their content, then it seems we must reject Gardner's changeability thesis with respect to forms. Thus, the fact that an unobeyable law "needs to have its content changed" in order to become obeyable does not seem to disqualify obeyability as a kind of form.

Rather than merely chop logic in the hope of achieving a cheap rebuttal, however, it would be nice to have some affirmative grounding for the placement of obeyability outside of the content of the law. Toward that end, let's hover a moment longer over the notion that legal content relevantly resembles linguistic content. In sparring with Bertrand Russell, P.F. Strawson argued that the meaning of a sentence gave "general directions for [the] use" of the sentence to make a true

(or false) statement.<sup>53</sup> Analogously, substituting command for assertion, we might argue that the meaning of a rule gives instructions for its use in making obeyable (or unobeyable) law. Perhaps, among the official duties of the court barber, one finds, "Thou shalt shave the head of the present King of France."<sup>54</sup> Whether this duty is capable of being discharged depends, of course, on whether such a person exists and whether he has any hair to shave, etc. The fact that the very words that, when uttered at time *T*, generate a norm that is capable of being obeyed may, when uttered at time *T'*, generate a norm that is not so capable, certainly seems to undermine the status of obeyability as purely a matter of content, for how can the content of two identical utterances be said to differ?

And what of consistency? As noted above, Gardner points out that, in order to harmonize antinomies, one must necessarily change the content of at least one of them. On this ground he concludes that consistency is ineligible to be thought of as a form. Of course, having already rejected the changeability thesis in the discussion of obeyability, it may seem sufficient simply to reassert that rejection here and move on. But additional analysis remains. The simplest answer to Gardner on this point is that consistency, like equality or priority, is a *relational* form.<sup>55</sup> A thing cannot be consistent except with respect to some other thing. True, with respect to a statute that mandates *S*, it is the content that makes it inconsistent with a statute that requires  $\sim S$ . Still, speaking of a legal *system*, the property of consistency (or inconsistency) may be deemed a formal property of the *system as a whole* with no greater reservations than those sketched out above in regard to obeyability as a formal property of a rule. The property of not containing mutually exclusive or contradictory directives is a formal property of a legal *system*, albeit one that requires some awareness of the content of the system's particular directives in order to identify, and one that may require changes to those directives in order to achieve.

With regard to prospectivity, Gardner argues that "a retrospective law that regulates  $\phi$ ing necessarily has different content from its prospective counterpart, in that it regulates  $\phi$ ing in the past as well as  $\phi$ ing in the future."<sup>56</sup> At the risk of appearing uncharitable, I must register my wonder at Gardner's use of a symbolic variable placeholder

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53. P.F. Strawson, *On Referring*, 59 MIND 320, 327 (1950).

54. See generally Bertrand Russell, *On Denoting*, 14 MIND 479, 483 (1905).

55. On relational forms see THOMAS NAGEL, MORTAL QUESTIONS 106-27 (1979).

56. GARDNER, *supra* note 17, at 199.

in the midst of an argument that we're dealing with content rather than form. True, the time at which a regulated act occurs may be part of the law's content: A law that prohibits the purchase of alcohol *after midnight* or of fireworks *other than during the week preceding the Fourth of July*, or that prohibits driving faster than 20 m.p.h. in a school zone *during the hours school is in session*, or that requires the filing of an income tax return *no later than April 15*—in these and dozens more examples we could name, the time of compliance is certainly part of the content of the law in the sense that knowing whether a violation has occurred requires knowing the time or date when the conduct allegedly in violation of the law took place. It does not follow, however, that a law that punishes conduct that was not prohibited by *any extant law* at the time the conduct occurred is formally indistinct—and distinguishable only by its content—from a law that does not. *Ex post facto* seems an easily enough identifiable *kind* or *category* as to permit us to refer to it as a *form*, albeit one, like others discussed here, that may require some examination of content in order to identify. Whether the law applies to conduct that took place last year is a matter of content, but that fact, together with another fact about the date of enactment, combines to determine whether the law is formally prospective. A law whose content “regulates  $\phi$ ing” at time  $T - n$  takes the *form* of a retroactive law if and only if the law is enacted on or after time  $T$ .

In just a few sentences Gardner disposes of stability and generality before pausing to insist that “[a]ll of these Fullerian desiderata pass judgment on the content of the law, and indeed on nothing else.”<sup>57</sup> The broad daylight between Gardner's intuitions and my own shines very brightly through his next sentence: “Although it is a bit harder to see at first, *even legal clarity* is a matter of law's content.”<sup>58</sup> My reason for being struck by this sentence is that I would have thought clarity to be *less*—not more—obviously a matter of form. If the law contains a clear prohibition of this or that conduct, that is not simply a “clearer form” of a more vague prohibition of “the same” conduct (whatever that might mean). Rather, a law that constrains conduct more (or less) clearly than another is a law that constrains such conduct *differently* from the other and thus reaches a *different universe of conduct*; it is therefore better viewed as a different law altogether in the sense of having different legal content. Gardner makes a similar point:

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57. *Id.* (emphasis added).

58. *Id.* (emphasis added).

A more determinate law that regulates  $\phi$ ing has content different from that of a less determinate counterpart. When the law is more determinate, there are more cases of  $\phi$ ing of which it is true that the law either does or does not regulate them, and fewer of which it is true that the law neither does nor does not regulate them.<sup>59</sup>

When Gardner proposes—without comment and in passing—three media (statute, precedent, custom) that he regards as forms,<sup>60</sup> one is tempted to accuse him of illicit redefinition until it occurs to one that we've stipulated to no *licit* definitions in the first place; Gardner is proceeding to define "form" by tedious extension, and by my tally we have now amassed six proposed instances: the shape of a cake; the medium of a book; the condition of being promulgated or not, said of law; statutes; case precedent; and legal custom. Again, insofar as Gardner opens his criticism of Craig by remarking on the under-definition of terms, it seems unfair that Gardner should enjoy the benefit of that very same lack of definition in furthering his own argument.

Gardner has now dealt with seven of the eight desiderata (he does not discuss the congruence desideratum) and has concluded that five of them "pass judgment on" content rather than address themselves to form. Although his successive arguments amount to little more than restatements of his conclusion, one can, with reasonable effort, supply the missing premises, one of which seems to be, as observed above, that form, whatever else may be true of it, is something that can be changed and manipulated without affecting content, whatever "content" may mean. I have already stated my objection to this premise, but, before moving on, it is perhaps incumbent upon me to attempt my own elaboration of the form/content distinction.

As Raz has said, "[p]hilosophy is not lexicography,"<sup>61</sup> and it should not be without some reluctance that a philosopher repairs to the dictionary to support the rational reconstruction of a concept. Even so, the operationalization of any term seems a worthwhile prerequisite to making elaborate arguments about its referent. Professor Robert Summers, whose own enumeration of rule-of-law principles runs to a staggering twenty-two, overlapping at several points with Fuller's more modest eight, states that *all* of his (Summers's) principles are

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59. *Id.* at 200.

60. *Id.*

61. Joseph Raz, *The Problem about the Nature of Law*, 21 U.W. ONTARIO L. REV. 203, 207 (1983).

formal and backs this claim with numerous citations to the Oxford English Dictionary.<sup>62</sup> Summers's principles pertain to the "manner, method, way, or fashion" in which law and its techniques are to operate in order to be law-like.<sup>63</sup> He also notes that the principles are "of or pertaining to [the] procedure" by which the law is created—"a well-recognized meaning of formal in the English language."<sup>64</sup> Finally, he notes that several of the principles are "structural," ordering "relations between parts within a whole, another standard meaning of formal."<sup>65</sup> Because Summers's scope is so much broader than Fuller's, it is not clear how much help his argument offers here, even assuming we overcome our reluctance to make what appears to be a lexical usage argument. Still, at the very least, features like promulgation and congruence in application certainly do seem to speak to the "manner, method, way, or fashion" in which law operates, as Summers suggests. And, in any event, we lack a more precise statement from Gardner concerning why we shouldn't think of the desiderata as addressing "manner, method, way, or fashion" and thus cannot answer him on this point directly. Let's move on to content.

Legal "content" may be a misnomer, but one view of content as it is used here is that it is concerned with the substantive aims or ends sought to be achieved by the implementation of legal norms.<sup>66</sup> To illustrate, let's return to the above example of the different systems of taxation.<sup>67</sup> One of the two methods of taxation would impose a progressive marginal tax on the incomes of taxpayers; the other would levy a flat tax that would be indifferent to taxpayers' relative incomes. If the former law took effect, the result would be that the people to whom it applied would pay taxes in proportion to their incomes; if the latter took effect, the result would be that they would pay identical taxes, regardless of their respective abilities to do so. What I believe Craig means when he says that rule-of-law principles do not pass judgment on "the actual content of the law itself" — and I think

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62. ROBERT S. SUMMERS, FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY 337 (2006).

63. *Id.* (quoting THE OXFORD ENGLISH DICTIONARY, vol. 6, "form," I.5.a (J. Simpson and E. Weiner eds., 2d ed. 1989)) [hereinafter *OED*].

64. *Id.* (quoting *OED*, *supra* note 63, at vol. 6, "form," I.11.a).

65. *Id.* (citing *OED*, *supra* note 63, at vol. 6, "form," I.5.a).

66. Indeed, Fuller's fourth chapter is entitled "The Substantive Aims of Law", the first section therein treating "The Neutrality of the Law's Internal Morality Toward Substantive Aims." FULLER, *supra* note 14, at 152–53.

67. See *supra* note 46 and accompanying text.

Fuller would generally agree – is that those principles take no position on law’s underlying substantive aims. You can scour Fuller’s *desiderata* and find no ground on which to resolve the controversy between those who favor a flat tax and those who favor a progressive one. On the other hand, either of these tax codes would pass the formal Fullerian test if it were promulgated, prospective, etc., and would fail that test if it were not. Thus, a law whose content (that is, the substantive aims it seeks to achieve or the state of affairs it seeks to bring about in the world) we deem unjust may nevertheless conform to rule-of-law principles, even as a law whose content we deem just may violate them. I find the latter distinction to be entirely uncomplicated.

As discussed more fully in the next Part, the importance of the foregoing distinction to the question with which I opened this Article, namely, the question of where Fuller can be situated along the natural law-positivist continuum, is that it helps explain how Fuller can, like a positivist, maintain that law’s *content* is posited, while at the same time, like a natural lawyer, acknowledge that law has a nature that can at once be described by reference to formal characteristics and at the same time be said to have a moral dimension. As I will argue, the reason Fuller can maintain the former position is that the formal properties of law are content-neutral; but the reason he can assert that latter is that the forms themselves are not morally neutral – they tend toward justice, fairness, and respect for the citizen subject to law. The nature of law as Fuller understands it reflects this tendency toward justice at least to some degree.

## II. RULE-OF-LAW PRINCIPLES AS BOTH INCLUSION CRITERIA AND EVALUATIVE STANDARDS

In a footnote, Gardner says he will leave aside Fuller’s “much-discussed ambivalence” about whether a legal system can fail to live up to its inner morality.<sup>68</sup> He continues:

[I]t is a necessary truth about standards (norms, principles, rules, rulings, etc) that whoever is subject to them can conceivably fail to live up to them. It follows that, to the extent that the law cannot conceivably fail to be clear, open, prospective, general, etc, these are not standards for law, and can be no part of law’s inner morality. It follows that . . . Fuller

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68. GARDNER, *supra* note 17, at 196 n.5.



cannot avoid having two distinct topics of discussion: (1) Which things are instances of law?; and (2) once we know that, what standards should we set for them *qua* law?<sup>69</sup>

Gardner concludes this footnote by foreshadowing that this discussion will “loom large” in a later section of his essay.

I am sensitive to the risk of being unfair to Gardner by subjecting a mere footnote to more scrutiny than he likely intends it to withstand, but this passage is freighted and invites careful unpacking. Part of the problem in answering Gardner here arises from a certain ambiguity in his statement that Fuller “cannot avoid” discussing the two topics. Does Gardner mean that Fuller could not and in any case *did not* avoid discussing both topics? Did Fuller in some sense *try* to avoid these two topics and fail? Or did Fuller’s “much-discussed ambivalence” lead him to leave the connection between the topics unsettled—an omission that haunts his work to this day? I don’t know which if any of these propositions Gardner intends; the later section in his essay, over which he says the question looms so large, contains no citation to, nor any other acknowledgment of, Fuller’s own discussion of the two topics.

But discuss them he does. Fuller quite explicitly addresses the issue of whether the eight desiderata are conceptual inclusion criteria that a putative law must exhibit in order to count as actual law (and thus, it follows, properties of law by definition), or whether they are standards of the kind Gardner describes (and thus tools by which to evaluate what concededly is law). For Gardner, it seems a matter of categorical logic that if the eight desiderata are standards they cannot be inclusion conditions, and if they are inclusion conditions they cannot be standards. And, to a degree, this makes sense: Law cannot be evaluated in light of its conformity to that to which by definition it cannot fail to conform. Hence the two discussions Fuller must have: The first is about what law *is*; the second is about what law *ought to be*. But Fuller offers a way of viewing the desiderata such that they can indeed be about both the *is* and the *ought* of law – though, importantly, the *ought* in this discussion is non-substantive or content-neutral. The way he goes about this is to treat each desideratum not as a binary trait, such that putative law either exhibits or does not exhibit the trait, but as a kind of continuum, a dimension for evaluation along

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69. *Id.*

which putative law might take any of a range of values. Below a certain value on that range, the name "law" does not properly attach. Viewed this way, the desiderata serve as inclusion conditions because, by definition, what we call law must exhibit these features at least to that threshold degree. On the other hand, above this threshold value, the very same desiderata become pure standards for evaluation.

For the above reading there exists ample textual support. Immediately following the allegory of Rex and preceding the separate analyses of each desideratum in turn, *The Morality of Law* contains subtitled sections, the first of which addresses "The Consequences of [Rex's] Failure,"<sup>70</sup> and the second of which deals with "Aspiration toward Perfection in Legality."<sup>71</sup> In the latter section Fuller makes clear that,

[c]orresponding to these [eight routes to failure] are eight kinds of legal excellence toward which a system of rules may strive. What appear at the lowest level as *indispensable conditions for the existence of law at all*, become, as we ascend the scale of achievement, *increasingly demanding challenges* to human capacity.<sup>72</sup>

I detect no contradiction in the foregoing formulation, and indeed others have offered similar conceptual models. Waldron, for example, announces not eight but five formal rule-of-law type features he believes essential to a legal system<sup>73</sup> and states expressly that "all five criteria . . . are matters of degree."<sup>74</sup> Though not substantive, the features "are not without moral significance."<sup>75</sup> He continues, "I think we call something a legal system if it satisfies a recognizable minimum along these five dimensions, at least to the extent that it pays credible tribute to the concerns that underlie each of the criteria."<sup>76</sup> And, sounding quite Fullerian:

A legal system can be in better or worse shape, but after a point it can be in such bad shape that it does not satisfy the criteria for being a legal system at all.

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70. FULLER, *supra* note 14, at 38.

71. *Id.* at 41.

72. *Id.* (emphasis added).

73. Waldron, *supra* note 19, at 20 ("courts"), 24 ("general public norms"), 28 ("positivity"), 31 ("orientation to the public good"), and 32 ("systematicity").

74. *Id.* at 42.

75. *Id.* at 40.

76. *Id.* at 42-43.

But even if it is recognizable as a legal system, we may still demand more from that system on any or all of these dimensions. The fact that we work with a roughly defined threshold for a system of governance to count as law does not mean that we rest satisfied with these minimum credible achievement.<sup>77</sup>

But why does Fuller's handling of the standards and inclusion conditions matter? It matters because it has the potential to resolve a sort of dilemma that confronts Fuller's defenders, a version of which appeared in the famous "Hart-Fuller debate" in the *Harvard Law Review* a few years before the publication of the two scholars' now-famous books.<sup>78</sup> The dilemma is this: If one admits that there is a moral dimension to law, then one seems to invite the sort of (substantive) *is/ought* difficulty engendered by the *non-est-lex* proposition, that is, that to know whether such-and-such is law one must first know whether it is good, and one must therefore in turn know what is The Good. To repeat an earlier quotation from Raz, to explain the rule of law thus would be nothing less than "to propound a complete social philosophy."<sup>79</sup> On the other hand, insisting that the rule-of-law principles are morally neutral exposes Fuller's defenders to what is sometimes referred to as Hart's "instrumentalist" argument, according to which a rule-of-law-compliant system such as Fuller envisions merely facilitates the furtherance of whatever (good or evil) aim the sovereign might care to pursue and is therefore "compatible with very great iniquity."<sup>80</sup> On this view, the very mention of any "morality," internal or otherwise, is called into question, since the asserted neutrality of the desiderata with respect to the morality of law's substantive aims would seem to render "inner morality" a misnomer; in Hart's withering phrase, one might as well talk of "an internal morality of poisoning."<sup>81</sup>

The foregoing is not a true, formal dilemma, but it is a practical one, insofar as most of Fuller's defenders would not wish to accept either horn without qualification. But I think they need not do so. Although Fuller might have done a better job of defending himself on this score, the answer to the dilemma is that, per Fuller, the formal features of

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77. *Id.* at 45.

78. The "debate" consisted of two articles: Hart, *supra* note 12, and Fuller's reply in Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

79. RAZ, *supra* note 16, at 211.

80. HART, *supra* note 10, at 206–07.

81. Hart, *supra* note 20, at 1286.

the rule of law embody moral choices that have, by hypothesis, *already been made* in any system of what we call law. Whether or not a rule *ought* to be published, for example, is of course a normative question, but, says Fuller, law is a mode of social ordering characterized in part by its having answered that question in the affirmative. Likewise with the other desiderata. Whether a rule *ought* to be prospective is a normative question; whether it *is* prospective is a factual one, and one need not debate the actual desirability of this desideratum or others in order to assess a legal system's compliance with them. Thus falls the first horn of the dilemma: Law does indeed have a moral dimension, reflected in the moral choices embedded in the rule-of-law principles, but this proposition does not commit us to the view that deciding whether this or that thing is law necessitates a thoroughgoing examination of whether its aims and outcomes be "just" and all that that entails. On the other hand, if a system exhibits a certain degree of deficiency in the desiderata, then the system under discussion, whatever else it may be, is not a system of law: It may be a system of command; it may be a system of management; but it is not law.

One may argue that my answer to the first horn is so weak as to leave myself open to being gored by the second. For if what I propose is really all we mean by law's "inner morality," mayn't one grant that, other things being equal, a system that supplies the desiderata is preferable to one that does not and yet still maintain that such a system could countenance slavery, bigotry, gross inequality, and other "very great iniquity" as Hart suggests? Fuller himself, alas, focuses heavily on this second horn of the dilemma—and for the most part unconvincingly. An example appears early in Fuller's contribution to the debate with Hart. "Professor Hart seems to assume," Fuller harumphs, "that evil aims may have as much coherence and inner logic as good ones. I, for one, refuse to accept that assumption."<sup>82</sup> Acknowledging that he cannot prove the proposition and that he may seem "naïve," Fuller nevertheless "rest[s] on the assertion . . . that coherence and goodness have more affinity than coherence and evil."<sup>83</sup> In this unfortunate turn, Fuller answers the strong Hartian-Austinian separability thesis with a kind of bizarre denial that depends on (1) a concededly unanswerable empirical question (namely, whether coherence and good "have more affinity" than do coherence and evil), which in turn depends on (2) agreement about what is morally good (perhaps an essentially contested concept), thus stacking an empirical

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82. Fuller, *supra* note 78, at 636.

83. *Id.*

question atop an already difficult meta-ethical one. In the same section of the article, he proceeds to make five additional points, none of which is very clear or easily summarized, let alone persuasive.<sup>84</sup>

In general, focusing on the second horn of the dilemma is a mistake for Fuller, for, if either horn is to make contact, surely it is this one. Better to make the partial concession that, yes, if we accept a “thin” rule of law such as the one Fuller advances – one generally indifferent to substantive aims – then some very odious substantive aims may indeed be pursued through what we’ll count as rule-of-law-compliant systems. To return to the example of the progressive income tax, some may claim to find such a tax very odious indeed, and yet, by Fuller’s own lights, such a judgment is strictly a matter of “external” morality. For Fuller to hedge now seems both unnecessary and a sign of weakness.

Even so, Fuller scores some significant points against Hart later in the article, particularly in his response to Hart’s discussion of the notorious “grudge informer” cases. In a typical case, a post-World War II German court had to decide the fate of a criminal defendant charged with having procured the wrongful imprisonment of her husband during the Nazi reign by reporting him to the government and thereby causing him to be prosecuted for disloyal remarks and sentenced to death under a statute then in force.<sup>85</sup> Interestingly, Fuller and Hart come to the same ultimate conclusion regarding how such cases should have been handled under the circumstances: Both would favor enactment of a retroactive statute, such that the offending spouse in this situation could not escape prosecution.<sup>86</sup> Even so, they differ mightily on the question of whether the spouse’s conduct could be said to have complied with the *law* then in effect. Hart has no trouble saying that the statute in question was law, “however morally iniquitous” it may have been.<sup>87</sup> Fuller, by contrast, maintains that it is “impossible to dismiss the problems presented by the Nazi regime with a simple assertion: ‘Under the Nazis there was law, even if

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84. *Id.* at 636–38.

85. The informer cases are discussed in Hart, *supra* note 12, at 613–21, and Fuller, *supra* note 78, at 648–57. David Dyzenhaus has argued that “neither Hart nor Fuller had a correct understanding of the Grudge Informer Case.” *The Grudge Informer Case Revisited*, 83 N.Y.U. L. REV. 1000, 1004 (2008). For purposes of this Article, however, it is not necessary to assess either scholar’s grasp of the actual historical events; what matters here is how each deals with informer-type cases in the abstract.

86. Hart, *supra* note 12, at 619; Fuller, *supra* note 78, at 661. It is noteworthy that in Fuller’s later discussion of the desiderata in *THE MORALITY OF LAW*, his treatment of the prospectivity desideratum is among the most heavily qualified. See FULLER, *supra* note 14, at 51–62.

87. Hart, *supra* note 12, at 626.

it was bad law."<sup>88</sup> "If all Nazi statutes and judicial decisions were indiscriminately 'law,'" he continues, "then these despicable creatures [such as the informer spouse] were guiltless, since they had turned their victims over to processes which the Nazis themselves knew by the name of law."<sup>89</sup> Although he is at times in high dudgeon, referring to the statute under which the informer's spouse was prosecuted, for example, as a "legislative monstrosity,"<sup>90</sup> Fuller's argument here is nevertheless far more sophisticated and nuanced than an argument of the form "The Nazis were evil, *ergo* the Nazis were lawless," or "Nazi law is 'too evil' to count as law." On the contrary, although the article precedes his book by a number of years, Fuller's argument is coolly well-grounded in the desiderata he will eventually propound in his book, and in their conspicuous absence from the statute in question.

The husband in the informer case received the death sentence even though the statute did not provide for this—a violation of the congruence desideratum.<sup>91</sup> Similarly, the statute in that case barred *public* statements of the kind the husband made, not statements made in confidence to one's spouse—another congruence issue.<sup>92</sup> And, in general, Fuller notes that the statute was "overlarded and undermined . . . by uncontrolled administrative discretion."<sup>93</sup> Fuller's point is not that the statute was directed toward a bad substantive aim but that the statute failed to put anyone on reasonable notice concerning what conduct would be held to violate it and what the penalty for violation would be; indeed, it did not seem intended to do so. Rather, the statute's purpose seemed to be to arm executive or administrative authorities with a colorable ground on which to prosecute anyone whose conduct they found objectionable. In an adjacent discussion, Fuller mentions the rumored existence of secret laws under the Nazi regime, anticipating another theme of his later book chapter, the promulgation desideratum. "Now surely," Fuller maintains, "there can be no greater legal monstrosity than a secret statute."<sup>94</sup> And in finding that such "monstrosity" did not deserve the respect accorded duly enacted law, the post-war German jurists were not "[running] away from the problem they should have faced" by the "simple

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88. Fuller, *supra* note 78, at 646.

89. *Id.* at 649.

90. *Id.* at 654.

91. *Id.*

92. *Id.* at 654–55.

93. *Id.* at 655.

94. *Id.* at 651.

dodge of saying, 'When a statute is sufficiently evil it ceases to be law.'"<sup>95</sup>

As acknowledged above, the "dilemma" under discussion here is not a true, logical dilemma, and my solution to it may not satisfy everyone. In concluding this Part, I consider a pair of lingering objections to my handling of standards and inclusion conditions that I anticipate from different sides of the debate. First, a Hartian positivist might argue that the characterization of putative law that fails to exhibit certain evaluative conditions as non-law, even if only to some unspecified degree, smacks of question-begging equivocation. According to this view, Fuller simply converts what concededly are evaluative standards into inclusion conditions at the margins and declares victory: To state that what we mean by "law" includes at least these particular moral choices, at least to some degree, is merely to restate the conclusion that what we mean by "law" includes *some* moral choices. And, the objection continues, it is not clear why these particular moral choices should be less problematic than others we might name, such as the by-now well-worn example of the progressive tax. True, the question of whether a system satisfies the desiderata is an objective one and thus seems to avoid the endless debate that attends essentially contested concepts such as justice and The Good, but that objectivity is only achieved by pushing the embedded *subjective* question into another domain and summarily pronouncing it off the table, ineligible for discussion. To illustrate why this move by Fuller is suspect, suppose a ninth desideratum, that law should, at a minimum, prohibit theft. As a matter of sociological fact, it is probably the case that most of what we would tend to call legal systems throughout human history have contained some such prohibition, perhaps far more than have exhibited fidelity to the other eight desiderata; should we seek to define law extensionally, perhaps the theft prohibition is a better candidate for consideration as an inclusion condition than Fuller's own.

This challenge is not without some force, as Fuller's argument, like so many philosophical arguments, ultimately rests on intuition. Austin thinks law relevantly resembles command. Hart notices certain respects in which what we call law systematically differs from unadorned command and points instead to rules. Fuller notices irreducibly moral elements in those rules and seeks therewith to supplement Hart's model. At any point in this progression one might reject the proposed refinements because, in her view, law's resemblances to

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95. *Id.*

command, say, are simply more important and more indicative of law's "essence" than are its differences. Even so, I believe I've shown that Fuller's choice of features for inclusion in his model of the rule of law is non-arbitrary; as discussed at length above in Part I, the desiderata are *formal*, not substantive, and it is chiefly in this respect that they differ from, say, a law against theft. It is true that the desiderata reflect and embody moral choices, but they do so, for the most part, transubstantively.

If the Hartian worries that Fuller's concept of law is too "thick," the second objection comes from the opposite direction, asking, in essence, what good is a rule of law that does not concern itself with principles of democratic legitimacy and fundamental rights. In Fuller's discussion of secret statutes, he mentions their use by the Nazis to ratify "wholesale killings in concentration camps," pivoting to his claim that "there can be no greater legal monstrosity than a secret statute."<sup>96</sup> But surely the *killings themselves* were a greater monstrosity; can Fuller really mean that a campaign of genocidal mass murder can be made compliant with the "rule of law" through the observation of a few procedural formalities?

There are good reasons not to try to speak for Fuller here, but rather to limit discussion to the question of the weight his theory can reasonably bear. Fuller himself struggled with the thinness of his theory, as already noted above with respect to his clumsy handling of the dilemma's second horn. Also noted above, Fuller did not expressly refer to the inner morality of law as embodying the rule of law, and there exists the possibility that he did not intend the desiderata to be exhaustive of rule-of-law principles.<sup>97</sup> The obvious question, then, is whether there is any formal limitation on the variety of substantive aims that may be sought to be achieved by a system that complies with Fuller's minimum requirements. Fuller eventually gets around to answering this question in the affirmative,<sup>98</sup> but I am far less sanguine than Fuller on this question. I think a rule-of-law model thin enough to form part of the concept of law will typically be thin enough to countenance certain significant injustices or "iniquities." How so? Because, if the rule of law is to be made part of the *concept* of law, then any disqualifying indicia should conform to most peoples' intuitions concerning what is sufficient to render a system un-

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96. *Id.* at 651.

97. *See supra* note 37.

98. FULLER, *supra* note 14, at 153 ("But a recognition that the internal morality of law may support and give efficacy to a wide variety of substantive aims should not mislead us into believing that *any* substantive aim may be adopted without compromise of legality.").



law-like, and most attempts to “thicken” the rule of law will tend to violate this requirement. Consider democratic legitimacy, for example, and in this regard note that Fuller illustrates his desiderata through the allegory of Rex—a *king*. Should we insist that the rule of law embody post-Enlightenment principles of popular sovereignty and that the rule of law is an essential component of the *concept* of law, then it would seem that we would have to deny the name of law to everything from the Justinian Code down to the Magna Carta. The better handling of the rule of law is to conclude not that it prohibits iniquitous or unjust law generally, but that there are very particular injustices and iniquities—those that result from laws that are unpublished, hopelessly unclear, impossible to obey, etc.—that the rule of law tempers and attenuates.<sup>99</sup>

Still, even within this narrow framework, there may be limits. As discussed at greater length in the next Part, Fuller views the desiderata as minimally necessary to a legal system capable of commanding the obedience of those subject to it. A system that commits genocide against an ethnic group within its jurisdiction, or one that enslaves a subset of its population based on racial characteristics, certainly cannot be entitled to the obedience of the affected subset. We might be reluctant to pronounce the United States, during the first eighty-seven years of its existence, utterly lawless because it permitted the practice of slavery, but, as I will argue below, from the point of view of those enslaved, the system under which they labored certainly did not function as a system of law: It may have been a system of command; it may have been a system of management; but it was not law.

### III. THE CENTRALITY OF OBEYABILITY

Chapter Two of Fuller’s book opens with the following telling epigraph from a seventeenth century English case: “[A] law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them.”<sup>100</sup> In this pithy pair of clauses, Chief Justice Vaughan raises two of the eight

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99. I should not overstate the originality of the claim I make here; other scholars have examined (and objected to) the characterization of the rule of law as tempering certain iniquities. Most notably, Raz has argued that the problems the *rule* of law attenuates are problems *given rise by law itself*, so that the rule of law deserves no credit for doing any independent good. RAZ, *supra* note 16, at 224. Arguably, however, this characterization begs the question of whether arbitrary command is “law”—a question I believe Fuller would answer in the negative.

100. FULLER, *supra* note 14, at 33 (quoting *Thomas v. Sorrell*, [1673] EWHC (K.B.) J85, (1673) Vaughan 330; 124 Eng. Rep. 1098–1113).

desiderata: obeyability and consistency. But he does more. He seems to imply that the real problem with contradiction in the law is obeyability—that what really makes antinomies problematic is that they cannot (all) be obeyed. And this seems right. Depending on the nature of the particular injunction or prohibition, a system that places its citizens under continuing and concurrent obligations to do both *S* and  $\sim S$  obviously contains at least one law it is not possible for a citizen to obey, for, in obeying either of the antinomious laws, one necessarily disobeys the other. In this Part, I propose to investigate whether the other desiderata can be recast as variants of obeyability. In so doing, I may at first seem to stray afield from my original inquiry regarding the classification of Fuller's legal theory. I will argue, however, that viewing the desiderata through the lens of obeyability reveals something important about what Fuller believes a system must be like in order to be law-like.

One may well take issue with Fuller's description of the generality desideratum. He would have it mean nothing more than that "there must be rules" and cites twentieth century regulatory agencies' attempts to proceed case-by-case in the development of standards as examples of failures in this regard.<sup>101</sup> Moreover, he expressly distinguishes the generality desideratum as he understands it from the requirements of fairness embodied in constitutional prohibitions on certain private law, which he believes to be the province of external morality.<sup>102</sup> This may be a mistake, but it is not necessary to quibble with Fuller on this point. If generality means nothing more under Fuller's analysis than that rules exist, then absent generality there is no rule for anyone to obey.<sup>103</sup>

Regarding unpublished law, it is of course possible for a citizen by chance to conduct herself in a way that happens not to violate some

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101. FULLER, *supra* note 14, at 46.

102. *Id.* at 47.

103. Lest I understate the problem with Fuller's somewhat idiosyncratic conception of generality here, I should note that I do not share it and, importantly, that under my own conception generality *cannot* easily be subsumed under obeyability—it represents an entirely different kind of limitation on the lawgiver's power. My own conception of generality is closer to that of Hart, who observed that a law can be "general in two ways," indicating "a general type of conduct" and applying to "a general class of persons who are expected to see that it applies to them and to comply with it." HART, *supra* note 10, at 21. But the sort of generality that is relevant to the rule of law is, despite Fuller's dismissal of it, exactly the sort that is embodied in constitutional fairness provisions, such as the prohibition against bills of attainder, U.S. CONST. art. I, § 9 [cl. 3], and the Fourteenth Amendment's Equal Protection Clause, *Id.* amend. XIV, § 1. Alas, my dispute with Fuller on this point will have to await another Article; in *this* Article, though I differ with Fuller about certain conclusions that derive from his stated premises, I take the premises as I find them, including his odd definition of generality.

unpromulgated prohibition, but it is not possible for her to form the intent to do so, at least not under what seems to be the relevant description.<sup>104</sup> For if we ask her “did you intend to comply” with some unpublished law, she will probably say “no,” even after learning that her conduct put her in conformity with that law; her conformity was coincidental. As Raz has observed, “[a] person *conforms* with the law to the extent that he does not break the law. But he *obeys* the law only if part of his reason for conforming is his knowledge of the law.”<sup>105</sup> Of course, as a practical matter, one may maintain that there is a lot of unconscious compliance with law that is not strictly coincidental – it is explained by a rough but regular correspondence between a community’s popular values and the laws that govern that community, given rise by the tendency of the latter to be influenced by and to reflect the former through the legislative process, together with the tendency of individuals to take social cues from the community whose values are influencing the legislative process in complex but consistent ways. Few of us sit down and study the published statutes of our community, but most of us manage not to violate them in much the way that a motorist may avoid speeding without ever consulting his speedometer or taking note of the posted speed limit simply by driving with the flow of traffic. This is a fair point, but it raises issues for sociological rather than philosophical investigation, and in any case it does not undermine the proposition that it is impossible to obey *truly* unknown law; the speeding example merely posits a kind of alternative to promulgation – the normative force of the observed collective conduct of the community and its officials. The fact remains that a person who is punished for failure to conform to some truly undisclosed law is, like the person punished for the violation of one of two contradictory laws, punished for conduct he had no reasonable opportunity to bring into conformity with that law. An unpublished law is an unbeyable law.

A similar situation arises with prospectivity, for a law of retrospective application functions at the (pre-enactment) time of one’s compliance (or lack thereof) in exactly the way that an unpublished law functions at all times it is in force. That is, if I happened to be in conformity at an earlier time *T* with the provisions of an *ex post facto* law that would not be enacted until some later time *T'*, this conformity is every bit as coincidental as the conformity to the unpublished law

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104. “Relevant description” is used here in the Davidsonian sense. See generally DONALD DAVIDSON, *Agency*, in *ESSAYS ON ACTIONS AND EVENTS* 43–61 (2d ed. 2001).

105. RAZ, *supra* note 16, at 213–14 (emphasis added).

imagined in the previous paragraph. As with an unpublished law, it is not impossible for my conduct to have conformed to the requirements of the later retroactive enactment, but it is impossible for me to have conformed my conduct intentionally. Again, as with unpublished law, one can imagine certain hypothetical scenarios that supply specious counterarguments. Suppose, for example, that one resides in a community that routinely passes *ex post facto* laws; further suppose that the legislature in that community is presently considering such a measure, one that would penalize certain conduct dating back to the beginning of the legislative session. For anyone within the jurisdiction who is aware of the measure under consideration, it would be foolish to engage in the possibly-soon-to-be-prohibited conduct if there appeared to be any significant chance that the measure might pass. But, once again, this putative counterargument does little more than attack a hypothetical premise by positing an unusual situation in which there exists some reasonable uncertainty as to the legal status of certain conduct despite the lack of any actual present prohibition. The problem with what we think of as the typical *ex post facto* scenario is that, as in the case of a secret law, and as in the case of a law contradicted by another law, an *ex post facto* law may cause a citizen to be punished for violating a law he had no opportunity to obey.

Although the case for including clarity and congruence may be slightly weaker, both can be seen as raising promulgation-type problems, at least at the margins. With respect to clarity, one can imagine a situation in which an enacted law, though published and promulgated, is so vague or ambiguous that it fails to provide useful guidance, for how can one voluntarily comply with a law if no one knows what it requires? Likewise, a congruence problem arises when the law as promulgated does not enable citizens to anticipate how officials will interpret and enforce it. One can imagine at least two variants of the latter scenario. As in the case of speed limits, a soft incongruence may occur in situations where the "real rule" that governs conduct (or, more precisely, the rule that best explains and predicts the incidence of official enforcement actions) is related to—and perhaps even a function of—but ultimately distinct from the most natural reading of the promulgated rule: When the nominal speed limit is 55 m.p.h., the effective speed limit is probably around 64. Here, the real rule may still be ascertained and (generally) relied upon, but such ascertainment requires that one supplement one's reading of the enacted rule with observations of the collective conduct of one's community and of the officials charged with enforcing its norms. The sec-

ond and more concerning variant is one in which the official distribution of punishment bears little or no observable relationship to the published law — a rather severe promulgation problem — or worse, is utterly random and capricious, bearing no observable relationship even to citizens' patterns of conduct — perhaps a generality problem.

The case is yet harder to make with respect to stability, but even this desideratum has implications for obeyability at least as a practical matter. Should the law change frequently and erratically, today requiring *S*, tomorrow  $\sim S$ , it might be possible in principle for a person to remain in compliance by carefully attending to the mercurial vacillations of sovereign decree, but in reality it may become utterly impracticable for a citizen to keep abreast of such changes while continuing to lead any kind of normal life, let alone to engage in any complex planning that requires reliance on the future state of the law. In short, frequent and erratic enough changes may make compliance so difficult as to approximate impossibility, such that only a negligible few may have stamina (or good fortune) enough not to run afoul of the law's protean decrees.

Finally we come to obeyability itself. While I am not aware of any other scholar who has done what I am attempting — who has marched through the desiderata one-by-one, trying to show how they can all be subsumed under this one heading — I am certainly not the first to note the preeminence of obeyability. Raz, for example, has noted that the rule of law "has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it."<sup>106</sup> For the second aspect to obtain, "*the law must be capable of being obeyed.*"<sup>107</sup> And indeed, as mentioned above,<sup>108</sup> Fuller himself acknowledges the possibility of collapsing the desiderata in just this way:

The question may be raised at this point whether most of the other desiderata that make up the internal morality of the law are not also ultimately concerned with the possibility of obedience. *There is no question that the matter may be viewed in this light.* Just as it is impossible to obey a law that requires one to become ten feet tall, so it is also impossible to obey a law that cannot be known, that is unintelligible, that has not yet been enacted, etc.<sup>109</sup>

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106. RAZ, *supra* note 16, at 213.

107. *Id.* (emphasis added).

108. *Supra* note 23 and accompanying text.

109. FULLER, *supra* note 14, at 70 n.29 (emphasis added).

But Fuller rejects this approach. His concern, he says, “is not to engage in an exercise of logical entailment, but to develop principles for the guidance of purposive human effort.”<sup>110</sup> From the lawmaker’s standpoint, he continues, “there is an essential difference between the precautions he must take to keep his enactments consistent with one another and those he must take to be sure that the requirements of the law lie within the power of those subject to them.”<sup>111</sup> Well, yes and no. True, the set of All Laws Possible to Obey includes laws with regard to which the diligent lawmaker must take account of things other than the formal characteristics of legislative enactments, including contingent facts about the natural or physical world – whether or not it is within subjects’ volition to become ten feet tall, say. But if the other desiderata constitute a subset of the obeyability desideratum, then a lawmaker for whom the latter is his sole consideration will necessarily seek to filter out all un-obeyability in just the way that a filter for birds will necessarily reach wrens and jays and sparrows. Still, Fuller expressly raises and rejects this view of his project; it is incumbent upon me to explain why I believe Fuller can be defended by reference to a claim he seems at pains to avoid making.

Moreover, the desideratum I have chosen as the primary one may strike some as particularly impoverished, insofar as obeyable laws can be quite draconian. An injunction or prohibition of the kind that can be likened to an Austinian command may very well be issued *in the genuine hope that it be obeyed*. Consider the case of a master and a slave – the very case that, above, I suggest constitutes an instance of lawlessness. With respect to a majority of the master’s orders to the slave, his authentic wish is that they be carried out – a condition that presupposes obeyability. After all, the slave represents a factor of production to the master and he generally orders the slave to do things that he (the master) wants done, hence, things that are *possible to do*. If all that differentiates command from law is that the latter is capable of obedience, then it would seem that orders given under a system of chattel slavery, because they are not necessarily (or even typically) incapable of obedience, deserve the full pedigree of law, even under a Fullerian analysis. This is a very powerful version of the instrumentalist argument; a most iniquitous law may be entirely obeyable.

With respect to the first of these two objections, the answer is that, despite his insistence that the eight ways not be reduced to obeyability, Fuller elsewhere makes clear that the purpose of his project is to

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110. *Id.*

111. *Id.*

lay out minimally sufficient criteria for obliging citizens' obedience; he states that "there is a kind of reciprocity between government and the citizen with respect to the observance of rules" — a kind absent from the master-slave relationship, as we'll see — and that "[w]hen this bond of reciprocity is finally and completely ruptured by government, *nothing is left on which to ground the citizen's duty to observe the rules.*"<sup>112</sup> But what could obliterate such duty faster than that the rules not be obeyable, or not exist at all? "Certainly," Fuller writes in an adjacent passage, "there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist."<sup>113</sup> Quite so — just as there can be no ground for asserting that he should obey that which cannot be obeyed. At best, Fuller can be said to be ambivalent regarding the reduction to obeyability.

With regard to the second objection, it boils down to a restatement of the dilemma raised in the previous Part: A thin rule of law may be part of a concept of law that tolerates injustice, while a thick rule of law may be subsumed under a concept of justice and thus do no independent work. Again, I think for the most part that the desiderata are intended to provide necessary but insufficient conditions for justice to obtain and that law, even rule-of-law-compliant law, must be supplemented with external morality to bring about justice. As Professor Kristin Rundle has observed in her recent book, *Forms Liberate*, Fuller "has in view a particular quality of relationship between the lawgiver and the legal subject, one that is *reflected* in the observance of his eight principles but which is not *exhausted* by them."<sup>114</sup> Still, it is this quality of relationship — what Fuller above calls "reciprocity" — that is absent when law is unobeyable. Not all obeyable law is just, but all unobeyable command is un-law-like, insofar as it entails a special disregard for citizens' status that is essential to law as Fuller sees it. This point bears enlargement.

The eight ways, says Rundle in her book, "do tend to read like something of a checklist for how to create and maintain a legal order," but this narrow reading leads to "considerable misunderstandings" about Fuller.<sup>115</sup> To understand Fuller, she continues, "we need to move towards [a] more capacious understanding of law's 'form' [—] a conception of the form of law that is inclusive of the conception of the

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112. FULLER, *supra* note 14, at 39–40 (emphasis added).

113. *Id.* at 39.

114. RUNDLE, *supra* note 13, at 92.

115. *Id.* at 91–92.

person as a responsible agent that Fuller argues is implicit in the internal morality of law."<sup>116</sup> Moreover, we need to think "about Fuller's repeated references to the relationship of 'reciprocity' that a legal system constitutes, and which signals the equal presence and responsibilities of *lawgiver and legal subject alike*."<sup>117</sup> Per Fuller, "the legal subjects' moral obligation to obey law only arises in the first place in response to, or in anticipation of, the lawgiver's corresponding effort to create and maintain a workable legal order within which she might be able to live her life."<sup>118</sup> Accordingly, "fidelity to law is something qualitatively different to deference to authority."<sup>119</sup> And finally:

Departures from the principles of the internal morality of law . . . are permissible, but if either the formal features of law are abused, or the subject is for some reason considered not capable of responsible action, then what purports to be governance through law may slide into something that, in merely acting upon the subject rather than respecting her as an agent, no longer has the character of law.<sup>120</sup>

As Rundle sees it, a major problem with positivism for Fuller is that, where he sees law as characterized by this reciprocal relationship, the positivist sees "the essence of law in 'a pyramidal structure of state power', abstracted from 'the purposive activity necessary to create and maintain a system of legal rules.'"<sup>121</sup> Interestingly, a similar observation is expressed by Professor Sundram Soosay — a scholar who may not have very much common ground with Rundle in general. "What [Fuller thinks] is so misguided about the positivist project," Soosay writes, "is the way in which human societies are understood to be ordered artificially, from the top down, through exclusively bureaucratic means. This is the effect of equating all law with its visible, institutional form . . ."<sup>122</sup> Per Soosay, this view "produces a form of ordering [more befitting] military organisation and totalitarianism [than] liberal, democratic states", and he notes that "Fuller describes the positivist understanding of law variously as managerial

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116. *Id.* at 92.

117. *Id.* (emphasis added).

118. *Id.* at 89.

119. *Id.* at 90.

120. *Id.* at 99.

121. *Id.* at 93 (quoting FULLER, *supra* note 14, at 110, 106).

122. Sundram Soosay, *Rediscovering Fuller and Llewellyn: Law as Custom and Process*, in *NEW WAVES IN PHILOSOPHY OF LAW* 31, 40 (Maksymilian Del Mar ed., 2011).



direction; a one-way projection of authority, emanating from an authorised source and imposing itself on the citizen; a datum projecting itself into human experience and not . . . an object of human striving.”<sup>123</sup>

With these scholars’ observations in mind, let’s reconsider Fuller’s controversial proposition about the affinity between coherence and goodness through the lens of obeyability.<sup>124</sup> As a reminder, I found Fuller’s proposition doubly problematic insofar as it seemed to concede the need to introduce substantive (as opposed to content-neutral) “ought” questions into the concept of law and compounded the error with an empirical proposition about the alleged affinity. To be clear, my reconsideration of the issue here does not offer a solution to either of those problems; I wish merely to test intuition concerning the effect, if any, that my obeyability thesis has on the proposition in question. Does obeyability have “more affinity” with good than with evil? More precisely, is it the case that, among those exercises of official power as to which intuitions are most likely to diverge concerning whether they deserve the name of law, violations of the obeyability desideratum are likely to be found? I must of course answer the question not empirically but thought-experimentally, but I propose that the answer is “yes.”

The test environments mentioned above are Nazi Germany and the early American institution of slavery. I should here acknowledge that these are both among the greatest human rights tragedies in recent history, and a decent respect for the millions of shattered lives in their wake counsels against lightly relying on their illustrative power. Such historical events are, however, at the very core of the questions under discussion here, as both are paradigm instances of nominally law-like systems whose legal status serious scholars dispute. It is therefore all but necessary to discuss these events in any discussion of the kind undertaken in this Article.

Let’s begin by considering two authoritative statements of American law, one from before, the other after, the abolition of slavery. In his *Dred Scott* decision, Chief Justice Taney infamously found that African Americans

had [long] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that

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123. *Id.* (footnotes and internal quotation marks omitted).

124. *Supra* notes 82–84 and accompanying text.

the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.<sup>125</sup>

Eight years later, the Thirteenth Amendment became part of the Constitution. It provides that, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."<sup>126</sup>

Brief though they are, these excerpts illuminate much about the interaction between slavery and law. The first text makes clear that slaves were not the persons to whom law's decrees were directed, as evidenced by the extreme statement that African Americans had "no rights" under the law; this is far more abased a status than mere non-citizenship, as a foreign visitor who lacked political rights (to vote or hold office, say) would still not be barred from the protections of basic *civil* rights in most instances – would not, for example, be deprived of life, liberty, or property without due process of law, as slaves and other African Americans routinely were. True, there were laws *about* slaves, as there were about "ordinary article[s] of merchandise and traffic", but there were no laws of which slaves could be said to be the proper legal subjects. Here is none of Rundle's "conception of the person as a responsible agent"; as Rundle herself has noted, in lamenting a foregone opportunity in his private correspondence for Fuller to make the case for why slavery violates internal morality, that morality is "incompatible with the . . . iniquity of designating a person as an object of property and acting upon them accordingly."<sup>127</sup>

But what about obeyability? A subtextual implication of the second text quoted above is of more significance here. Involuntary servitude persists today – "as a punishment for crime." But for African Americans, for most of this nation's history and pre-history, all that was necessary to subject them to this extraordinarily severe punishment was to show that they were African Americans.<sup>128</sup> There existed no rule such that, should one choose to obey it, she could avoid the fate of

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125. *Scott v. Sanford*, 60 U.S. 393, 407 (1856).

126. U.S. CONST. amend. XIII, § 1 (emphasis added).

127. RUNDLE, *supra* note 13, at 113–14.

128. As touched on briefly above, *supra* note 103, in this Article I leave aside Fuller's awkward handling of the generality desideratum. The omission is especially glaring here, since policies of slavery and genocide based on racial and ethnic traits can more easily be conceived of as generality violations than as violations of obeyability. But again, for purposes of this Article I limit myself to consideration of the desiderata as Fuller himself described them.

enslavement – unless it was an implied rule perversely requiring her to be other than who she was, like a rule requiring one to become ten feet tall.

Likewise with the Nazis. In addition to the already noted “monstrosity” of secret laws and the grudge informer scenario in which the law seemed intended not so much to secure compliance as to provide arbitrary discretion to officials, the Nazi regime had in common with the American system of chattel slavery the fact that millions of its victims were selected solely by reason of their ethnic extraction. As with American slaves, the Jews targeted by Nazi genocide had no opportunity to bring themselves into compliance with any rule that would spare them deprivation of liberty and life. From the viewpoint of early African Americans and Jews under the Nazi regime, there was no law to obey.

#### CONCLUSION

An unobeyable law is not a law. This proposition eschews the metaphysical confusion entailed by the proposition that an *unjust* law is not a law because the question of whether a law is obeyable is an objective question, one that for the most part does not depend for its answer on the resolution of difficult normative or ethical questions or on reaching agreement about an essentially contested concept such as justice. In this Article, I have attempted to show that the legal theory of Lon Fuller, perhaps above his own objection, supports this conclusion. With this in mind, let’s return to the question of Fuller’s position along the positivist-natural law continuum.

I have argued, contra Gardner, that Fuller’s eight desiderata are matters of *form*. This is important because it explains how, as elaborated in my second argument, Fuller’s formal requirements of a rule-of-law-compliant legal system can be at once inclusion conditions and evaluative standards for law and yet remain distinct from substantive or non-content-neutral requirements that one might propose, such as that law be good or just in general, or that it implement specific policies such as taxing the rich (or not) or, less controversially, prohibiting theft. As formal features of the rule of law, compliance with which is necessary, per Fuller, for law to exist at all, the desiderata are part of Fuller’s concept of law itself. And this move by Fuller is crucial to understanding where he fits in the larger conversation. Quite unlike the classical natural-law theorists (at least as Kretzmann imagines them), Fuller would not endorse the *non-est-lex* proposition. On the other hand, unlike an Austinian positivist, Fuller obviously would

not conflate law with simple command. Where Fuller and Hart differ can be harder to nail down, but at least one difference seems to be that, where Hart acknowledges that law typically possesses normativity, Fuller is concerned to explore and identify the conditions under which its normativity is acquired and maintained (or not) — conditions he finds in the desiderata. The difference is not that he and Hart answer the question differently, but that Hart did not bother to ask the question.

Finally, I have argued that one desideratum, obeyability, by itself entails the other seven. A sufficiently unobeyable putative law fails with respect to an essential inclusion feature and is therefore disqualified as law. In making this last point, however, I show how it is not a mere triviality, a statement about the bare capability of a given directive (to a slave, say) of being obeyed. Rather, drawing on work by Rundle, I show how obeyability reflects but does not altogether embody a reciprocity between government and governed that Fuller deems essential to a legal system. In doing so, I hope I have shed light on an issue with which Fuller himself struggled, namely, the attempt to explain why and how law — at least rule-of-law-compliant law — tempers and subdues certain injustices, such as those illustrated by American slavery and Nazi genocide. Fuller's own intuition was that these iniquities were incompatible with his internal morality of law, but he had trouble articulating why. I hope I have shown that the answer lay in the failure of the governments perpetrating those injustices to enter into the kind of reciprocal relationship with those subject to their decrees that respected their responsible human agency.