

Book Review: The Hart-Fuller Debate in the Twenty-First Century, by Peter Cane (ed)

Sean Rehaag

Osgoode Hall Law School of York University, srehaag@osgoode.yorku.ca

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Book Review

THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY, edited by Peter Cane¹

SEAN REHAAG²

IN 1958, THE FIRST VOLLEY in the famous debate on law and morality between H.L.A. Hart and Lon Fuller was published in the *Harvard Law Review*.³ Fifty years later, scholars gathered at the Australian National University to discuss the debate. In *The Hart-Fuller Debate in the Twenty-First Century*—a fascinating collection of essays that emerged from the gathering—scholars from a variety of perspectives set out not to re-enact the debate, but rather to ask what it might mean for contemporary legal thought.

It will be recalled that one of the issues at stake in the Hart-Fuller debate was how the post-Nazi German legal system should respond to heinous acts committed during the Nazi period and purportedly authorized by Nazi law.

Hart argued that because these acts, however reprehensible, were lawful at the time they were committed, the only way that their perpetrators could be lawfully punished was through retrospective criminal legislation. Any other approach—especially reasoning suggesting that Nazi laws were not valid laws because they were morally odious—would, according to Hart, confuse what the law *is* with what the law *ought to be*. Hart argued that maintaining this distinction was not only intellectually sound, but also might encourage individuals to question, and perhaps to refuse to obey, immoral laws. For Hart, encouraging individuals not to blindly adhere to law is important because laws may be used for immoral ends—a point that relates to his larger theory of law, according to which a norm is considered a law when it is understood to be valid by officials

1. (Oxford: Hart, 2010) 287 pages.

2. Assistant Professor, Osgoode Hall Law School, York University.

3. H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1957) 71 *Harv. L. Rev.* 593 [Hart, "Positivism"]; Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (1957) 71 *Harv. L. Rev.* 630 [Fuller, "Fidelity"].

who enforce it. In other words, rather than locating the validity of laws in the perspectives of individuals who are actually subject to them, Hart resorted instead to the internal perspective of officials responsible for enforcing laws, pointing out that there is no reason why the mere fact that such officials recognize a norm as legally valid should mean that the norm is morally sound.⁴

Fuller, by contrast, argued that Hart had too quickly conceded that the heinous acts in question were lawful. It is important to note that Fuller did not argue, in natural law terms, that Nazi dictates had immoral ends and that such immoral ends simply could not be accomplished through law properly so-called. Rather, Fuller argued that fidelity to legality—*i.e.*, to ensuring that laws are public, clear, non-contradictory, proscriptive, reliable, possible to comply with, and applied as articulated—is an essential feature of legal systems that allows human beings to govern their interactions with one another with reference to rules. Fuller contended that the systemic procedural irregularities in which Nazi dictates were embedded departed so seriously from the principles of legality that at least some Nazi dictates could not reasonably be characterized as legal. These irregularities included extensive use of legislation to retroactively render criminal acts (including mass murder) lawful, secret regulations and legislation, and political interference with the judiciary such that the interpretation and application of laws became subject to executive whims. Given these irregularities, according to Fuller post-Nazi German courts could legitimately refuse to allow individuals to avoid legal repercussions for heinous acts committed under the colour of Nazi “law.” Fuller’s contention ties into his general theory of law, according to which legal systems are not constituted by the mere existence of officials who share an internal perspective on what counts as a valid set of laws, but rather by an orientation—shared by officials and legal subjects alike—towards governing their interactions with one another in a manner that displays fidelity to the principles of legality, or, as Fuller sometimes called it, to the internal morality of law.⁵

Most of the contributors to the collection agree that the Hart-Fuller debate, which began partly with this disagreement over how the post-Nazi German regime should approach Nazi “law,” holds plenty of implications for twenty-first

4. See generally Hart, “Positivism,” *ibid.* note 3. See also H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994).

5. See generally Fuller, “Fidelity,” *supra* note 3. See also Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969).

century legal thought. However, not surprisingly, they disagree on the nature of those implications. Indeed, much of the collection is itself organized as a set of debates, with one contributor staking out a position on the implications of the Hart-Fuller debate and the following contributor responding with a critique.

To be sure, a great deal of ink has already been spilled over the Hart-Fuller debate. However, this collection brings together a wider diversity of perspectives on the debate than one typically encounters. To give just a few examples, the contributors include legal historians, analytic legal philosophers, scholars of private and public international law, law and literature theorists, legal pluralists, criminal law scholars, and, of course, authors sympathetic to Hart, Fuller, neither, or both. In my view, those interested in the relation between law and morality in general, and the Hart-Fuller debate in particular, will find this diversity of perspectives helpful in terms of thinking through the debate from various disciplinary standpoints.

