PROCEDURAL NATURAL LAW AS AN ENCOMPASSING INTERPRETIVE APPROACH

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ABSTRACT: *This paper seeks to reconcile Lon Fuller's procedural natural law with more specific, critical subdisciplines of legal philosophy, like Critical Race Theory, feminist jurisprudence, legal pluralism, and international law. Fuller articulates his philosophy of law called procedural natural law in* The Morality of Law, *which defends both an externally driving force of a legal system, its external morality, and internal structures of law, its internal morality. Several subdisciplines exist within legal philosophy that seek to critique such broad and expansive philosophies as excluding the truly important debates regarding legal systems, and these subdisciplines attempt to offer criticisms of legal systems as philosophical outsiders. However, the notion of an externally driving moral force in Fuller's procedural natural law provides a comprehensive philosophy that actually provides appropriate, even necessary, ideological grounds upon which the critical subdisciplines can articulate their criticisms most effectively.*

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The discipline of legal philosophy is marked by several ideological schools of thought. These legal philosophy approaches are intended to define and describe entire legal systems, explain the function of law, and make assertions regarding the purpose of law. H. L. A. Hart's legal positivism, Oliver Wendell Holmes, Jr.'s legal realism, and natural law theory are all legal philosophies articulated for these purposes. These foundational philosophies have the tendency, however, to become an almost internal dialogue. While they are useful in addressing each other and engaging in a shared discussion, they do not welcome anyone offering a critique of their assumptions about the legal system as a whole. Those legal philosophers who articulate a new approach with distinct concerns, objectives, or considerations of law are not equipped to join their discussion. This is argued by Patricia Smith, as she describes the internal debate of scholars like H. L. A. Hart and Lon Fuller as not accessible

to other interpretative approaches. Philosophers of these alternative approaches to interpretation, including Critical Race Theory, feminist jurisprudence, legal pluralism, or international law, must critique the legal systems from the outside.[1] Smith is arguing that Hart, Fuller, Holmes, and others are making basic assumptions about the law that are invalid. Alternative legal interpretations seek to critique these assumptions. However, the legal philosophy of procedural natural law, outlined by Fuller in his *The Morality of Law*, articulates a vision of law that accounts for and allows for the incorporation of outside legal approaches, including feminist jurisprudence, Critical Race Theory, legal pluralism, and international law, as effective critiques of the fundamental morality of legal systems.

Procedural natural law fundamentally claims that

1 Patricia Smith, *Feminist Jurisprudence and the Nature of Law*, *in* READINGS IN THE PHILOSOPHY OF LAW 224-25 (Keith C. Culver & Michael Giudice eds., Broadview Press 3rd ed., 2017), (1993).

law is inherently moral, which is essential for creating the space to articulate oppositional critiques to the overarching purposes of a legal system. Human legal institutions reflect what Lon Fuller calls the morality of duty, according to which the law is designed as rules that protect and preserve society.[2] It is not the duty of law to make humans the best they can be but rather to ensure society is protected.[3] Fuller dedicates a chapter of his *The Morality of Law* to a discussion of the eight fundamental conditions of law, including intelligibility, consistency in application, and ability to be obeyed, and without any one of which no legal system can exist. These conditions are all practical requirements for a legal system, and Fuller justifies them in this chapter based on their practical and logical natures. He refers to these eight conditions as the "internal morality of law," and he claims that each of the

2 Lon L. Fuller, The Morality of Law, 6, 15, (Yale U. Press, rev. ed.1969).
3 *Id.* at 17-19.

seemingly practical conditions is predicated on morality.[4]

The institutions that comprise a legal system must necessarily be moral because legal institutions are purposive. Just as individual laws are enacted for a specific purpose, so legal systems and the institutions that comprise them must be enacted for a specific purpose. But what is that purpose?[5] Law cannot simply be an expression of authority, because then any internal structures would be secondary to the use of force by the given authority. The primary feature of legal systems that demonstrates this argument is that they are held together by an external force. Legal systems cannot, by their own authority, bind citizens to submit to them, and this general acceptance of the legal system cannot be enacted through rules or legislation. Legal systems are held together by a moral or purposive value that exists apart from the rules of the legal system. All the laws in a legal system are aimed at creating a functioning

4 *Id.* at 39-91.
5 *Id.* at 145-47.

set of rules that will achieve a specific purpose, and this purpose is the externally binding force that unites the legal system and compels citizens to adhere to it. Without this externally binding force, the laws provide no obligation to be obeyed and no compelling reason to be instantiated. This is comparable to knowing how to take a trick in a game of Hearts without knowing why one might want to do so, without being given a compelling reason to acknowledge the rules of the game. It is a feature of all legal systems that human conduct is regulated for societal benefit. Definitions of societal benefit, however, may vary. Thus, the purposive nature of law requires internal structures that, by Fuller's argument that law is intended to regulate society by means of internal structures,provide a teleological aspect of law distinct from existing laws, which allows for changes to the whole basis of law that come through alternative legal philosophies.[6]

6 *Id.* at 147-51.

The field of legal philosophy is home to several broad analyses and conceptions of law, of which procedural natural law has been explained in depth above, but it has also yielded several more specific, narrow disciplines. These subdisciplines, including feminist jurisprudence, Critical Race Theory, legal pluralism, and international law, do not seek to address overall questions of what makes a legal system or what law is. Instead, they all strive to analyze a specific subset of a legal system, expose a flaw or defect of it, and correct it. At first, these enterprises may seem to be incompatible with systematic articulations of law like Hart or Holmes's philosophies. Some philosophers in these subdisciplines, such as Patricia Smith, often feel this way. Many of these broad legal philosophies offer very little room to hear and engage with outside critiques, forming a kind of association among them as critiques that are not appropriate for legal-philosophical discussions. Fuller's procedural natural law, however, analyzes both

the internal and external elements of law, allowing for outside critiques to be heard.

The field of feminist jurisprudence is a unique approach to the law that seeks to analyze gender power structures that have been institutionalized in the law. Patricia Smith articulates the common view of all branches of radical feminism as recognizing male dominance through social constructions and legal institutions. The goal of feminism is to "reverse the institutional structures of domination."[7] Feminism is not merely intended to enact reforms and change but to deconstruct and reconstruct societal values, especially as seen in legal institutions. In Hart's legal positivist view, no justification exists for this course of action. Only the legal rules for creating a law matter in determining the legitimacy of a law.[8] Procedural natural law, however, recognizes a moral force outside of

7 Smith, *supra* note 1, at 220.
8 H. L. A. Hart, The Concept of Law¸ 110 (Paul Craig ed., Oxford U. Press 2012).

the legal institutions themselves. It is with this notion of law as a purposeful enterprise that feminist jurisprudence interacts, perhaps without even being aware of it. Catharine A. MacKinnon argues that the law "institutionalizes the power of men over women" and that "male supremacist jurisprudence erects qualities valued from the male point of view."[9] Males, as the ones who shaped and designed the legal institutions of society, are the ones who held civil power and decided social norms. The laws themselves are not necessarily unjust on their own; rather, the whole legal system is founded in male dominance and reflects the results of that. Through the feminist jurisprudential approach, legal philosophers demonstrate that something is fundamentally wrong with the morality and intention of law. The feminist jurisprudential argument of Smith and MacKinnon, which is that law is fundamentally unjust, engages with the legal theories of procedural natural law. In language familiar to Fuller's context, feminist legal

philosophers argue the moral enterprise of constructing civil society has gone awry. The claim that action must be taken to rectify the imbalance of power toward male domination is, in effect, a claim that the purpose of the legal system by which law takes its moral character has been founded wrongly. The external force binding law together, recognized uniquely in procedural natural law, currently reflects male domination and ought to be rectified by immediate action at an institutional level. This fundamental claim provides an internal impetus for change, by means of the necessary conditions of a legal system, to construct a legal system that adequately achieves its purposeful enterprise. Only in the procedural natural law system can a systemic change be undertaken, not to solve for a lack in any of the structural conditions of law but for the morality of the system itself.

The approach of Critical Race Theory shares some of the fundamental claims of feminist jurisprudence,

and, likewise, its claims about justice and morality find ideological space in Fuller's explanation of procedural natural law. As with feminism, Critical Race Theory argues that the law itself is inherently unjust, specifically by failing to protect equality of rights for all races. Richard Delgado articulates this position clearly, arguing that "civil rights and minority interests are thus worthy of protection but only insofar as they do no limit speech."[10] Delgado demonstrates that despite the stated intentions of the American judicial system, the reality is that racial justice is always a secondary concern in the legal system to more general rights like free speech.

In making this claim about a fundamentally unequal legal system, the assumption of Critical Race scholars is that there exists a more fundamental source of justice and law than merely the legislation and policies that comprise the

10 Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, in READINGS IN THE PHILOSOPHY OF LAW, *supra* note 1, at 239.

legal code. Delgado also expresses this distinction when he argues that there exists in the law a "disjunction between a public law full of lofty democratic precepts and aspirations, and a system of moneymaking…[which is] governed by the acquisition impulse."[11] The American democratic principles of justice and equality are demonstrated as not being upheld in the American legal system. This manifests itself not as a violation of one of the eight conditions of the internal morality of law—that of congruence between rule and action—but as an unjustly institutionalized foundation of law. To Delgado and other Critical Race philosophers, the problem is not that the system has actively racist laws but that the system enshrines a disparity between principles and enactments of justice. This is not a conflict between legitimate and illegitimate laws; rather, it is a conflict between two underlying principles of democracy—liberty and equality.[12]

11 *Id.* at 242.
12 *Id.* at 243.

Delgado's fundamental assumption is based on the underlying principles of democracy, which claim that the legal system has a morality outside itself. This assumption recognizes what Fuller asserts in his articulation of procedural natural law—the legal system is held together by some outside force connected to the moral purposiveness of law. Delgado and other Critical Race theorists, as with feminist jurisprudence theorists, critique this outside moral force. The critique made on this ground is more effective at advocating for systemic change, operating outside the legal system to address the underlying moral claims of the legal system. As Khiara Bridges points out, the goal of Critical Race Theory is ultimately to see a change in policies and institutions.[13] Fuller's conception of law as moral allows for an internal impetus for institutional change. If the legal system inherently serves a moral purpose, as Fuller

13 OLLI @Berkeley, *America's Unfinished Work: Khiara Bridges on Critical Race Theory and Current Issues*, YouTube (October 9, 2020), https://youtu.be/RmBDOeWINMs.

asserts, then claims about the justice and morality of the law's purpose should be taken seriously.

Bridges, Delgado, and others have a solid basis in arguing that, since law serves a moral purpose, we ought to ensure that morality is just and equitable. Legal systems cannot exist without that external force rooted in the law's moral, purposive enterprise. It provides clear grounds for argumentation to debate what exactly that enterprise ought to reflect, which has the likely result of bringing about practical changes in the law as it adjusts to the more just and moral foundation. Arguing on these grounds ensures changes in the law, and it also provides for the whole legal system to be evaluated on its moral basis and purposes.

The final alternative approaches to legal philosophy that can be articulated within a framework of procedural natural law are the philosophies of legal pluralism and international law. While separate disciplines, the arguments they make fall on similar grounds, especially

with respect to the way procedural natural law accounts for their arguments and assumptions.

Brian Tamanaha presents an analysis of legal pluralism that demonstrates several key elements of Fuller's argument. Tamanaha develops the idea of legal pluralism, exploring the problem of conflicting legal systems and local customs resulting especially from imperialistic and colonial history. In one case study, he discusses the situation of a judge in the Micronesian state of Yap who refuses to give up his judicial authority and, with the support of the entire Yapese legal and judicial system, continues to act as the Chief Judge despite being removed from office by the Legislature. Tamanaha proposes the explanation that the legal system imposed on Yap, as well as the rest of Micronesia, was externally applied by the United States during a colonial administrative period. The legal system of Micronesia was thus transplanted from the US and imposed on a culture that had previously been

established and was deeply rooted in Yapese society. The result of that disparity between legal system and culture is different "organizing stories," which direct people to recognize legal institutions and obey legal authorities. The two positions "didn't know or tell themselves the same story about the law and legal system."[14]

The issue of these two conflicting authorities with overlapping jurisdiction is one of moral authority. The American legal system works in the United States because it is the manifestation of the moral enterprise of American society. Likewise, Yapese society has a purposive enterprise. Society exists for some reason and has some justifying force. It is founded on some principles, and it has some shared, collective values. All of those concepts are encapsulated in the term "organizing stories" that Tamanaha utilizes. These reasons, principles, and values

14 Brian Z. Tamanaha, *Looking at Micronesia for Insights about the Nature of Law and Legal Thinking, in* Readings in the Philosophy of Law, *supra* note 1, at 246-47.

are the justifying force that enacts law. They make the force external to a legal system that justifies the legal system and authorizes its power. However, in Yap, the external force that ought to hold the legal system together exists separate from the legal system, as the legal system is an artificial addition to Yapese society. The moral enterprise of law and the institutions seeking to carry out moral enterprise do not match; they tell different organizing stories.[15]

In addition to the initial problem of the disparity in organizing stories, which can be expressed in procedural natural law, several consequences of that disparity between culture and law fit under the framework of Fuller's internal morality of law. Tamanaha writes that the lack of enforcement of the legislative decision is a result of "power wielded by the persons in the initial group" and "discourse barriers…operat[ing] to disable those outside this initial group(s) from challenging the power."[16] The legal

15 *Id.* at 253.
16 *Id.* at 250.

institutions are not upheld fully because of breakdowns in the internal morality of the law. When those with culturally given authority to make the legal system fail to enforce the law as given or when the society does not understand what the legal system says in the places it diverges from cultural traditions, two of Fuller's necessary conditions for a legal system—those of consistent administration and of intelligibility—are not met. The lack of external unifying force translates to even further institutional breakdowns in the legal authority.[17] The issues brought up by Tamanaha that explore and emphasize the conflict between legal systems and cultural authority, while a unique field of legal study, fit in the framework of procedural natural law.

International law scholars address similar legal questions as legal pluralists, focusing on the relationships between principles and law in international communities. H.L.A. Hart critiques the notion of international law as

17 Fuller, *supra* note 2, at 46-49, 63, 81.

existing without secondary rules that guide how the primary rules of law operate. Without them, he argues, international law will never be binding on sovereign nations.[18] Roger Cotterrell agrees that international law does not fit into traditional legal theories, but he does not blame this on the lack of an external force that authorizes legal systems. The limitation with traditional legal philosophy in describing international law is that international law transcends state boundaries and their individual legal systems. International law does not derive its authority exclusively from individual states, begging the question of what, if any, source of international law's authority could be binding on separate sovereign states.[19]

The answer to this question, whether Cotterrell acknowledges it or not, is also the fundamental morality of law that Fuller describes in his description of procedural

18 Hart, *supra* note 8, at 213-16.
19 Roger Cotterrell, *Transnational Communities and the Concept of Law*, *in* READINGS IN THE PHILOSOPHY OF LAW, *supra* note 1, at 477, 480.

natural law. In effect, Cotterrell is arguing that something holds together international law, and it is not merely individual state authority. The individual states that make treaties or agreements and engage in transnational activity are not the source of the binding nature of the whole body of international law. The binding force has to be something external to the body of law.[20]

Martti Koskenniemi seeks to explain what that binding force that compels international law is. He argues that international law is the result of political realities and choices and of normative principles. Both are necessary for a proper understanding of how international law operates and has any authority. The two aspects, the pragmatic and the idealistic, support each other in giving credence and legitimacy to the functioning of international law as a body.[21] This claim of Koskenniemi operates on procedural

20 Fuller, *supra* note 2, at 148.
21 Martti Koskenniemi, *The Politics of International Law*, *in* Readings in the Philosophy of Law, *supra* note 1, at 456-59, 468.

natural law grounds. His argument for the source of law's authority and legitimacy is that there exists an external aspect of law that makes it binding. It is held together by some purposive enterprise that guides law, varied as its sources may be. Because the external, binding, and driving condition of political reality and principled idealism are met in international law, disputes can arise among nation-states who engage in international law about whether law is generalized or fair or administered evenly. Disputes about what international law should look like indicate a general assent to the overarching principles that establish international law as a body of law, tacitly agreeing to the binding notion of the legal system to argue about the specifics of what the binding force created.

One of the biggest questions of international law philosophy deals with a fundamental aspect of law under procedural natural law. While international legal theorists do not acknowledge procedural natural law as a common legal

philosophy that shares analytical tools with their approach, they do reject, as with Cotterrell and Koskenniemi, notions of law as being completely self-contained criteria.[22] In this respect, they join with Critical Legal theorists, like Smith and Delgado, whose arguments demand legal theories that have a principle or force that transcends criteria within the system itself. It does no good to argue about whether a law was properly enacted by Congress, for instance, if the whole system by which legislation is enacted depends on a system that subordinates one race to another. The legal theories of feminist jurisprudence, Critical Race Theory, legal pluralism, and international law alike necessitate something that is lacking in legal philosophies like realism or positivism.

That binding force, that purposive enterprise of the whole legal system that is denied by other legal philosophies, is articulated as a major tenet of procedural

22 Cotterrell, *Transnational Communities*, *in* READINGS IN THE PHILOSOPHY OF LAW, *supra* note 1, at 478.

natural law, especially in Lon Fuller's *The Morality of Law*. Procedural natural law, then, becomes the most comprehensive of the broad philosophical approaches. It provides argumentative grounds on which many other seemingly outsider legal approaches of feminist jurisprudence, Critical Race Theory, legal pluralism, and international law can articulate critiques and analyses of law and legal systems. While they may not acknowledge the grounds on which they are arguing, procedural natural law provides an ideological link between many disparate legal philosophies. Many assumptions are shared between these approaches and procedural natural law. More importantly, however, these approaches advocate alone of all the major philosophies for the crucial element of law that is its externally binding moral purpose, which makes these approaches viable.