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Fuller and the Folk

The Inner Morality of Law Revisited

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The philosophy of law, or jurisprudence, is an area of study wherein experimental methods are largely absent but sorely needed. It is puzzling that the experimental turn has been slow in coming to jurisprudence, as the field straddles two disciplines where empirical evidence is increasingly common. On one flank, empirical studies have long been popular among non-philosophers in law departments; on the other, experimental methods now abound in many areas of philosophy.

While it is difficult to understand why few have adopted an experimental approach to jurisprudence, it is clear why experimental jurisprudence should be on the agenda: legal philosophers routinely ask questions that are explicitly empirical. To give just one brief example, consider the fact that in contemporary jurisprudence, some philosophers are concerned, in part, to give the correct account of *our* concept of law or *our* concept of a legal system (Raz, 2009), while others are anxious to show that there is no single concept of law (L. Murphy, 2005; Priel, 2013). It would seem that this empirical debate—about whether *we* have a shared concept of law at all, and if so, what contours that concept has—would benefit from empirical research. In particular, we might seek out folk

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psychological evidence, predicated on the positive impact such evidence has had in other domains of philosophy.

The foregoing may not be convincing. Traditional legal philosophers who do not use empirical methods will need to hear more to appreciate why strange, new techniques might be appropriate. Experimental philosophers who have yet to consider jurisprudence will need to hear more about the subfield and its issues to understand how they might contribute. We hope to address such philosophers and others, but not with a purely metaphilosophical tract. Instead, our chapter aims to exemplify the potential for experimental approaches to jurisprudence. As such, we focus on a narrow issue in jurisprudence. We appraise Lon Fuller's procedural natural law theory using experimental techniques. Admittedly, his is just one of many theories about law; however, it is a prominent theory, and legal philosophers have written extensively to criticize (Hart, 1965; D'Amato, 1981), defend (C. Murphy, 2005), and extend that theory (Winston, 2005). If our experiments usefully add to this debate, we hope to thereby have illustrated the legitimacy and value of experimental jurisprudence.

The trajectory of the chapter is as follows. We begin with background on Fuller's theory of law and on the state of jurisprudence. For those well-versed in those debates, this can be skimmed or skipped. Next, we offer an overview of the studies that we performed. In this overview section, we state with precision how our experimental approach helps to assess Fuller's theory. After the overview, we present each of the three studies themselves. For each study, we discuss our predictions, the motivating thoughts behind those predictions, the manner by which the experiment was performed, and the results. In the final section of the chapter, the general discussion, we elaborate on the results of our research, explore their limitations, and muse in a more broad-minded way about the future of experimental jurisprudence.

1. Fuller's Procedural Natural Law Theory

The key discussion in jurisprudence concerns the necessary and sufficient conditions something must satisfy in order to count as a law or a legal

system. Fuller (1969) offered a major contribution to this discussion when he proposed a novel set of necessary conditions. Specifically, Fuller argued that a social arrangement is a legal system insofar as that arrangement satisfies eight principles that he collectively called "the inner morality of law." These principles include the generality principle (that legal systems must have general rules of conduct), the publicity principle (that legal rules of conduct must be made public for those regulated to learn of their rights and duties), and the prospectivity principle (that a legal rule of conduct may only regulate conduct performed after the promulgation of said rule of conduct).[1] Since its initial formulation in the 1960s, Fuller's theory has been widely discussed and continues to enlist new adherents. This is not surprising because the view has certain theoretical virtues, virtues one can identify upon reviewing other well-known views in this debate.

If the key discussion in jurisprudence is the search for necessary and sufficient conditions for law, the most notorious debate within that key discussion concerns whether a norm has to have particular content in order to count as legal norm. Legal philosophers have been especially interested in whether a norm's content has to comport with the strictures of morality in order to be a legal norm. *If a norm permits or even requires those subject to it to perform grossly immoral acts, can that norm be a legal norm?* That kind of question has long been the hot-button issue in jurisprudence. Those who answer in the affirmative are, roughly speaking, legal positivists; whereas, those who answer in the negative are, roughly speaking, natural law theorists. Legal positivism has a long list of famous proponents (e.g., Kelsen, 1967; Hart, 1994; Waluchow, 1994; Austin, 1998; Raz, 2009; Shapiro, 2011); while natural law theory has its own list of famous proponents (e.g., Finnis, 1980; Dworkin, 1986; King, 1986; Aquinas, 1994; Murphy, 2011). Fuller set himself apart by straddling the divide between the two camps.

Scholars are often drawn to natural law theory because they hold as a considered judgment the thought that, prima facie, those subject to a law's provisions have a moral reason to obey it. Or to put this considered judgment another way, prima facie, law deserves subjects' respect. If this

[1] We reproduce the full set of Fullerian principles below and only offer this abbreviated list to help fix ideas.

considered judgment is used as a desideratum for selecting one's theory of law, one will endorse some content restriction as a condition for some norm to count as law. On the other hand, scholars are often drawn to legal positivism because they hold as a considered judgment the thought that some laws are unjust, such as those of the Third Reich, apartheid South Africa, and the antebellum American South.

Because, for Fuller, a norm can be law only if it has certain content (e.g., it is prospective and not retrospective), his view is often classed as a version of natural law theory. However, Fuller's natural law theory differs from more familiar versions of natural law theory which claim that a norm is a law only if the norm is just (King, 1986; Aquinas, 1994) or claim that unjust norms can, at best, be defective instances of law (Finnis, 1980; Murphy, 2011). Fuller's conditions only disqualify norms which exhibit certain *procedural* failings from being laws. Thus, for Fuller, many unjust norms can be laws, and only some unjust norms would fail to be laws. For this reason, commentators often label Fuller's view an instance of *procedural natural law theory*.

Fuller's procedural natural law theory might be thought to enjoy theoretical virtues of both traditional natural law theory and legal positivism. Fuller's view can countenance the considered judgment that law, prima facie, deserves subjects' respect. Given the procedural constraints that Fuller sees as necessary features of law, laws minimally treat people fairly. Arguably, this feature of law would deserve respect and would give subjects some moral reason to comply with law. To illustrate the minimal sense in which law treats people fairly on Fuller's theory, consider two of his principles. The publicity principle (that legal rules of conduct must be made public for those regulated to learn of their rights and duties) and the prospectivity principle (that a legal rule of conduct may only regulate conduct performed after the promulgation of said rule of conduct) together imply that law necessarily gives subjects fair notice of which behavior will elicit adverse state responses. The foregoing explains how Fuller can accommodate one of the driving thoughts behind traditional natural law theory, but he does not incur that theory's key theoretical cost, denying that there are unjust laws. It is to Fuller's theoretical advantage over other natural lawyers that he can claim with legal positivists that some norms are both unjust and legal in the fullest sense.

Before concluding this section on Fuller's work and its place in contemporary jurisprudence, we summarize the eight principles which comprise Fuller's inner morality of law. The principles are as follows. (For ease of exposition, *n* will signify some norm, *L* will signify law, and all claims concern a single jurisdiction.)

CONSISTENCY: n_1 and n_2 are both *L* only if n_1 and n_2 are mutually consistent.

ENFORCEMENT: *n* is *L* only if the published version of n accords with how *n* is enforced.

GENERALITY: *n* is *L* only if *n* is a general rule of conduct.

INTELLIGIBILITY: *n* is *L* only if *n* can be understood by subjects.

POSSIBILITY: *n* is *L* only if *n* requires only those acts subjects are physically capable of performing.

PROSPECTIVITY: *n* is *L* only if *n* regulates only conduct performed after the promulgation of *n*.

PUBLICITY: *n* is *L* only if *n* is publicly announced.

STABILITY: *n* is *L* only if *n* does not change too frequently.

2. Overview of the Studies

Having outlined our general ambitions and offered a sketch of Fuller's position, we now must explain our experiments. This explanatory task is twofold: to chart the specific steps we took and to justify using these experiments in appraising Fuller's procedural natural law theory.

Broadly, our experiments attempt to ascertain the extent to which Fuller's inner morality of law reflects the folk understanding of law. The folk understanding of law can be important for assessing Fuller's theory in two different ways, depending on how one understands his effort.

Following Haslanger (2012a, 2012b), philosophical analysis of the kind that Fuller and others engage usually proceeds in one of two modes, either as *conceptual analysis*, analysis of what 'we' take the analysandum to be, or as *descriptive analysis*, analysis of what the analysandum actually is, irrespective of how we see it. If Fuller was engaged in conceptual analysis, he was trying to characterize 'our' concept of law. As such, his

theory is, more or less, a prediction of what those who possess the concept of law would say. Therefore, folk intuitions bear directly on whether his attempt has been successful. The folk intuitions are the very subject of Fullerian claims on this construal. Alternately, insofar as Fuller attempts to do *descriptive* analysis of law, analysis of what law actually is, folk intuitions bear indirectly on whether Fuller is right. It is a familiar epistemic principle that views requiring a massive error theory, that is, views that imply that most people have false beliefs with respect to a given proposition, are to be regarded skeptically (Wright, 1994; Jackson, 1998). To be fair, this epistemic principle has its detractors (Frances, 2013), but generally, philosophers hold that extraordinary evidence is needed to overturn widespread, commonsense views. Given that, determining what people believe is essential to determining whether the presumption against error theories weighs for or against Fuller's theory.

Whether one understands Fuller's effort as an instance of conceptual analysis or descriptive analysis, experimental data would best bolster his account if it demonstrated that the folk *widely* and *reliably* agree with his principles. This implies that there are two ways that the data could cause trouble for the account: Folk support for Fullerian principles might be modest or even meager, or folk support for Fullerian principles might be unstable. If the data should reveal modest support, his account faces problems, whether construed as conceptual or descriptive analysis. If few share his view and Fuller is attempting to predict our shared concept of law, we may have to reject the account entirely as an inaccurate prediction. If we view the theory as descriptive analysis, the presumption against error theories may tell against him. If the data should reveal unstable support among the folk—presented in one fashion, Fullerian principles garner widespread support; presented another way, they are roundly rejected—supporters of Fuller would need to explain away the Fuller-unfriendly response pattern. Otherwise, some of Fuller's opponents will attempt to explain away the Fuller-friendly response pattern, thereby saddling the view with the previous problem, that of modest support.

With the foregoing in mind, we developed three experiments in which we probe folk (Studies 1 and 2) and expert (Study 3) concepts of the law. Our studies aim to capture the levels of support that Fullerian principles garner while also examining two kinds of effects on judgments about the nature of law. These effects, of *construal level* (Trope and Liberman, 2010) *evaluation mode* (Hsee, Loewenstein, Blount, and

Bazerman, 1999), have already been observed in other areas of judgment and decision-making. Below, we briefly describe both effects and summarize evidence of their impact upon decision-making at large.

2.1 Construal level

The theory of construal level posits that mental representations (e.g., of a soccer player scoring a goal) can occur at different construal levels: Higher-level construal focuses on the abstract and functional properties (e.g., whether it was a winning goal, or a beautiful goal), while lower-level construal highlights the concrete, sensorimotor, and/or descriptive properties (e.g., whether it was a shot or a header, whether it had spin, etc.). Psychological distance is closely linked to construal level (Trope and Liberman, 2010) because events that are closer to us in some respect, whether temporally, spatially, or socially, are construed at lower levels. Distant events, by contrast, tend to be construed at higher levels.

Throughout our studies, we investigate whether intuitions about Fuller principles are susceptible to effects of construal level—in the contrast between (i) hypothetical (higher-level) versus actual (lower-level) laws in Studies 1 and 3, and (ii) between the essence of law (higher-level) and concrete instances of law (lower-level) in Study 2.

2.2 Evaluation mode

Judgments and decisions can be made in one of two evaluation modes (Hsee, Loewenstein, Blount, and Bazerman, 1999): *separate evaluation*, in which a single option or alternative is evaluated, or *joint evaluation*, in which various options are presented and evaluated at once and often by comparison to each other.

A wealth of studies has shown that our preferences and judgments can vary as a function of evaluation mode—perhaps because judgments in separate evaluation depend on more spontaneous impressions and easily evaluable features, while in joint evaluation, secondary characteristics that are harder to evaluate can be taken into account (see, e.g., Hsee, 1996).

In an oft-cited example, when asked *separately*, participants offered to pay more for a new dictionary with only 10,000 entries than for a

dictionary with 20,000 entries and a torn cover. Then, when asked *jointly*, participants were willing to pay more for the dictionary with more entries. Thus, it is sometimes argued that joint evaluation provides the opportunity for spontaneous assessments—i.e., assigning more weight to the defective cover than to the number of entries—to be checked against subjects' own normative benchmarks—i.e., believing that one ought to value the number of entries more than the condition of the cover (Bazerman, Gino, Shu, and Tsay, 2011).

In Study 1, we examine whether the folk conception of law varies as a function of evaluation mode. In particular, we test whether the folk endorse the procedural natural lawyer's view—that laws necessarily observe Fullerian principles—more in separate or joint evaluation.

3. General Methods

Our studies were conducted on samples drawn from two populations: (1) United States adults ($N = 242$) with no specific training or knowledge of the law, and (2) bar association members ($N = 73$) with training and substantial experience in the legal profession. Complete study materials, data and scripts are available at https://osf.io/my2xe/.

3.1 Lay sample

242 participants (39% women; Age: $Q_1 = 27$, $Mdn = 31$, $Q_3 = 40$) were recruited from Amazon Mechanical Turk to take part in Studies 1 and 2. All participants were US residents with a 90% approval rate and were compensated for their participation (at $7.25/hour, based on median completion time during pre-testing).

3.2 Law professionals

73 participants (56% women; Age: $Q_1 = 38$, $Mdn = 52$, $Q_3 = 63$) were contacted via state bar associations. All participants were members of bar associations, and most (87%) were lawyers. Median years of experience doing law-related work was 25 (Q_1 = "10"; Q_3 = "30 or more").

4. Study 1: Necessary or Actual? Fullerian Principles in Separate and Joint Evaluation

In our first study, we sought to determine the degree of support Fullerian principles enjoy among the folk. In particular, we sought to determine how likely the folk were to endorse these principles in the manner set forth by Fuller, as necessary conditions for something to count as a law. We also sought to determine how likely the folk were to endorse these principles, if understood as mere contingent truths. Finally, we also sought to explore the effect of evaluation mode.

In this and the subsequent studies, we test whether Fullerian principles enjoy endorsement at the 2:1 supermajority level. A case can be made that "widespread support" is satisfied at any level of support at or above a simple majority. For that reason, our choice of 2:1 may appear arbitrary. Several considerations recommend this level of support. A bare majority is consistent with rife disagreement. If, for instance, 50.1% of the folk endorsed Fullerian principles, it would seem premature and perhaps even misleading to claim that Fuller's theory comports with the folk conception of law. It may even be premature to posit a univocal folk conception of law in the face of such disagreement. At the other extreme, requiring unanimity seems unduly onerous and uncharitable to Fuller's view. If all but a small fraction of participants endorse Fullerian principles, it would be unreasonable to claim that Fuller's theory fails to track folk intuitions. With both simple majority and unanimity ruled out as reasonable options, both the 2:1 and the 3:1 levels recommend themselves. The 3:1 level looks particularly attractive because it seems to "split the difference" between simple majority and unanimity. However, because we predicted that Fullerian principles would not even garner support at the 2:1 level, we chose this level as opposed to the more demanding 3:1 level.

To continue about our predictions, we predicted that Fullerian principles would garner only modest support, falling below the 2:1 level, whether the principles were understood as necessary claims or claims about the actual world. This skeptical prediction is motivated by general skepticism that Fuller's theory reflects folk intuitions as well as some concern that there is a univocal folk conception of law to be tracked. We also predicted that the folk would be more likely to endorse Fullerian

principles as true of the actual world than as true necessarily. Two reasons backed this prediction. First, since necessity entails actuality but not vice versa, the necessity claim is the more ambitious. Second, we expected that participants' own experience living in polities that observe the rule of law would dispose them to claim that actual legal systems often do respect Fullerian principles; however, we also expected participants to be familiar with political orders—historical, contemporary, and even fictional—with little respect for the rule of law, and this familiarity would dispose them to reject the idea that Fullerian principles are necessary truths.

4.1 Study 1a: Fullerian principles in separate evaluation

In this part of our first study, we ask one group of participants to evaluate Fullerian claims as actually true, and another group to evaluate whether they are necessarily true.

4.1.1 Procedure

Participants were randomly assigned to one of two conditions, Actual or Necessary. In the Actual condition, participants read:

In this survey, we will ask you eight questions regarding the law.

Meanwhile, in the Necessary condition, participants read:

Imagine that anthropologists discover a few previously unknown societies on Earth, referred to as the Faraway nations. Their inhabitants are Homo sapiens like us and, though their customs and traditions are unique, they have government and laws much like the rest of nations on Earth. In this survey, we are interested in what you suppose Faraway nations are like. Specifically, we will ask you eight questions about their laws.

Next, participants were shown pairs of statements for each Fullerian principle and were asked to endorse one statement from each of the eight pairs. In each pair, one statement was a Fullerian principle, phrased either as an empirical claim ("The law as enforced does not differ much

from the law as formally announced") or as a necessary claim ("The law as enforced [in Faraway nations] could not differ much from the law as formally announced"). The other statement in the pair was the negation of the Fullerian principle.

4.1.2 Results

There was substantial variation in endorsement by principle: Some principles, like the publicity principle and the possibility principle, garnered endorsement by a supermajority; others, such as the consistency principle, fell even below a simple majority view (see Figure 1.1 and Table 1.1).

To generate an overall measure of support for Fullerian principles, we first averaged participants' responses across all eight principles: Agreement

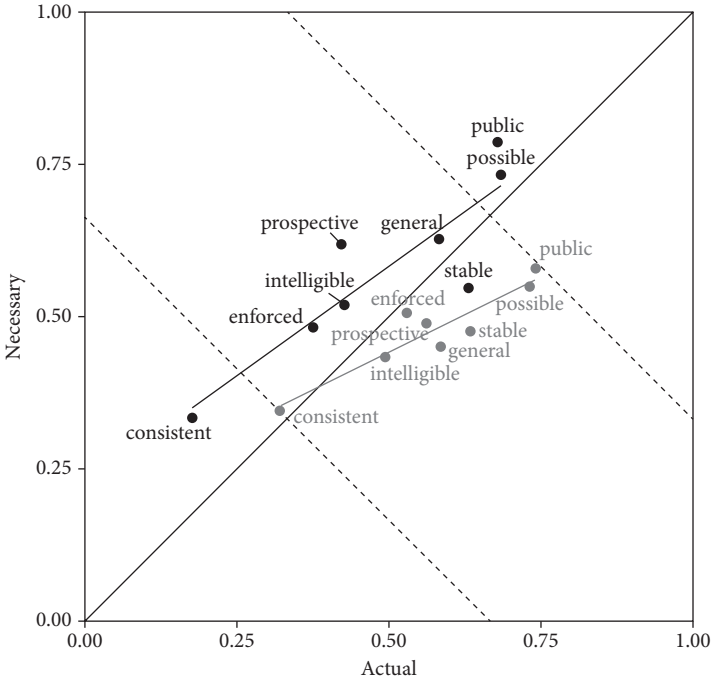

Figure 1.1 Actuality (x-axis) and necessity (y-axis) judgments for each Fuller principle under separate (black) and joint (gray) evaluation.

Note: The solid diagonal line highlights the judgment reversal between conditions. The diagonal dashed lines correspond to supermajority disbelief (1:2) and belief (2:1) averaging across judgment types.

Table 1.1 Endorsement of Fuller principles (in descending order) and effects (odds ratio and 95% confidence interval) of statement modality, evaluation mode, and their interaction derived from mixed-effects logistic regression models on agreement.

		Model 1		Model 2
	Weighted prop.	**Necessity**	**Joint Evaluation**	**Necessity × Joint Evaluation**
Publicity	0.70 [0.65, 0.75]	0.89 [0.56, 1.43]	0.71 [0.44, 1.14]	0.28 ** [0.11, 0.73]
Possibility	0.68 [0.63, 0.73]	0.70 [0.42, 1.18]	0.71 [0.42, 1.20]	0.30 * [0.11, 0.88]
Stability	0.57 [0.52, 0.63]	0.57 * [0.34, 0.94]	0.85 [0.51, 1.42]	0.71 [0.27, 1.87]
Generality	0.57 [0.52, 0.63]	0.81 [0.51, 1.30]	0.69 [0.43, 1.10]	0.46 [0.18, 1.18]
Prospectivity	0.53 [0.48, 0.59]	1.29 [0.83, 1.99]	1.01 [0.66, 1.57]	0.33 * [0.13, 0.82]
Enforcement	0.49 [0.43, 0.54]	1.18 [0.77, 1.82]	1.43 [0.93, 2.21]	0.59 [0.25, 1.40]
Intelligibility	0.46 [0.41, 0.52]	1.06 [0.68, 1.65]	0.96 [0.61, 1.65]	0.53 [0.22, 1.31]
Consistency	0.29 [0.24, 0.34]	1.56 # [0.96, 2.52]	1.46 [0.90, 2.35]	0.49 [0.18, 1.30]
Model 1: Main effects only		0.87 [0.73, 1.05]	0.94 [0.74, 1.19]	–
Model 2: + Necessity × Joint interaction		1.60 ** [1.26, 2.04]	1.45 * [1.05, 2.01]	0.42 ** [0.28, 0.62]

Note: #: $p < 0.10$, *: $p < 0.05$, **: $p < 0.005$.

with Fullerian views ranged between 46% and 54% in the Actual condition (M = 0.50, SD = 0.21), and between 52% and 64% in the Necessary condition (M = 0.58, SD = 0.27). One-sample t-tests against the 2:1 supermajority level revealed that support for Fuller principles fell short of a supermajority in both conditions: Actual $t(82) = 7.16$, $p < 0.001$; Necessary $t(80) = 2.81$, $p = 0.006$.

Surprisingly, agreement with Fuller principles appeared to be *higher* in the Necessary than in the Actual condition—opposite to our original prediction. A mixed-effects logistic regression confirmed this result: We entered condition as a fixed effect, and participant and principle as random effects, while allowing the slope of condition to vary across principles. The model revealed a significant effect of condition, $OR = 1.55$, 95% CI [1.04, 2.34], $t = 2.21$, $p = 0.027$. In other words, participants were more likely to believe that Fuller properties are necessary for law (when thinking about hypothetical legal systems) than that they are actual properties of laws.

It is unclear why a majority of participants treated Fullerian principles as necessarily true with regard to hypothetical laws, but not empirically true of the laws they know. First, it could be that participants do not fully understand necessity and possibility ($\Diamond A \rightarrow \sim\Box\sim A$). Alternatively, by appealing to hypothetical laws in one condition and known laws in another, perhaps we inadvertently asked participants to report on distinct concepts (Knobe, Prasada, and Newman, 2013).

If, however, participants view these distinct intuitions as conflicting or inconsistent, then the difference in participants' judgments regarding actual versus hypothetical laws ought to vanish (or even reverse) under joint evaluation—a hypothesis we pursue in Study 1b.

4.2 Study 1b: Joint evaluation

In this second part of the study, we asked a single group of participants to assess whether Fullerian principles actually hold, and whether they hold necessarily. We predicted that the surprising result we obtained in Study 1a would dissipate when participants make both judgments at once. Joint evaluation, we surmised, would help participants to spot the seeming inconsistency in claiming that laws obey Fullerian principles by necessity though many laws fail to do so in practice.

4.2.1 Procedure

Participants were asked to make both types of judgments (actuality and necessity) regarding each Fuller principle. A short introduction to the study made this clear.

4.2.2 Results

Agreement with Fuller principles ranged between 53% and 63% in the Actual condition (M = 0.58, SD = 0.24), and between 42% and 54% in the Necessary condition (M = 0.48, SD = 0.26), once again significantly below supermajority support in one-sample t-tests: Actual $t(77) = 3.18$, $p = 0.002$; Necessary $t(77) = 6.33$, $p < 0.001$.

Indeed, prompting participants to evaluate Fuller principles simultaneously as empirical and necessary claims reversed the distinction we saw under separate evaluation. In a mixed-effects model, the effect of condition was highly significant, $OR = 0.64$, 95% CI [0.46, 0.89], $z = 3.00$, $p = 0.003$. This time, laws were seen as observing Fullerian principles de facto (by a simple majority), but not necessarily in a hypothetical legal system—as we originally predicted.

Table 1.1 summarizes Fuller principles by endorsement and compares the results of Studies 1a and 1b, through additive (Model 1) and interactive (Model 2) models with evaluation mode and statement modality as fixed effects. The Necessity × Joint Evaluation interaction represents the judgment reversal across conditions: Overall, participants were more likely to treat Fuller principles as necessarily (but not actually) true when judged in isolation, and as actually (but not necessarily) true when making both judgments at once.

5. Study 2: The Abstract Essence versus Concrete Instances of Law

The previous study focused on attitudes toward Fullerian principles when stated in abstract terms. Next, we introduce concrete violations of Fullerian principles and ask participants to assess whether they constitute law. By comparing participants' endorsement of abstract principles to their assessments of concrete laws, we aim to conceptually replicate the effect of construal level on Fullerian intuitions.

We predicted that the folk would be more likely to endorse Fullerian principles when the principles are stated abstractly than when grappling with the principles in concrete situations. This prediction is undergirded by the thought, expressed by others (e.g. Hart, 1965), that Fuller's principles express reasonable rules-of-thumb to make legislating rational and

efficient. As such, it may be hard—when thinking abstractly—to imagine how one would engage in lawmaking in any other way. However, if one is invited to consider concrete cases of lawmaking that run afoul of the Fullerian principles, this difficulty in imagining dissipates, which should lead to lower rates of endorsement.

Finally, we also investigate whether judgments on either task, the concrete or the abstract, are impacted by the order in which the tasks are presented. In our opening study, we found evidence that participants treated their judgments at different construal levels as contradictory. Specifically, they appeared to 'correct' their spontaneous Fullerian intuition—that hypothetical laws necessarily observe Fuller principles—when prompted to consider also whether actual laws in fact observe them. Analogously, we might expect that beliefs about the essence of law, stated in abstract terms, might depend on whether participants previously considered specific violations of Fuller principles (i.e., an effect of order on judgments in the abstract condition).

5.1 Procedure

In a 2 (construal: *abstract*, *concrete*) × 2 (order: *abstract-first*, *concrete-first*) mixed factorial design, 104 participants were randomly assigned to one of two orders. Every participant completed two tasks—an abstract task and a concrete task—in a counterbalanced order across participants.

In the abstract section, participants were asked whether laws 'must' observe a given Fuller principle *P* or if they 'can' violate *P*, for example:

Can there be laws that contradict one another or must laws be consistent?

The dependent measure in the abstract condition was participants' endorsement of one of two statements:

There can be laws that contradict one another in a single jurisdiction (0: non-Fullerian),

or

There must not be any laws that contradict other laws in a single jurisdiction (1: Fullerian).

In the concrete section, participants read about a city ordinance, policy proposal, or bill that violated a certain Fuller principle *P* and were asked whether it was 'truly a law' or not. For example:

In a hypothetical country, a state legislature passes two bills that the governor eagerly signs. The first bill is a speed limit bill. It says that driving along Highway 1 at speeds over 80 kilometers per hour is forbidden and that anyone found driving at speeds over 80 kilometers per hour on Highway 1 will be ticketed.

The second bill is a speed minimum bill. It says that driving along Highway 1 at speeds under 85 kilometers per hour is forbidden and that anyone found driving at speeds under 85 kilometers per hour on Highway 1 will be ticketed. As a result of the two bills, many tickets are issued and the state revenues increase dramatically.

In the above example, we then asked *"Are these two bills truly laws?"* Fullerian judgments (that they are *not* laws) were coded as *1*s, while non-Fullerian judgments that they are laws despite violating the consistency principle were coded as *0*s.

5.2 Results

As predicted, we observed an effect of construal level, $OR = 7.51$, 95% CI [3.75, 15.03], $z = 5.69$, $p < 0.001$. Participants were much more likely to endorse Fuller principles in the abstract. When stated abstractly, participants endorsed Fullerian principles approximately 67%, 95% CI [64%, 69%] of the time. When assessing concrete violations of Fuller principles, participants largely reported that they were truly laws nonetheless, with only 21%, 95% CI [19%, 24%] reporting Fullerian judgments.

Unexpectedly, there were no effects of order in either condition, $|z| < 1$, ps > 0.50. Exposure to violations of Fuller principles did not affect beliefs

about the inner morality of law, and reflection on the essence of law in the abstract did not promote Fullerian reactions to concrete violations of procedural principles.

6. Study 3: The Expertise Defense

So far we have assessed views about the inner morality of law in a sample of participants who lack technical knowledge of the law. In reaction to past folk psychological evidence, philosophers have sometimes argued against drawing any major conclusions from laypeople's use of technical concepts (Sosa, 2007). On this view, evidence of *experts'* beliefs is needed to understand whether law truly observes Fuller's inner morality of law. In Study 3, we examine whether professionals with legal training and experience reveal distinct intuitions about the nature of law.

6.1 Procedure

For this study, lawyers were contacted through their bar association mailing lists and assigned to one of two conditions, Actual or Hypothetical, as in Study 1a. The materials were identical to Study 1a, except we added specific questions about participants' experience in the legal profession to the demographic information section.

6.2 Results

Averaging across principles, overall agreement with Fullerian views ranged between 39% and 54% in the Actual condition (M = 0.47, SD = 0.22), and between 57% and 78% in the Necessary condition (M = 0.67, SD = 0.32). Like lay participants, legal professionals did not tend to think that actual laws observe Fuller principles at the 2:1 supermajority level, Actual, $t(34) = 5.26$, $p < 0.001$. However, they did tend to judge that hypothetical legal systems would necessarily observe Fuller principles at approximately a 2:1 ratio, $t(37) = -0.08$, $p = 0.93$.

Replicating the results of Study 1a, law professionals tended to demonstrate the effect of construal level observed in laypeople, $OR = 4.05$, 95% CI [1.15, 15.08], $z = 2.29$, $p = 0.022$. When thinking about hypothetical legal systems, Fuller principles were viewed as necessary properties although they were not viewed as properties of actual law.

We then compared the responses of legal professionals to those of lay participants. No simple effects of expertise emerged in either modality: Professionals were no more likely to judge that Fuller principles are actually observed, $OR = 0.81$, 95% CI [0.33, 1.97], $z = -0.51$, $p = 0.61$, or that they are necessarily observed by hypothetical legal systems, $OR = 1.86$, 95% CI [0.84, 4.28], $z = 1.57$, $p = 0.12$.

Much like lay respondents, experienced lawyers exhibited the core intuition that Fuller's procedural principles are necessary for law, while at the same time believing that laws in practice fail to observe them.

7. General Discussion

In three studies, we found limited support for Fuller's (1969) procedural natural law theory. As we noted at the outset, in the best case for Fuller, we would see widespread and reliable folk endorsement for his principles. This is not what we see.

First we consider the *widespread* front. Though some individual principles were widely endorsed by the folk, others were not, and as a set, the inner morality of law did not garner 2:1 supermajority level support from the folk. Insofar as Fuller aimed to capture 'our' concept of law, his theory misses the mark at least in part. Because many of his principles garner a slim majority support (when construed the right way), worries about the presumption against error theories probably do not obtain. Thus, if Fuller's venture is what we called descriptive analysis, he may be largely safe. However, as some of his principles did not gain supermajority level support (particularly the consistency principle which has 2:1 supermajority level opposition), perhaps that needs to be modified.

There are larger problems on the *reliability* front. In conjunction, Studies 1a and 1b show that participants' views about Fullerian principles shift depending on the conditions in which they are evaluated. Instability of this kind is problematic for Fuller, because, as we argued above, when

there are two conflicting reports of the level of endorsement, Fuller's defenders are now saddled with data to explain away. This general problem looks particularly worrying given the precise way that results turned out, since non-Fullerian reactions look like they emerge in the epistemically preferable circumstance, i.e., joint evaluation in Study 1b. In joint evaluation, as opposed to separate evaluation, arguably one's views are more likely to reflect one's more settled opinion. Study 2 looks similar, for it shows that when we vary construal levels from high to low, participants are more likely to doubt Fullerian principles. Again, Fuller is saddled with something to explain away; and again, there is room to argue that the non-Fullerian response pattern is formed in the more epistemically ideal setting. Such an argument might begin by noting that our intuitions are sharpest when considering more everyday things.

On closer inspection, our experiments also point toward effects of construal level on the propensity toward Fullerian views. When asked to reason about the law at a higher construal level, a majority of respondents demonstrated Fullerian intuitions. This was true when participants reasoned about hypothetical legal systems instead of actual legal systems (Studies 1 and 3), and when they described the abstract essence of law instead of concrete instances of law (Study 2).

Taken together, the evidence we presented casts doubt upon the notion that we have a stable and univocal concept of law. Rather, our evidence suggests that natural law and positivist concepts of law are supported by thinking at different levels of construal. If so, the philosophical debate concerning the role of morality in law may in part arise from the psychological capacity to oscillate between two conflicting concepts of law (see also Struchiner, Hannikainen, and Almeida, ms.).

Our results also speak to two common objections levied against folk psychological evidence on philosophical issues: the *expertise* defense and the *reflection* defense.

Regarding the former, did experienced legal professionals reveal different intuitions? They did not; legal professionals were also divided with regard to the truth of Fuller principles and susceptible to the effect of construal level. If anything, under separate evaluation, legal professionals were somewhat *more* likely to treat Fuller principles as necessary properties of hypothetical laws despite recognizing that the principles are flouted by actual legal systems. One may wish to push back at this

point by contending that legal professionals are not the relevant sort of experts for the expertise defense. On this refurbished version of the expertise defense, legal philosophers, not lawyers, are the true experts. We do not and need not deny that our attack on the expertise defense would be *better* if we also surveyed legal philosophers. Nevertheless, trained lawyers do not have untutored minds about the law, such that one can just dismiss their intuitions. These professionals have expertise vis-à-vis the folk regarding a wide range of norms that purport to be law, and frankly, many trained lawyers have expertise vis-à-vis legal philosophers.

Regarding the reflection defense, did conditions favoring more careful reflection influence beliefs about the inner morality of law? Indeed, our evidence indicated that, when prompted to resolve the tension between their conflicting intuitions, individuals were more likely to conclude that Fuller principles are contingent, not necessary, properties of law.

However, we must draw attention to important limitations of our studies. First, our sample of legal professionals was smaller than one would hope. As a consequence, our claims regarding the expert concept of law should be treated as provisional and subject to confirmation in future research. Second, we did not succeed in eliciting a distinction between necessary and contingent truth overall, which may somewhat compromise our conclusions regarding the modality of Fuller principles.

We close by re-emphasizing the broad ambition of this chapter. As the article actually proceeded, it was largely a piece which offered new reasons to doubt Fuller's procedural natural law theory. As such, one might be led to believe mistakenly that the interest of this chapter lies solely in point-scoring for particular sides in a narrow debate. One of our broader ambitions was to demonstrate that, by using empirical methods, we can contribute to core debates in jurisprudence. Thus, this work hopes to make a significant methodological point about jurisprudence, that experimental methods are viable. We also hope that this chapter provides a blueprint to others (to revise and improve!) on gathering information about folk intuitions about the nature of law. At present, little such evidence is available (but see, e.g., Tobia, 2018; MacLeod, 2019). Thus, this venture and others it inspires will be helpful to many philosophers.

To see this, we mention just three groups that stand to benefit from more experimental jurisprudence projects. There are philosophers of law engaged in conceptual analysis of law (e.g., Raz, 2009); for them, folk intuitions are the very thing they aim to discover. Experimental jurisprudence will provide more reliable access to the truths they seek. Other philosophers contend that we have no shared concept of law (e.g., L. Murphy, 2005); for them, access to good data about folk intuitions could help to decide that matter. Our data might be suggestive on this front, but much more evidence is needed. Still other philosophers argue that our task as philosophers of law should include (or even wholly comprise) advocating that people accept particular conceptions of law for practical reasons (L. Murphy, 2005; Stoljar, 2012; Donelson, in press); for them, data about which views already have currency might influence the views that these philosophers recommend. These are just some of the theorists who stand to gain from more of these projects. We can only hope that others will continue in our stead and that this will yield a new, experimental jurisprudence.

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References

Aquinas, T. (1994). *The Treatise on Law*. Ed. R. J. Henle. Notre Dame: University of Notre Dame Press.

Austin, J. (1998). *The Province of Jurisprudence Determined*. Indianapolis: Hackett.

Bazerman, M. H., Gino, F., Shu, L. L., and Tsay, C. J. (2011). Joint evaluation as a real-world tool for managing emotional assessments of morality. *Emotion Review*, 3(3), 290–2.

D'Amato, A. (1981). Lon Fuller and substantive natural law. *American Journal of Jurisprudence*, 26(1), 202–18.

Donelson, R. (in press). Describing law. *Canadian Journal of Law and Jurisprudence*.

Dworkin, Ronald (1986). *Law's Empire*. Cambridge, MA: Harvard University Press.

Finnis, J. (1980). *Natural Law and Natural Rights*. Oxford: Oxford University Press.

Frances, B. (2013). Philosophical renegades. In *The Epistemology of Disagreement: New Essays*, 121–66. Eds. Jennifer Lackey and David Christensen. Oxford: Oxford University Press.

Fuller, L. L. (1969). *The Morality of Law*, rev. edn. New Haven: Yale University Press.

Hart, H. L. A. (1965). Review of *The Morality of Law*. *Harvard Law Review*, 78(6), 1281–96.

Hart, H. L. A. (1994). *The Concept of Law*, 2nd edn. Eds. Penelope A. Bulloch and Joseph Raz. Oxford: Oxford University Press.

Haslanger, S. (2012a [1999]). What knowledge is and what it ought to be: Feminist values and normative epistemology. In *Resisting Reality*, 341–64. Oxford: Oxford University Press.

Haslanger, S. (2012b [2005]). What are we talking about? The semantics and politics of social kinds. In *Resisting Reality*, 365–80. Oxford: Oxford University Press.

Hsee, C. K. (1996). The evaluability hypothesis: An explanation for preference reversals between joint and separate evaluations of alternatives. *Organizational Behavior and Human Decision Processes*, 67(3), 247–57.

Hsee, C. K., Loewenstein, G. F., Blount, S., and Bazerman, M. H. (1999). Preference reversals between joint and separate evaluations of options: A review and theoretical analysis. *Psychological Bulletin*, 125(5), 576.

Jackson, F. (1998). *From Metaphysics to Ethics: A Defence of Conceptual Analysis*. Oxford: Oxford University Press.

Kelsen, H. (1967). *Pure Theory of Law*. Trans. M. Knight. Berkeley: University of California Press.

King, M. L. (1986 [1963]). Letter from Birmingham City Jail. In *A Testament of Hope*, 289–302. Ed. James M. Washington. New York: Harper & Row.

Knobe, J., Prasada, S., and Newman, G. E. (2013). Dual character concepts and the normative dimension of conceptual representation. *Cognition*, 127(2), 242–57.

MacLeod, J. (2019). Ordinary causation: A study in experimental statutory interpretation. *Indiana Law Journal*, 94(3), 957–1029.

Murphy, C. (2005). Lon Fuller and the moral value of the rule of law. *Law and Philosophy* 24, 239–62.

Murphy, L. (2005). Concepts of law. *Australian Journal of Legal Philosophy*, 30(1), 1–19.

Murphy, M. (2011). The explanatory role of the weak natural law thesis. In *Philosophical Foundations of the Nature of Law*, 3–21. Eds. Wil Waluchow and Stefan Sciaraffa. Oxford: Oxford University Press.

Priel, D. (2013). Is there one right answer to the question of the nature of law? In *Philosophical Foundations of the Nature of Law*, 322–50. Eds. Wil Waluchow and Stefan Sciaraffa. Oxford: Oxford University Press.

Raz, J. (2009 [2004]). Can there be a theory of law? In *Between Authority and Interpretation*, 17–46. Oxford: Oxford University Press.

Shapiro, S. J. (2011). *Legality*. Cambridge, MA: Harvard University Press.

Sosa, E. (2007). Experimental philosophy and philosophical intuition. *Philosophical Studies*, 132(1), 99–107.

Stoljar, N. (2012). In praise of wishful thinking: A critique of descriptive/explanatory theories of law. *Problema: Anuario de Filosofía y Teoría del Derecho*, 6, 51–79.

Struchiner, N., Hannikainen, I. R., and Almeida, G. (ms.) An experimental guide to vehicles in the park.

Tobia, K. (2018). How people judge what is reasonable. *Alabama Law Review*, 70, 293–359.

Trope, Y., and Liberman, N. (2010). Construal-level theory of psychological distance. *Psychological Review*, 117(2), 440–63.

Waluchow, W. J. (1994). *Inclusive Legal Positivism*. Oxford: Clarendon Press.

Winston, K. (2005). The internal morality of Chinese legalism. *Singapore Journal of Legal Studies*, December, 313–47.

Wright, C. (1994). Response to Jackson. *Philosophical Books*, 35(3), 169–75.