Lon Fuller, the Model Code, and the Model Rules

John M.A. DiPippa

University of Arkansas at Little Rock William H. Bowen School of Law, jmdipippa@ualr.edu

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LON FULLER, THE MODEL CODE, AND THE MODEL RULES

JOHN M. A. DiPippa*

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* Professor of Law, University of Arkansas at Little Rock School of Law; B.A. 1974, West Chester State College; J.D. 1978, Washington & Lee University School of Law. Thanks to Professor Teresa Collett who, as a disembodied voice at the end of a telephone line, got me involved in this project, to Dean Howard Eisenberg, formerly of UALR Law School for his support, to UALR Law Professor Teresa Beiner, for being a good colleague and a good friend, and to Nicky Sherman, who tracked even the most obscure references.
I. INTRODUCTION

Lon Fuller’s jurisprudence significantly influenced the structure and format of the 1969 American Bar Association’s Model Code of Professional Responsibility. The Model Code’s three-part structure of Disciplinary Rules, Ethical Considerations, and Canons followed Fuller’s ideas on the morality of law. The structure also suggested a connection to Fuller’s ideas on the purposive nature of law and legal interpretation.

The Model Code reflected the peak of Fuller’s influence in post-World War II American jurisprudence. Fuller’s influence disappeared during the drafting and in the adoption of the 1983 American Bar Association’s Model Rules of Professional Conduct. The Model Rules abandoned the Code’s structure and format in favor of a re-statement-like model of black letter rules and accompanying commentary. The Model Rules represented the victory of a new jurisprudential orthodoxy over Lon Fuller’s jurisprudence, reflecting

1. Fuller produced a large body of work on a wide variety of topics. For an overview of his thought, see ROBERT S. SUMMERS, LON L. FULLER, JURISTS: PROFILES IN LEGAL THEORY (William Twining ed., 1984) [hereinafter PROFILES]. For a collection of Fuller’s work organized around the outline of the book that Fuller intended to write, see LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER (Kenneth Winston ed., 1981) [hereinafter SOCIAL ORDER]. Both of these works contain complete bibliographies. The Winston work also includes some of Fuller’s unpublished manuscripts. See also Special Issue on Lon Fuller, 13 LAW & PHIL. 253 (1994) (six articles discussing different aspects of Fuller’s jurisprudence).

2. Robert Summers described this combined jurisprudence as “pragmatic instrumentalism.” Robert S. Summers, Professor Fuller’s Jurisprudence and America’s Dominant Philosophy of Law, 92 HARV. L. REV. 433, 433 (1978). I adopt Summer’s claim that Fuller’s jurisprudence has been eclipsed by pragmatic instrumentalism.

I use this term, like Summers, to refer to that blend of realism and positivism that comprises contemporary American jurisprudence. Id. at 436. In my usage, it is the
the rise and fall of normative jurisprudence following World War II and its replacement as the dominant orthodoxy by 1980.

A. Jurisprudence as the Framework of Lawyer Codes

Jurisprudence is a paradigm—a coherent model or framework that establishes fundamental beliefs and permissible avenues of enquiry. Jurisprudence constitutes the way lawyers understand themselves and their work. Lawyers are steeped in jurisprudence in law school and in the practice of law. The subjects they studied and the ways in which law schools are organized reflect the jurisprudential assumptions of the profession. Lawyers, perhaps more than other professionals, are creatures of their philosophies. In this way, jurisprudence is unavoidable. Merely because one is not concerned directly with it does not make it go away. One may not think about breathing, but one breathes anyway. One may not deliberate about the economic system of a country, but one nonetheless fulfills some role in it. One’s jurisprudence, however unsophisticated or subliminal, is nonetheless played out in one’s conduct at law.

Alasdair MacIntyre described this process in relation to the history of moral enquiry. MacIntyre pointed out that “[w]hat are taken to be the relevant data and how they are identified, characterized, and classified will depend upon who is performing these tasks and what his
or her theological and moral standpoint and perspective is.”  

This is clarified when thinkers attempt to create a systematic approach to the problems of their discipline. The answers are both generated and constrained by the standards and practices of the particular moral tradition: “There is no standing ground, no place for enquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument apart from that which is provided by some particular tradition or other.”

To investigate the effect of jurisprudence on lawyer behavior, MacIntyre would have us look at the question from the inside, as it were. We must look at the practices of lawyers as they are defined by the institutional arguments for them. These arguments themselves define the goals of these practices, their optimum use, and their inherent limitations. When the standards of the tradition can no longer justify its practices, new or modified arguments must be advanced or the practices abandoned.

Jurisprudence establishes the framework for legal thinking and the behavior of lawyers. It defines what law is and how lawyers should approach legal questions. Moreover, it sets the standards by which legal discourse is evaluated. Of course, the question remains exactly how jurisprudence influences lawyer behavior and how a person should go about investigating its effect. MacIntyre notes that we are not taught “a coherent way of thinking and judging, but one constructed out of an amalgam of social and cultural fragments inherited” from the traditions that spawned our culture and the different temporal stages from which those fragments are derived.

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8. There is a “mode internal to that particular type of enquiry which already presupposes one particular theoretical or doctrinal stance and commitment rather than another.... What is true of physical enquiry holds also for theological and moral enquiry. What are taken to be the relevant data and how they are identified, characterized, and classified will depend upon who is performing these tasks and what his or her theological or moral standpoint and perspective is.” Moral Enquiry, supra note 7, at 17.


10. See Moral Enquiry, supra note 7, at 18. MacIntyre describes three modes of moral enquiry: 1) The Encyclopedic—a belief in the continual progress of human culture, and typified by the Encyclopedia Britannica’s attempt to state the canon of then current knowledge; 2) The Genealogical—a belief that the history of human culture is the story of the individual will power and typified by Nietzsche’s critique of the canon in Zur Genealogie der Moral; and 3) The Traditional—a belief that the history of human culture defines the goals toward which we move and defines the current issues needed to be resolved to move toward that goal and typified by Pope Leo XIII’s encyclical Aeterni Patris.

Narrative jurisprudence provides one way to explore how jurisprudence might influence lawyer behavior. The structure of one's world view, that is, one's jurisprudence, emerges from the context of an individual's life. However, there are problems with this approach. When everyone's point of view is a jurisprudence, nothing is jurisprudence. When theory depends on the constellation of unique and particular circumstances, we must rely on the integrity of the narrator, which may not always be justified. By investing every person's narrative with the importance of every other narrative, it becomes difficult to effectively study any one jurisprudence.

Although I am skeptical about finding evidence of influence in any particular lawyer's actions, I am not so skeptical about finding it at the institutional level. If the influence of jurisprudence can be found, there are several reasons why it will be found at the institutional level.

Institutional discourse is the discourse of elites. It is engaged in by people who have the time, training, motivation, and resources to stake out a position. They elaborate these positions by drawing sharper and clearer lines to make their points of view stand out. The great professional exertions needed to come up with professional codes should be processes whereby jurisprudence will be the most clearly distilled and have the most apparent influence. That is, the effort by elite lawyers to construct a systematic set of rules will require these lawyers to reflect on what they have been doing in their practice, as well as the problems within it. A one-size-fits-all code must be set at such a high level of generality that it will reflect less of the chaos of

12. See, e.g., Derrick Bell, And We are Not Saved: The Elusive Quest for Racial Justice xi (1987) (examining the civil rights movement in order to justify what has happened or not happened since and stating Bell's wish to explain how "black people . . . feel about it"); Naomi R. Cahn, Inconsistent Stories, 81 Geo. L.J. 2475, 2475 (1993) (exploring the idea that although narratives are encouraged and stories celebrated, the possibility of conflict and inconsistency cannot be overlooked); Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2411 (1989) (noting that many authors tell stories "these days"). For an example of this technique from a theological perspective, see Milner S. Ball, The Word and the Law (1993). But see, Mark Tushnet, The Degradation of Constitutional Discourse, 81 Geo. L.J. 251, 251 (1992) (arguing that standardless narrative may lead to false jurisprudence).


14. Cf. James D. Hunter, Culture Wars: The Struggle to Define America 59 (1991) (stating that "public disclosure . . . is largely a discourse of elites"). Hunter discusses how elite elements within the American culture with the time and resources to do so frame the political, cultural, and legal aspects of public debate. Most Americans find themselves in the middle of a discourse of extremes. Moderate discourse is marginalized by both extremes.

15. Id. at 59–60.
everyday practice and more of the clear—but artificial—air of theory. Paradoxically, it will be easier to delineate a jurisprudence by taking the sum of individual chaotic practices.16

Looking at lawyer codes for evidence of jurisprudence is also suggested by the possible incongruity of "Codes" or "Rules" of ethics. If one maintains a sharp distinction between law and ethics, then codes of ethics are oxymorons. Ethical decision making cannot be bounded by a set of rules any more than legal decision making can be accomplished by the roll of dice.17 According to Stephen Salbu, "[c]odes of ethics provide a sadly diluted notion of what ethics entails, how ethical decisions are made, and the nature and degree of individual responsibility involved in the process of examining one's choices."18

This is so because "legal reasoning is evoked to decide whether to abide by clear-cut rules and regulations, [while] . . . ethical reasoning is triggered only by questions that lack an unambiguous response."19 Thus, when codes of ethics purport to provide rules, they confront an individual with the choice to conform or not—a choice associated with a coercive legal regime.20 True ethical decisions allow for an individual to weigh the multitude of factors that go into moral decision making.21 The decision to conform is left to the uncoerced choice of the individual.

According to Salbu's view, law is produced when codes of ethics are written. If it is law, then what lawyers think about the nature of

16. An analogy from quantum physics will help explain my choice. Because codes happen infrequently, they represent a snapshot of the bar's self understanding at a given time. It is the measurement of the mass and motion of lawyers. Like subatomic particles, the measurement we get is uncertain because in order to measure its mass we must stop its motion and in order to measure its motion we must remove its mass. Thus, when we produce lawyer codes, we freeze time and motion. The codes are static entities which attempt to say something to the dynamic reality of everyday practice. Thus, they will always be uncertain reflections of that dynamic reality. In order to frame a code, we must stop the practice long enough to make some decisions about it. While this can be done in the laboratory or the committee meeting, in reality it is not feasible. By the time a code is finally produced, it represents an old, if not obsolete, version of legal practice. Nevertheless, codes may be the only way to measure the influence of jurisprudence on legal practice because they are the only snapshots we have.


19. Id. at 104.

20. Id. ("At the margins, where exercise of independent judgment would render divergent opinions, the personal cost of coercion through the application of codes may be extremely high.").

21. Id. at 105.
law will profoundly and directly affect the structure and content of these codes. Even if one does not accept the unyielding distinction between law and ethics, one can agree that jurisprudence will affect the structure and content of codes. If ethics is the way people make decisions about how they should live, then law is the paramount social ethics. Writing lawyer codes is an extension of ethical reasoning to a specific and important application. The understanding of the nature of law, the faith in its processes, and its rhetorical structures will naturally find their way into lawyer codes.

B. The Rise and Fall of Lon Fuller's Jurisprudence, the Model Code, and the Model Rules

The answer to the institutional question can now take shape. The dominant jurisprudential mode of the time will be reflected in the structure, style, and, to a lesser degree, content of the profession's commonly accepted standards of professional behavior. This Article will focus on the way in which Lon Fuller's jurisprudence influenced the 1969 Model Code of Professional Responsibility. When this jurisprudence fell from prominence and a new orthodoxy replaced it, the very differently structured Model Rules of Professional Conduct resulted.

Specifically, the Model Code illustrates Lon Fuller's ideas concerning the dual moralities of aspiration and duty and the embodiment of moral values in legal processes. The Code's three-part structure of Canons, Ethical Considerations, and mandatory Disciplinary Rules follow Fuller's delineations. As per Fuller's jurisprudence, the combination of aspiration and duty was meant to elevate and discipline, educate and punish. The Model Code established the minimum standards of conduct so that it might become possible for lawyers to transcend the minimums and strive for excellence.

In contrast, the Model Rules illustrate the revival of legal realism, its blending with positivism, and their eventual victory over their juris-

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23. The content of the Code will be more directly influenced by the personal interests of lawyers themselves. Compare Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 653 (1981) (arguing ethical codes are attempts to control the market for legal services) with Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689, 689 (1981) (stating that lawyer codes consistently resolved moral, social, and political conflicts in favor of lawyers). See also Posner, supra note 4, at 1 (proposing that mainstream legal thought is a byproduct of the cartel-like organization of the legal profession).
prudential rivals. The Model Rules outline only the basic norms of professional behavior. They reflect the positivism of their drafters and the realism of their enactors. They are not meant to suggest any metaphysical ideal. At the bottom, they are pragmatic and positive, conceived as a comprehensive legislative codification of the current practices of lawyers and designed to give lawyers answers to their professional responsibility questions.

There are two primary reasons to investigate the relationship of Fuller’s thought and the Model Code. First, Fuller was a very influential figure in Post-World War II American jurisprudence. In a paragraph that may only be slightly hyperbolic, Robert Summers called Fuller “a major figure in modern legal theory,” “unquestionably the leading secular natural lawyer of the twentieth century,” “the greatest proceduralist in the history of legal theory,” “one of the foremost theorists of means-ends relations in legal ordering,” and a “major critic” of British and European Positivism, as well as American Instrumentalist theory.24 Multiple jurisprudential schools claimed as well as decried Fuller.25 Such breadth suggested that his point of view might be compatible with the broader goals of the legal profession’s elite. These are the people with the influence and the resources to spend time writing codes of conduct. Second, there are obvious similarities between Fuller’s moralities of aspiration and duty and the Model Code of Professional Responsibility’s structure.

In spite of Fuller’s influence, the Model Code did not last very long as the official statement of lawyer ethics. The Model Code had been adopted over few objections. Nevertheless, fewer than ten years since its adoption, the ABA appointed a commission to revise the Code. Five years later the ABA replaced the Model Code with the Model Rules. How was it possible that the profession could so completely outgrow its standards of professional conduct in so short a time? The answer lies in the jurisprudence of the time—during that time the profession rejected the jurisprudence on which the Code was modeled and accepted a very different one. This jurisprudential change led the drafters of the Model Rules to reject the structure of the Model Code.

I do not mean to overstate Fuller’s influence. The Model Code is not a systematic elaboration of Fuller’s views. I have no evidence that the drafters of the Code consulted Fuller, read Fuller, or even in-

24. Profiles, supra note 1, at 151.
25. See infra Part II.B.
tended to model the Code on Fuller's thought. Thus, there will not be a point by point coherence between Fuller's jurisprudence and the Model Code, particularly in the content of the Disciplinary Rules themselves. By the same token, the Model Rules are not a systematic refutation of Fuller. I am only pointing out the significant congruities between Fuller's statement of the reciprocal relationship between aspiration and duty in the law, the Code's attempt to structure its provisions to do the same, and the Model Rule's rejection of this structure and relationship.

We can see Fuller's influence in the Code's three-part structure of Canons, Ethical Considerations, and Disciplinary Rules. This structure suggests Fuller's ideas on the distinction between the moralities of aspiration and duty, the necessary connection of law and morality, and the necessity of the lawyer's fidelity to the legal system. While Fuller's influence may not have been direct, his basic ideas formed a point of view about the law, lawyers, and the legal system that shaped the way the drafters saw their task, the professional problems they believed needed to be solved, and their understanding of the role of lawyers in society. Further, it may have guided the decisions about the appropriate structures necessary for professional regulation.

The identification of positivism and legal realism with totalitarianism prompted a Post-World War II jurisprudential project to find a moral basis for law. Citizens in general sought reassurance that the American way of life was superior to other cultural forms. Legal thinkers shared in this desire. Thus, it became necessary not only to describe the workings of our legal system, but also to demonstrate that it was better than other foreign systems. Legal realism and positivism both failed to provide this assurance. They could as easily describe and justify foreign systems as well. The superiority of the

26. See infra note 136 and accompanying text.
27. It would be possible to conduct a Fullerian critique of the Code and the Rules. It might point out what Fuller would have included in the Code, how he might have drafted the provisions, what he would have prohibited, and what he would have encouraged, even how he might have revised the Code if he had served on the Kutak Commission. But that is for another day. Here I will sketch the influence of some of Fuller's basic insights on the Code. They can be detected most easily in the Code's structure, style, and, to a lesser degree, its content.
28. One reason to reverse the Plessy "separate but equal" doctrine was to demonstrate the superiority of the American political, economic, and legal systems over communism. Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 524–25 (1980) (giving credibility to battle to win third world "hearts and minds").
American system could be demonstrated only by establishing that it rested on, proceeded from, or carried into being moral norms.29

To the generation that fought and won World War II and which was fighting a Cold War with communism, Fuller's discussion of the profound morality of the legal system and its superiority over competing (i.e., European) systems must have made both intellectual and visceral sense. Fuller understood the lawyer's role to be intimately tied to social freedom.30 If the purpose of law was to create the social structures in which people led productive, useful lives, then lawyers were the primary architects of this freedom.31 Law was a moral and social enterprise. Lawyers therefore had unique moral and social responsibilities.

In the same way that the Model Code suggests Fuller's influence, the Model Rules suggest a different jurisprudence. The jurisprudence that influenced the Model Code relinquished its dominant position during the ten years after the Code was first presented. Whereas Fuller's jurisprudence and the related legal process school may have dominated the field during the 1960's,32 the field changed dramatically in the 1970's. Realism rebounded after its disappearance following World War II and positivism lost the taint of its association with Na-
zism. The two combined formed a prevailing orthodoxy that defined other jurisprudential forms unworthy and unworkable.

This orthodoxy influenced the drafting of the Model Rules in the same way that Fuller's thought influenced the drafting of the Model Code. I believe that because Fuller's influence was so obvious in the structure of the Code, it was natural that the new orthodoxy would seek to eliminate the traces of the old.33

In the end, Fuller may not have influenced the drafters directly but he almost certainly reflected their understanding of themselves and the role that they and the law played in a democracy. For this reason alone, the connection between Lon Fuller's thought and the Code of Professional Responsibility deserves attention.

II. An Overview of Fuller's Thought

A. Introduction

What follows is not a systematic or complete treatment of Fuller's jurisprudence.34 Instead, I have isolated elements of Fuller's thought that seem to have influenced the structure, style, and content of the

33. Cf. Kenneth I. Winston, Introduction, 13 Law & Phil. 253, 253 (1994) (Fuller fell from grace "because the generation of scholars immediately succeeding him regarded his work as failing to meet the standards of argument set by the dominant mode of discourse in Anglo-American philosophy.").

Once again, I want to distinguish critique from description. I will not perform a Fullerian critique of the Model Rules nor, for that matter a positivist or a realist one. I only hope to show how the Model Rules are animated and directed by different conception of law and the lawyer's role. I outline, but do not fully develop, the possible consequences that may flow from this different conception.

34. Indeed, Fuller did not present a systematic treatment of his jurisprudence. He wrote a series of books and articles that treated aspects of his overall thought but never set out a definitive statement of his jurisprudence. In fact, his books seem only to suggest the outlines of a grand theory. Winston's book, The Principles of Social Order, gathers together excerpts of Fuller's published works as well as many of his unpublished works. Social Order, supra note 1, at 11. Winston's book follows the outline Fuller made for a systematic work called The Principles of Social Order. Winston's collection attempts to set out, for the first time, the elements of Fuller's grand theory. Winston argues that Fuller's failure to list these elements during his lifetime resulted in a great deal of misunderstanding of Fuller's thought, and precipitated a good deal of unjustified criticism. Id. at 11–12. I do not take sides in this debate. Although I am attracted to Fuller's way of thinking, the thesis of this Article does not require that I advocate for Fuller and his jurisprudence. Instead, I am only trying to describe what appears to me to be the influence of Fuller in the Model Code and the subsequent banishment of Fullerian influence from the Model Rules. In addition, I will outline some of the possible consequences of this change. For general treatments of the contemporary jurisprudence wars from different perspectives see Gary Minda, Postmodern Legal Movements (1995) and Richard A. Posner, The Problems of Jurisprudence (1990). For a useful survey of the development of various jurisprudential schools, see Bailey Kuklin & Jeffrey W. Stempel, Foundation of the Law: An Interdisciplinary and Jurisprudential Primer (1994).
final version of the 1969 Model Code of Professional Responsibility. These elements are:

1. The Inner Morality of law embodied in legal structures and processes.
2. The distinction between a morality of aspiration and a morality of duty.
3. The relationship of legal forms to the realization of individual choice.
4. The lawyer as a social architect.

B. Fuller's Place in American Jurisprudence

Lon Fuller's jurisprudence cannot be easily categorized. He sided with the legal realists and vigorously rejected formalism. Nevertheless, he also rejected the legal realists' basic contention that law was either sociology or instrumental politics. In addition, Fuller also attacked positivism for being consistent with totalitarianism. Although he has been called an advocate of a "secular natural law" theory, Fuller also rejected a great deal of the natural law tradition.

Fuller's refusal or inability to construct a place for himself within conventional theoretical categories caused his thought to suffer sometimes unwarranted criticism and to be misunderstood. It has also caused later interpreters to attempt to solve the problem by teasing

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35. See, e.g., Lon L. Fuller, American Legal Realism, 82 U. P.A. L. Rev. 429 (1934) (using Karl Llewellyn's work as representative of legal realism).
36. Lon L. Fuller, The Law in Quest of Itself 52–55 (1940) [hereinafter Quest].
37. Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 659 (1958) [hereinafter Fidelity] (asserting that German legal positivism, from legal science consideration of the moral ends of law, paved the way for the rise of the Nazis).
38. Social Order, supra note 1, at 11.
39. In A Rejoinder to Professor Nagel, 3 Nat. L. F. 83 (1958), Fuller wrote: To avoid further misunderstanding I should like to record here that I do not accept any “doctrine of natural law” which asserts one or more of the following propositions: 1) The notion that the demands of the natural law can be the subject of an authoritative pronouncement; 2) the notion that there is something called “the natural law” capable of concrete application like a written code; 3) the notion that there is a “higher law” transcending the concerns of this life against which human enactments must be measured and declared invalid in case of conflict. Id. at 84.

In the same piece, Fuller went on to say that Aristotle did not seem to adhere to these views either. Id. To consider Fuller's qualification of his argument in favor of a revival of natural law thought see Quest, supra note 36, at 100–01. For an argument that in spite of Fuller's protestations he espoused a version of natural law apparent in his emphasis on method and his understanding of the connection between substance and method, see Robert C. L. Moffat, Lon Fuller: Natural Lawyer After All, 26 Am. J. Juris. 190 (1981).
Fuller's true theory from his work. Whether or not there is a grand Fullerian theory, the best way to understand Fuller is to take Fuller on his own terms. He should be viewed as an "insider" whose philosophical task was to "decide how he and his fellow lawyers may best spend their professional lives." Instead of trying to find a grand theoretical structure, we should look to describe the vision of the law and the lawyer's role toward which Fuller's thought aimed. This will not only yield a better understanding of Fuller's thought, but it will also be more consistent with Fuller's jurisprudential method.

C. Law as a Structure of Social Order

Fuller placed the human community at the center of law. He defined Law as the purposive attempt to subject human enterprises to the governance of rules. Fuller argued that law represents the human attempt to construct models of legal or social processes. Although individual choices play a role, those choices are ineffective unless society creates some social mechanisms to facilitate and protect them.

In all significant areas of human action formal arrangements are required to make choice effective. Our more important choices are meaningless if there is no way of carrying them over into the larger social order on which we are dependent for almost all our satisfactions. But to give social effect to individual choice, some formal arrangement, some form of social order, is necessary.

Fuller distinguished substantive principles of law from rules of social order. These substantive principles are derived, according to classic natural lawyers, from an understanding of human nature. Fuller said that he could not see any standard for making moral deci-

40. See, e.g., Social Order, supra note 1, at 11-12 (attempting to construct the coherent exposition of Fuller's theory that Fuller outlined, but never finished, using the concept of eunomics). See also, Profiles, supra note 1, at vii (offering a "reconstruction" of Fuller's thoughts because "Fuller did not always develop his views systematically, and he did not always see how to get the most theoretical mileage out of his insights").
41. Quest, supra note 36, at 2. For an article discussing the development of Fuller's idea of internality, see Schauer, supra note 29.
42. Peter R. Teachout, The Soul of the Fugue: An Essay on Reading Fuller, 70 Minn. L. Rev. 1073, 1075 (1986) (noting that scholars have failed to form a coherent theoretical system from Fuller's writings because the writings do not themselves yield one).
43. Lon L. Fuller, The Morality of Law 145 (1964) [hereinafter Morality] (stating that law is "a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it").
44. Social Order, supra note 1, at 27.
45. Social Order, supra note 1, at 26.
sions except "that which is in keeping with man's" nature as it would be if it were able to resolve its disharmonies and to surmount its imperfections." Fuller did not elaborate on the substantive features of natural law, however. He was more concerned with deriving the natural law of human social structures. As he said, he was "concerned with the glue that holds together what one writer has called the furniture of society and not the structure of the furniture itself." Fuller connected legal rules to the needs of the general and specific human communities in which all people lived. Rules of law are needed to "keep peace," to allow people to "deal justly" with one another, and to enable people to "collaborate effectively" with one another. He understood law in relation to the social goals it serves—personal security, just dealing, and effective collaboration. Law is not strictly instrumental, however. Means and ends both constitute and structure social life. They "move in circles" so that understanding one helps establish and understand the other. This is what Fuller called Eunomics—"the science, theory, or study of good order and workable social arrangements." For Fuller, the crucial evaluative question did not simply concern the fit between means and ends. Rather, the key question was what kinds of human communities these means and ends created. The good social order is not the order of "a concentration camp—but is an order that is just, fair, workable, effective, and respectful of human dignity."

46. I will be quoting Fuller extensively. As was the custom of his time, Fuller used the masculine pronoun to refer to people in general. I will quote Fuller as in the original without resorting to the intrusive and somewhat arrogant "sic" whenever he uses the masculine in a generic way. The reader should be aware that I do not limit his insights to men only.

47. Social Order, supra note 1, at 12.

48. Social Order, supra note 1, at 71.

49. Lon L. Fuller, Anatomy of the Law 6 (1968) [hereinafter Anatomy] ("For men to live together successfully they need rules that will keep peace among them, make them deal justly with one another, and enable them to collaborate effectively [with one another].").

50. Summers, supra note 2, at 438.

51. Lon L. Fuller, Human Purpose and Natural Law, 3 Nat. L. F. 68, 72 (1958). See a discussion of this point in Moffat, supra note 39, at 191–92. See generally Social Order, supra note 1, at 47–64 (containing the text of Fuller's previously unpublished essay, Means and Ends).

52. Social Order, supra note 1, at 48. See also Lon L. Fuller, American Legal Philosophy at Mid-Century: A Review of Edwin Patterson's Jurisprudence: Men and Ideas of the Law, 6 J. Legal Educ. 457 (1954) [hereinafter American Legal Philosophy].

53. Summers, supra note 2, at 439.

54. Social Order, supra note 1, at 47.
These are not higher rules in any metaphysical sense. Rather, they are like the natural laws of carpentry or architecture or music—specific ways to accomplish socially defined goals. After discussing Stravinsky's Poetics of Music, Fuller said:

It is easier to define a perfect omelet than it is to describe the most delectable dish imaginable. To say that a lawyer arguing a case within the limits of forensic procedure achieved perfection in his art is to convey more meaning than to assert of an argument that it is the best conceivable in any context. In all areas, from the most trivial to the most exalted, the mind is compelled to sharpen its judgment by narrowing its range. Some limitation of means, imposed by circumstances or voluntarily accepted, is essential for an intelligent definition of the end sought.55

Social structures are the institutional forms in which human freedom is possible. “One cannot think about social goals (ends) without also thinking about social structures (means).”56 For individuals and for society, the moral life “is one that forms a coherent pattern, not one that is manipulated to bring about a series of desirable states of mind and body.”57 Staking out his typical middle-ground, Fuller concluded:

We can agree that it is definitely undesirable that the whole of human life should receive its pattern from social institutions. This does not preclude an equal agreement that our social institutions should be so designed as to give coherent meaning and direction to that portion of the life of man that is their proper province.58

Fuller described two different kinds of human associations: those organized by legal principles and those organized by common aims.59 The former is typified by the market economy or the political system, while the latter is typified by small voluntary associations like families or churches.60 These are not necessarily different forms of organiza-

55. SOCIAL ORDER, supra note 1, at 51.
56. SOCIAL ORDER, supra note 1, at 57.
57. SOCIAL ORDER, supra note 1, at 58.
58. SOCIAL ORDER, supra note 1, at 58.
60. SOCIAL ORDER, supra note 1, at 67. Fuller goes on to suggest that the different forms of associations require different modes of problem solving or dispute resolution. The reciprocal society may rely on more formal means of resolution while the smaller should rely on less formal, more open textured methods. Interestingly, the United States Supreme Court drew the same distinction years later in Roberts v. United States Jaycees, 468 U. S. 609 (1984), where Justice Brennan's opinion suggests a freedom of association along Fullerian lines—public associations subject to more formal rules than private associations.
tion. Rather, legality or commonality provide different principles by which associations can be organized. In fact, all associations display both principles. The issue is which principle predominates.  

D. Law as the Language of Social Interaction

To interact effectively, people needed a situation where the activities of others took on some predictability. Customary law, which Fuller described as a "language of interaction," provided that regularity because it structured activity. Individuals could expect that others with whom they were dealing would act according to the custom. Calling this unwritten law a code was not an exaggeration:

The word code is appropriate here because what is involved is not simply a negation, a prohibition of certain disapproved actions, but also the obverse side of this negation, the meaning it confers on foreseeable and approved actions, which then furnish a point of orientation for ongoing interactive responses.

This customary law showed up in private forms of dispute resolution like private contract, mediation, and arbitration. Fuller spent a good deal of his career describing and justifying these various forms. Fuller was not concerned here with crowded court dockets or efficient case handling, however, in the fashion of so many contemporary advocates of alternative dispute resolution. Rather, he saw these as different manifestations of the complementary forms of social organization. Thus, they were not alternatives to legal methods. Instead,

it becomes apparent that in a complex modern society enacted law and the organizational principles implicit in customary law are not simply to be viewed as alternative ways of ordering

61. Social Order, supra note 1, at 76. Fuller describes the inherent tension between the two principles. In one passage he describes the longstanding conflict in religious organizations between Spirit and Law. Quoting a "well known theologian," he concludes by stating that "[w]hen the Spirit of God has burnt itself out, or lost its vigor, Canon Law proliferates." Id. at 80. Fuller criticized the "creeping legalism" of voluntary associations. Id. at 79. To him, organizations which rest on shared commitment cannot substitute formal legal procedures and remain the same. Id. at 80. The change in procedures irreparably damages the association and changes its character. At the same time, Fuller reminds the reader that all organizations require a blend of both principles. Id. at 72. The issue is not simply Spirit versus Law or Commitment versus Formality. It is the blend of the two and the corresponding creation of the appropriate processes for that precise blend. Id. at 84.

62. Social Order, supra note 1, at 213 (emphasis omitted).

63. Social Order, supra note 1, at 213–14.

64. Social Order, supra note 1, at 213–14.

65. See generally Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L. Rev. 305 (1971) [hereinafter Mediation] (suggesting that mediation is always directed at bringing about a more harmonious relationship between the parties); Forms and Limits, supra note 59, at 388–91; Social Order, supra note 1, at 169.
men's interactions, but rather as often serving to supplement each other by a kind of natural division of labor.66

It was not enough for Fuller to identify this phenomena, however. Without going further, customary law and private social arrangements could be as oppressive and mysterious as made law and public institutions. Society could have rules either “imposed on it from above . . . [or] it may also reach out for rules by a kind of inarticulate collective preference.”67 Such a view left no room for the person and the exercise of human reason. Law from above was imposed without the participation or understanding of the persons affected, while law from below bubbled up without the acknowledgment of human agency.68

Given the necessity of people to live and work in social groups, Fuller argued that the customary ways that people structured their relationships constituted a natural law of human society.69 He compared this work to architecture where the principles for constructing a building do not change. Instead, only the circumstances in which these principles are applied change: “[T]here are principles of sound social architecture, objectively given, and . . . these principles, like those of physical architecture do not change with every shift in the details of the design toward which they are directed.”70

The range of existing private orderings was not a failure of law. It showed the creative human person at work, organizing particular relationships in ways appropriate for each context.71 This task was both moral and practical. These competing conceptions, both equally valid, require human judgment and cooperation in their resolution. In this view, the lawmaker is engaged in the process of reasoned discovery, rather than sheer invention, of the legal forms appropriate to introducing coherent and authoritative decisionmaking into particular social situations. It is this necessity of being responsive to external realities . . . that Fuller took to be the fundamental insight of traditional natural law theory.72

66. Social Order, supra note 1, at 246.
67. Social Order, supra note 1, at 216.
68. Anatomy, supra note 49, at 40 (“[T]he human element . . . is also an indispensable ingredient in any just and humane legal system. The complex undertaking we call 'law' requires at every turn the exercise of judgment, and that judgment must be exercised by human beings for human beings.”).
71. Freedom, supra note 30, at 1312.
72. Social Order, supra note 1, at 13.
E. The Moralities of Duty and Aspiration

For law to be both effective and valid it had to be backed by moral authority. No form of law can survive without a clear purpose and a social consensus on its uses. As Robert Summers described it, Fuller believed that law had to "be argued for." Otherwise, there is no incentive to obey the law and no purpose in doing so. Fuller argued that the principles of social order, discoverable by reason and present in all forms of social ordering, gave law its essential morality, or what he called its internal morality. Fuller saw law as composed of two distinct but related moralities: a morality of aspiration and a morality of duty. The morality of aspiration was best exemplified by the classical Greek notion of human "excellence, of the fullest realization of human powers." An aspirational morality starts at the top of human conduct with a conception of what is proper and fitting human conduct. It is "conduct such as beseems a human being functioning at his best." The morality of aspiration asks how we can "make the best use of our short lives." It is related to the economic notion of marginal utility—the best use of finite resources. The morality of duty, on the other hand, began at the bottom of human conduct. It "lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark." It is concerned not with utility but with exchange.

Moral aspirations impel a person toward excellence while moral duties warn a person against transgression. Thus, aspirations are stated positively while duties are prohibitory. However, duty and aspiration work together. Fuller used gambling as an example. Looking at the question from the standpoint of duty, a hypothetical legislator might ask what harms occur from the activity of gambling. The diligent legislator, using a morality of aspiration, will focus on whether or not gambling is an activity which befits a "man's capacities." Aspiration cannot effectively state a standard below which a person can be punished, however, because

74. Summers, supra note 2, at 441.
77. Morality, supra note 43, at 5.
78. Morality, supra note 43, at 5.
82. Morality, supra note 43, at 8.
[t]here is no way by which the law can compel a man to live up to the excellences of which he is capable. For workable standards of judgment the law must turn to its blood cousin, the morality of duty. There, if anywhere, it will find help in deciding whether gambling ought to be legally prohibited.83

The morality of duty may state the minimum standards in order to avoid harm to the individual and to society but these standards must not reach too far. They can "only seek to exclude . . . the grosser and more obvious [forms and] manifestations of chance and irrationality."84 Duty can only create the "conditions essential for rational human existence. These are the necessary, but not the sufficient conditions [sic] for the achievement of [human excellence]."85

Law can be compared to a step ladder—at the bottom are the "obvious demands of social living."86 Such social duties include personal security and respect for property. At the other end of the ladder are the highest levels of human achievement. Moral enquiry consists of drawing "the dividing line where the pressure of duty leaves off and the challenge of excellence begins."87 Fuller rejected the implication of the Platonic argument that one cannot know bad human conduct without some knowledge of perfectly good human conduct. The Platonic argument suggests that it is impossible to acquire such perfect knowledge, thereby making it impossible to properly draw a line between duty and aspiration.88 This leads to either a false confidence in our knowledge or a false pessimism about our abilities.

Fuller responded to the Platonic argument by pointing to common human experiences. We do not need a picture of the perfect human life to ban murder.89 We do so on the basis that no excellence, no social organization is even possible without the elementary protection from violence. We do not, and cannot, have a picture of the perfect life. In this respect, all law is imperfect but, nevertheless it is useful. Much like no one tool is perfectly suited for any particular task, no individual law is perfectly suited for any problem. Yet all tools can accomplish a wide range of tasks fairly well.90 Only when the person uses the tool at the limits of its range do we begin to find its limitations:

89. Morality, supra note 43, at 11.
A carpenter's hammer serves adequately over a large but indefinite range of uses, revealing its deficiencies only when we try to use it to drive very small tacks or heavy tent stakes. If a working companion asks me for a hammer, or the nearest thing to it available to me, I know at once, without knowing precisely what operation he is undertaking, that many tools will be useless to him. I do not pass him a screwdriver or a length of rope. I can, in short, know the bad on the basis of very imperfect notions of what would be good to perfection. So I believe it is with social rules and institutions. We can, for example, know what is plainly unjust without committing ourselves to declare with finality what perfect justice would be like.

Drawing the line between duty and aspiration will not always be easy. Rather than despair of the task, however, Fuller would have us confront it directly. There will be differences of opinion but Fuller says "[w]e know enough to create the conditions that . . . permit a man to lift himself upward." As a person aspires to excellence, that person is nevertheless a social being. The higher reaches of aspiration are somewhat individualistic and subjective. Without aspiration, there would be no society beyond purely animal or basic existence. The reach toward excellence both constitutes and continues possible human community.

Because duties state minimum requirements, there must be some incentive to obey them. Fuller suggests that the notion of reciprocity provides the basis for compliance with moral duties. Once some standard is set there must be some way to measure conduct against it. This measurement necessarily rests on a comparison of the "social fabric that unites strands of individual action." Any break in the fabric frees the individual from the responsibility to obey. Thus, reciprocity is at the core of duty. Without reciprocity, that is, without a social conception of the content of duty, there is no likelihood that anyone will obey.

This generates three conditions which help determine the maximum efficacy of duty:

93. Morality, supra note 43, at 13 (stating that if "we were cut off from our social inheritance of language, thought, and art, none of us could aspire to anything much above a purely animal existence").
95. Morality, supra note 43, at 22.
96. Morality, supra note 43, at 22 (concluding that any sufficient rupture in the social fabric released people from their duties).
First, the relationship of reciprocity out of which the duty arises must result from a voluntary agreement between the parties immediately affected; they themselves “create” the duty. Second, the reciprocal performances of the parties must in some sense be equal in value. . . . Third, the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I may owe you tomorrow—in other words, the relationship of duty must in theory and in practice be reversible.97

Once the duties are defined and the conditions for their maximum efficacy are laid out, the problem shifts to the location of the line between duty and aspiration. Duties stated too broadly, or too abstractly, or too virtuously impede a person’s progress toward excellence. It is too frustrating to be punished for failing to meet the highest standards when by definition few, if any, can actually meet them. Thus, the location of the line is both a theoretical and a practical problem.

This line of division serves as an essential bulwark between the two moralities. If the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration, and spontaneity. If the morality of aspiration invades the province of duty, men may begin to weigh and qualify their obligations by standards of their own.98

The line must be drawn with care because the two moralities dictate different ways to encourage compliance. The morality of duty implies that failure brings punishment. If duty represents society’s lowest expectation of an individual within it, then praising one for meeting the duty is not fitting. Punishment for such low standards seems to more closely conform to our expectations. On the other hand, the morality of aspiration represents the highest standards of human conduct. Not everyone will attain these levels. Even partial attainment is worthy of praise and reward. In this way, others are encouraged to follow the example of the person honored.

This difference implies a difference in the standards and procedures by which the punishment is administered or the reward is given. Punishment is surrounded by procedural and formal guarantees to prevent subjective preference from intruding. At the same time, such guarantees would be out of place when bestowing an award for excellence because the award itself represents an imperfect and somewhat subjective judgment.99

97. Morality, supra note 43, at 23 (emphasis added).
99. Morality, supra note 43, at 30–31. The location of the line between duty and aspiration is suggested by the essentially procedural dictates of the inner morality of the
F. Fuller’s View of Lawyers

Fuller’s jurisprudence led him to a specific view of lawyers. Lawyers were important social figures because of the profound morality that lay at the heart of their fundamental tasks. Fuller recognized that lawyers were both litigators and planners, trial warriors and trusted confidants, advocates and mediators. Fuller’s thoughts unified these disparate roles by stressing the inner morality at their core.

Fuller believed that a profound morality justified the adversary system. Legal structures embody moral aspirations and moral principles. Although Fuller never elaborated on the actual moral principles, he suggested that personal security and liberty suffer whenever a society cannot effectively and peacefully settle its disputes. Without law. Fuller identifies eight qualities inherent in this inner morality. If a law or legal system fails completely in any one of these aspects, it cannot be called law. The eight qualities are as follows:

1) There must be general rules, obviating the need for ad hoc determinations;
2) The rules must be promulgated;
3) The rules must be prospective, not retroactive;
4) The rules must be clear;
5) The rules must not require contradictory actions;
6) The rules must not require impossible actions;
7) The rules must remain relatively constant over time; and
8) There must a congruence between the declared rules and the actions of those administering the rules.

These canons are not to be mechanically applied. Rather, they serve as guidelines for the diligent legislator. It is relatively easy to state duties as prohibitions. They can be narrow and particular. Although they cannot be retroactive, prohibitory rules can be backward-looking in the sense that they are responses to past events which the law maker wishes to avoid in the future. But these canons of lawmaking that comprise the inner morality of law suggest that diligent lawmakers should do more than respond to past events with a series of “thou shalt nots.” Instead, the diligent can strive, as far as possible, to frame laws to be as that satisfy the eight canons. For example, perfect clarity, generality, and constancy may not be possible. The lawmaker, however, can try to frame laws as clear, general, and constant as possible under the circumstances. Continuing critique of the laws using these canons will reveal their weaknesses and lead to better clarity, generality, and constancy.

I have drawn this summary largely from Social Order, supra note 1, at 158. Fuller describes these standards in two books, Morality, supra note 43, and Anatomy, supra note 49. Fuller explained that these eight canons stated a kind of natural law of human law making—“What I have tried to do is to discern and articulate the natural laws of a particular kind of human undertaking, which I have described as ‘the enterprise of subjecting human conduct to the governance of rules.’” Morality, supra note 43, at 96.

These natural laws are not substantive in any significant way. Rather, they are procedural in that they lay out the way substantive choices can be made and structured. The substantive goals are the external morality of the law, determined by other means and analyses. The ideal judge is neutral as to these externals but committed to the internal morality.

100. Social Order, supra note 1, at 289.
101. Social Order, supra note 1, at 14.
such mechanisms, people could not pursue the good life. Lawyers create and preserve the means which make human society possible.  

At the same time, lawyers do more than try cases—lawyers are mediators, arbitrators, planners, counselors, and negotiators. If there is a natural law of procedures and institutions, then lawyers are in the best position to discern and apply this natural law. Lawyers are experts in social structure and thus are social architects when called upon to plan and create solutions to client's problems.  

Because lawyers understand the underlying principles of social order, they should be able to design systems and processes that will solve the unique problems presented by the clients' situation. Fuller saw law as a "purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it." These purposive, energetic, intelligent people are lawyers.  

Fuller rejected the realists' position that law was essentially the formal actions of authoritative institutions. A realist lawyer predicted the decisions of these institutions. Unconcerned with improving the "law," the realist lawyer instead attempted to become a technician skilled at manipulating the levers of authoritative institutions. Such a view had negative ethical connotations because it failed to offer any principle to help decide what the law ought to be. It also undermined the proper notion of professional role.  

If the distinguishing characteristic of the lawyer lies in his ability to predict where, and under what conditions, state power will strike, he ceases to be a lawyer when he concerns himself with any other question. This means that if he ventures into questions of what the law ought to be he leaves behind him the comfortable shelter of prestige-filled words like lawyer, professional competence, jurisprudence, and perhaps even legal philosophy. He is put strictly on his own with nothing to support him but a private call and a shaky belief in the validity of his own insight.  

Fuller believed that law was essentially about the establishment of a sound framework for social life. The lawyer's task under this view

102. American Legal Philosophy, supra note 52, at 476-77.  
103. Social Order, supra note 1, at 264-65.  
104. Morality, supra note 43, at 145. In this passage Fuller is contrasting his vision of law with the vision that conceives law as the struggle for power, with the designation going to the most powerful. In Fuller's view, law must be seen as an attempt to reach the excellences suggested by its substantive and procedural aims. In contrast, the opposing view studies law "for what it is and does, and not for what it is trying to do or become." Id.  
105. Social Order, supra note 1, at 250-51.  
106. Social Order, supra note 1, at 257.  
107. Social Order, supra note 1, at 251.
is technical only to a degree. The lawyer was an order-creator.\footnote{108} The ultimate task of a lawyer is to practice in such a way as to collaborate in establishing a sound social structure:

By the necessities of his profession the lawyer is frequently called upon to become the architect of social structure. This is true not only where great affairs of state are involved and constitutions or international treaties are being brought into existence, but in the most commonplace arrangements, like working out a contract for a two years' supply of paper towels for the rest rooms of a chain of service stations. In a sense, every contract, every testament, every lease—in short, every legal instrument is a kind of constitution establishing a framework for the future dealings of the affected parties.\footnote{109}

Fuller believed that lawyers participated in the construction of the social order.\footnote{110} The lawyer was not simply a means for the individual to achieve an end.\footnote{111} The lawyer was also a means by which society helps establish itself.\footnote{112} The question is not, "What does my client want?" Rather, the question is, "What is it my client wants that is consistent with the limits of the adversary system, the law, as well as society as a whole?" If my client wants to use means or accomplish goals that are inimical to the establishment of good social order, I should refuse. More importantly, I should not abandon my client, as I ride off on my moral high horse. Instead, I should advise my client on the best means to accomplish the goal which will also further the creation of a sound social order.\footnote{113} Hence, Fuller's interest in alternative legal forms—private contract, mediation, arbitration, and custom.

\footnote{108}{SOCIAL ORDER, \textit{supra} note 1, at 267.}
\footnote{109}{SOCIAL ORDER, \textit{supra} note 1, at 264–265.}
\footnote{110}{LON L. FULLER, THE ADVERSARY SYSTEM IN TALKS ON AMERICAN LAW 30, 37 (Harold J. Berman ed., 1961) [hereinafter \textit{ADVERSARY SYSTEM}] (stating that a lawyer "plays an essential role in one of the fundamental processes of an ordered community").}
\footnote{111}{ADVERSARY SYSTEM, \textit{supra} note 110, at 37–38 ("At no time is the lawyer a mere agent of his client.").}
\footnote{112}{SOCIAL ORDER, \textit{supra} note 1, at 277 (arguing that law should maximize freedom and lawyer's job should not be to "expound the fiat of some sovereign, nor to predict which way judges will jump, but to search for truth").}
\footnote{113}{\textit{See, e.g.}, SOCIAL ORDER, \textit{supra} note 1, at 261. Fuller stated that legal philosophy should analyze adjudication by asking the following questions: What kinds of human relations are best organized and regulated by adjudication, and what kinds are better left to other organizational procedures, such as negotiation and voluntary settlement, majority vote, or expert managerial authority? What are the consequences where adjudication is given problems inappropriate to its capacities, and how can the damage done be minimized? What are the procedural limitations which adjudication must respect if it is to be effective, not only in the sense of reaching an apt and intelligent decision, but also in retaining the respect of the losing party?}}
Fuller saw the lawyer as a person especially skilled in devising structures that solved clients' problems in ways that were consistent with society's needs.

III. FULLER'S INFLUENCE ON THE ABA'S MODEL CODE

A. Introduction

Fuller's influence on the Code of Professional Responsibility can be seen in the Code's differentiation of duties and aspirations. This distinction created a conception of the purpose of a professional code and a moral justification for the lawyer's role. In addition, the Code's structure emphasized a view of legal practice in which the interests of the system took precedence over the interests of the client. These elements moved the Code toward an integrated professional ethics, provided the moral justification for lawyer work, and suggested a purposive method of interpreting its provisions.

The American Bar Association adopted its first set of professional regulations in 1908. These principles, called the Canons of Professional Ethics, were broadly stated principles which addressed matters of civility as well as specific matters of professional regulation. The Canons relied heavily on the 1887 Code of Ethics adopted by the Alabama Bar Association. This Code relied primarily on Judge George Sharswood's nineteenth century Canons of Ethics. They authoritatively reflected the conscience of the profession in the early twentieth century and the latter part of the nineteenth. They were concerned with civility, discussing the "honorable relations between individuals" and ignoring the responsibility the lawyer had to society or the legal system. The Canons assumed a world of solo practitioners in small towns sharing common values. While that may have reflected life at the beginning of the century, it did not reflect the reality of life at mid-century. A federal judge, attempting to salvage the Canons in 1955, referred to them as

118. Geoffrey Hazard referred to this as the practice of "downstate Illinois." Geoffrey C. Hazard, Jr., Ethics in the Practice of Law 16 (1978) [hereinafter Ethics].
your statute law of ethics... so far as the American Bar Association is concerned the conduct of the lawyer is to be measured by these rules which are down in black and white and which apply to that conduct just like any statute would apply to any factual case which you will have in a lawsuit. [These rules] have been interpreted... over a period of years just like a court construes and interprets the statutory law.\textsuperscript{119}

B. The Joint Conference Statement

Dissatisfaction with the 1908 Canons of Ethics built over the years. The ABA appointed several committees to revise the Canons over a span of 25 years, but nothing ever came of their reports.\textsuperscript{120} Finally, the movement gained some speed with the appointment of the Joint Committee on Professional Responsibility in 1955. Fuller and his cochair, John D. Randall, published the committee’s report in the December 1958 ABA Journal.\textsuperscript{121} The report purported to be a “reasoned statement of the lawyer’s responsibilities, set in the context of the adversary system.”\textsuperscript{122}

From the very beginning we see Fuller’s concern for process and the morality embodied in it. According to the Joint Conference report, ethical discussions with non-lawyers foundered on the rocks of the adversary system: “Confronted by the layman’s charge that he is nothing but a hired brain and voice, the lawyer often finds it difficult to convey an insight into the value of the adversary system or an understanding of the tacit restraints with which it is infused.”\textsuperscript{123}

Just as Fuller pointed out the inner morality of legal systems, he suggested that a moral understanding of the lawyer’s work would only be possible after one thoroughly understands the inherent morality of the adversary system.\textsuperscript{124} Within the adversary system, lawyers advocate for their clients because that is the best way to ascertain facts and

\textsuperscript{119} Panel on Professional Ethics, 9 ARK. L. REV. 294, 295 (1955).

\textsuperscript{120} Committees reported on the need for changes in the Canons in 1924, 1933, and 1935. The 1924 report suggested the desirability of statements of general principles as opposed to specific rules but made no further recommendations. Edward L. Wright, The Code of Professional Responsibility: Its History and Objectives, 24 ARK. L. REV. 1, 3 (1970) [hereinafter History]. The 1933 report called the 1908 Canons “neither comprehensive nor exhaustive” and that a better statement of principles could be formulated. Id. at 3–4. Finally, the 1935 report recommended far reaching revisions so that new members of the profession could receive proper guidance. Id. at 4.


\textsuperscript{122} Joint Conference, supra note 121, at 1159.

\textsuperscript{123} Joint Conference, supra note 121, at 1159.

\textsuperscript{124} “Such an understanding is required not only to appreciate the need for an adversary presentation of issues, but also in order to perceive truly the limits of partisan advo-
resolve some disputes. However, Fuller would not rest his argument on such instrumental concerns. Fuller concluded his defense of the adversary system in this way: The advocate’s role is an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man’s capacity for impartial judgement can attain its fullest realization.

Lawyers need not apologize for the adversary system or their role within it. Instead, they should examine more closely the purposes the system is designed to serve to both better explain those purposes and to more adequately discern the inherent limits those purposes place on a lawyer’s conduct:

The advocate plays his role well when zeal for his client’s cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.

The Joint Statement also reflects Fuller’s Aspiration/Duty dichotomy. In the very first paragraph of the report, Fuller notes that “[o]ne who undertakes the practice of a profession cannot rest content with the faithful discharge of duties assigned to him by others. His work must find its direction within a larger frame.”

Fuller describes the profession’s standards of conduct in the same way he describes the minimum standards prescribed by the morality of duty. The lawyer must not be “content” with only doing his duty. “[H]e must realize that a letter-bound observance of the Canons is not cacy must impose on itself . . . to remain wholesome and useful.” Joint Conference, supra note 121, at 1160.

125. Joint Conference, supra note 121, at 1160-61.
126. Joint Conference, supra note 121, at 1161. Fuller once commented in a similar vein that angels need law, too. “[I]n order to discharge their celestial functions effectively, angels need ‘made’ rules, rules brought into existence by some explicit decision.” Morality, supra note 43, at 55-56. This is so not because angels are “bad,” but because there can be legitimate questions about meaning, interpretation, and application among good people. In a world of imperfect drafting, courts perform an essential function by resolving these questions. Id. at 56.

127. Joint Conference, supra note 121, at 1161.
128. Joint Conference, supra note 121, at 1159.
129. “All that he does must evidence a dedication, not merely to a specific assignment, but to the enduring ideals of his vocation.” Joint Conference, supra note 121, at 1159.
equivalent to the practice of professional responsibility."\(^{130}\) Observing the minimum duties makes it possible for the lawyer to pursue the "higher ideals" of the profession. Just as one must understand the adversary system's nature and purposes, a lawyer also should understand the nature of the lawyer's role and the reasons behind the rules of professional conduct.\(^{131}\) In this way, the lawyer will be guided toward the lofty purposes the legal system serves within a democratic society.\(^{132}\) Moreover, as a practical matter, the lawyer will be better able to understand his or her responsibilities in periods of rapid change and growth.\(^{133}\)

C. Drafting the Model Code

The influence of the moral tradition to which the Joint Statement pointed peaked with the 1969 Model Code of Professional Responsibility.\(^{134}\) Elements of this moral tradition and Fuller's jurisprudence survived in the first draft of the Model Rules. However, the choice to discard the aspirational aspects of the Code greatly undercut the effectiveness and intelligibility of the moral tradition. Moreover, the furor the first draft caused and the subsequent watering down of its most controversial elements revealed the further weakening of this Fullerian understanding of the practice of law. The complete rejection of the Code's style and format by the Model Rules represented the victory of a different conception of law.

After the Joint Statement appeared in the American Bar Association Journal, the committee did not meet again. The Joint Statement seemed to be another in the long line of committee reports recommending change but leading nowhere. In 1964, however, the ABA appointed a committee to study the Canons and to make recommendations for revising them.\(^{135}\) Like the constitutional convention of 1787, the committee quickly concluded that more radical action was

\(^{130}\) Joint Conference, supra note 121, at 1159.

\(^{131}\) Joint Conference, supra note 121, at 1159.

\(^{132}\) "The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized." Joint Conference, supra note 121, at 1159. Cf. American Legal Philosophy, supra note 52, at 463 (arguing that compliance with rules requires an understanding of the "reasons why these rules are necessary").

\(^{133}\) Joint Conference, supra note 121, at 1159–60.


\(^{135}\) History, supra note 120, at 4. The House of Delegates appointed the committee at the request of then ABA president Lewis Powell.
The influence of his thought is obvious, however. Among the reasons for completely rewriting the Canons was the need to provide guidance to new lawyers. The Canons impeded this process by failing to recognize the difference between the "inspirational and the proscriptive." The preamble to the Code cites the Joint Statement in three out of thirteen footnotes. The need for lawyers to understand their role in the adversary system and its role in society is pulled from the Joint Statement. Second, although a lawyer's practice may change, fundamental ethical principles derived from an understanding of the adversary system will always guide the lawyer. Third, some of these fundamental principles are stated in the Code to guide lawyers in specific situations.

Beyond these specific citations, the Preamble reads like a product of the Joint Statement. Lawyers play a vital role in the maintenance of a free and democratic society. They must understand their roles and the systems in which they operate in order to best fulfill their professional responsibilities. In a final flourish, the drafters write:

136. William Simon states that Fuller drafted the categorical restrictions of the Code but does not provide any source for this claim. William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1091 n.23 (1988). Reconstructing the legislative history of the Code is impossible because the committee intentionally opted not to compile any record of its deliberation. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY xi (O. Maru ed.) (1969). Simon may be correct about Fuller's role in the drafting process. Nevertheless, it is not essential to my position to establish Fuller's exact role. I am focusing on the general structure that the Code adopted and the Rules rejected. I argue that definite consequences flow from these choices. Whether or not Fuller actually participated in the drafting does not matter when his influence on the structure is so clear. Whether or not he wrote any particular provisions, the Code's Fullerian structure was rejected by the Model Rules only a decade later.

137. History, supra note 120, at 5.

138. "[T]he lawyer stands today in special need of a clear understanding of his obligations and of the vital connection between these obligations and the role his profession plays in society." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble n.3 (1969) (quoting Joint Conference, supra note 121, at 1160).

139. "No general statement of the responsibilities of the legal profession can encompass all the situations in which the lawyer may be placed. Each position held by him makes its own peculiar demands. These demands the lawyer must clarify for himself in the light of the particular role in which he serves." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble n.4 (1969).

140. "Under the conditions of modern practice it is peculiarly necessary that the lawyer should understand, not merely the established standards of professional conduct, but the reasons underlying these standards." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble n.7 (1969).
The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards [set forth in the Disciplinary Rules]. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.  

The dual moralities of the law infiltrated the drafters’ thinking and showed up in the actual structure of the Code. The Reporter for the Code argued that to be successful it must appeal to both the reason and understanding of the lawyer and serve as a basis of discipline. The Chair of the committee declared that the new code had two main purposes: to “aid the lawyer in his search for appreciation and understanding of the ethics and high principles and dedicated aspirations of the profession” and a “statement of the commonly accepted minimum standard of professional responsibility, in which sense it is a binding legal code, enforceable by disciplinary action of the courts.”

142. See generally John F. Sutton, Jr., Re-evaluation of the Canons of Professional Ethics: A Reviser’s Viewpoint, 33 Tenn. L. Rev. 132 (1966) (noting that many lawyers criticized the earlier version of the code of ethics as an unrealistic collection of pious platitudes and precatory statement concerning manners and virtue).
143. Edward L. Wright, Study of the Canons of Professional Ethics, 11 Cath. L. 323, 325 (1965) [hereinafter Study]. Wright did not follow Fuller completely. Whereas Fuller did not refer to any objective substantive principles served by law, Wright seemed to conflate the substantive principles of natural law with the procedural principle so important to Fuller. Wright argued:

Truth is objective and does not change with fashions and the times, just as plain justice is not subject to variables. But the settings in which lawyers practice and in which courts function are not static. Customs, practices, procedures, traditions and obligations of lawyers are constantly undergoing transition and these changes need orderly statement in legal codes.


Fuller was not comfortable with any assertions of absolute truth. See, e.g., Lon L. Fuller, The Problems of Jurisprudence 700-01 (Temp. ed. 1949) [hereinafter Problems] (rejecting notions of natural rights, rationalistic, political, economic, and religious absolutes). This led some to charge Fuller with being a relativist, or at least, with having relativistic tendencies. See, e.g., Anthony D’Amato, Lon Fuller and Substantive Natural Law, 26 Am. J. Juris. 202 (1981) (describing Fuller’s view that order, coherence and clarity have an affinity with morality). But see Moffat, supra note 39, at 190 (stating
This distinction between aspiration and duty was phrased in the exact language Fuller used to describe the two moralities of law. As understood by both Sutton and Wright, this distinction was necessary to correct the problems of the Canons. On one hand, the Canons did not adequately describe the ideals of the profession. Thus, they did not serve an educative function nor did they point out the goals toward which lawyers should aspire. On the other hand, they were written at such a high level of generality that they were practically useless as a basis of discipline. The drafters of the Code wanted to both elevate and police the profession.\textsuperscript{144} For this reason, they seem to have adopted Fuller's distinction of Aspirations and Duty.

The drafters structured the Code pursuant to this conception. Just as Fuller argued that law needed both an ideal toward which people could aspire and a floor below which people could not descend, the Model Code provided both aspirational ideals and disciplinary minimums. The Code was made up of "three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules."\textsuperscript{145} The Canons and the Ethical Considerations provided the aspirational content while the Disciplinary Rules provided the disciplinary minimums.

The drafting committee chose this model because of the importance they placed on the aspirational aspects of legal practice. The committee considered a number of alternative arrangements, including an arrangement that resembled the 1983 Model Rules.\textsuperscript{146} The committee rejected a bare code without aspirational ideals or explanatory comment as "narrow and unsatisfactory."\textsuperscript{147} They also rejected a code with explanatory comment because it "would fail to give practical guidance towards the true ideals of the profession."\textsuperscript{148} Finally, they rejected the establishment of official rules for discipline and unofficial ideals for

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\textsuperscript{144} "The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor." \textit{Model Code of Professional Responsibility}, Preamble (1969).

\textsuperscript{145} \textit{Model Code of Professional Responsibility}, Preamble (1969).

\textsuperscript{146} The committee considered revising and updating the Canons. They rejected this option because too much had changed since 1908 to make the Canons useful without major surgery. They considered drafting a regulatory code without comment; a code with explanatory comment; drafting an official regulatory code and an unofficial set of aspirations. All of these were rejected by the committee in favor of the three part structure of Canons, Ethical Considerations, and Disciplinary Rules. \textit{History}, supra note 120, at 6.

\textsuperscript{147} \textit{History}, supra note 120, at 6.

\textsuperscript{148} \textit{History}, supra note 120, at 6.
guidance because "the Ethical Considerations were too important and useful for relegation to an unofficial status." Instead, they decided to put the Ethical Considerations and the Disciplinary Rules back-to-back with the particular Canon to which they relate. This arrangement makes more obvious the nature of each Canon as a general principle, the Ethical Considerations as a statement of the level at which all lawyers should strive to act, and the Disciplinary Rules as minimum standards derived from the Ethical Considerations.

D. The Structure of the Model Code and Fuller's Jurisprudence

Fuller suggested that an aspirational morality provided both the goal toward which the human enterprise of law should be directed and the reasons behind specific duties. More specifically, he outlined a vision of legal practice that reflects this vision. In a Journal of Legal Education article, Fuller wrote that in spite of the disagreements about the content of professional regulation some agreement could be reached on basic principles. The basic principles Fuller was referring to were that

- a lawyer should understand his profession's vital role and purpose in a society governed by a rule of law, the self-regulation entrusted to his profession for the realization of this role and purpose, and finally, the standards adopted by his profession, pursuant to this trust, to enable his services to be performed more effectively in the public interest.

Fuller declared that the function of professional codes was to strike a balance between the "general principles of social organization . . . [and] an understanding of the peculiar function which the profession in question performs in the total processes of society." A code must contain a sense of mission and proportion: "A code that attempts to take the whole of right and wrong for its province breaks down inevitably into a mush of platitudes." Nevertheless, a professional code must not exclude completely exhortation:

- [A] code would not be complete with a declaration that these are worthy objectives and an exhortation to work hard to achieve them. The formulated code should attempt to set forth in detail those conditions—including social arrangements and

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149. History, supra note 120, at 6.
150. History, supra note 120, at 6.
151. Law Schools, supra note 30, at 203.
152. Lon L. Fuller, The Philosophy of Codes of Ethics, 74 ELEC. ENG'G 916, 916 (1955) [hereinafter Philosophy].
153. Philosophy, supra note 152, at 917.
standards of individual behavior—that must be respected if these goals are to be achieved.154

The Model Code’s Canons and its Ethical Considerations reflect Fuller’s ideas. The Canons were described as “axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.”155 They were not enforceable. Rather, they were something like chapter headings, stating the general principles and organizing the more specific applications underneath.156

The Canons provided the teleology for the Model Code. Without some overall goals set within a social context, law has no meaning. For example, perfect peace within the community is a worthwhile goal of social living. Although it may be unattainable, we may still structure our laws to move us in the direction of that goal. Thus, as an initial matter, we can prohibit murder. We do not have to know what a perfectly peaceful community will be like in order to know that outlawing murder will help us get there. Further up the ladder, we may wish to encourage sociable and peaceful conduct not by prohibiting conduct but by facilitating it. Now we pass from duty, a violation of which is punished, to something more aspirational. We encourage and praise such conduct. For example, we know that stable families in stable neighborhoods are more peaceful than others. So we may adopt tax, school, or zoning policies that encourage such stability. But whatever policies we adopt, our goal, our vision of the perfectly peaceful society, both guides and justifies our actions. In the same way, the Canons provide this same guidance and justification.

The Code recognized the distinction between punishment and exhortation. A complete code would not omit either enforcement of minimum duties or the encouragement of high ideals.157 A Code must tell lawyers “how to practice law in an inspiring, grand manner, and it should also tell courts and grievance committees the manner in which law shall never be practiced.”158 The 1908 Canons were not helpful

154. Philosophy, supra note 152, at 917.
156. History, supra note 120, at 9 n.23.
158. Sutton, supra note 142, at 137. Professor Sutton was the reporter for the Code’s drafting committee. For his later, revised views, see John F. Sutton, Jr., How Vulnerable is the Code of Professional Responsibility?, 57 N.C. L. REV. 497 (1979) where Sutton argued for revision of many of the Code’s provisions and for retention of the Code’s three part structure.
because they failed to make this distinction. The Canons were a mixture of minimal duties and high aspirations, often in the same Canon.\textsuperscript{159} Courts and disciplinary authorities were supposed to discipline conduct on the basis of language that did not separate the “criminal” from the “religious.”\textsuperscript{160} Society does not rely solely on moral persuasion. Instead, it has criminal statutes that define the minimally acceptable conduct for society to function.\textsuperscript{161}

The Model Code’s Ethical Considerations and the Canons were not merely clutter. They were necessary if lawyers were to understand and fulfill their commitment to the law. The Canons and the Ethical Considerations provide the moral structure for the lawyer’s professional life. The Canons were the foundation of the lawyer’s professional life and the Ethical Considerations were the moral architecture. All professional conduct rested on the bedrock of the Canons. At the same time, the Ethical Considerations buttressed the lawyer’s professional life in the same way that architectural buttresses did. They made explicit the internal moral structure.

For example, Canon 4 lays down the general principle of confidentiality. The Ethical Considerations develop the reasons why confidentiality is an important feature of the lawyer client relationship. Both the fiduciary nature of the lawyer client relationship and the proper functioning of the adversary system require confidentiality.\textsuperscript{162} Clients need to completely divulge information and lawyers need this information to function properly in the legal system. Thus, confidentiality is rooted in the reciprocal needs of the lawyer and the client. The client needs a lawyer and the lawyer needs the information. Confidentiality serves not only to facilitate “the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.”\textsuperscript{163}

\textsuperscript{159} See History, supra note 120, at 11 (indicating difficulties in deciphering which portion of a canon is a rule and which portion should be an ethical aspiration).

\textsuperscript{160} History, supra note 120, at 10.

\textsuperscript{161} History, supra note 120, at 10. Wright refers to Fuller in this context but, oddly, he cites to Robert Summers’ largely unfavorable review of Fuller’s book, The Morality of Law. See id. at 10 n.26 (citing Robert S. Summers, Book Review, 18 J. LEGAL EDUC. 1 (1965)). Fuller responded to Summers and his other critics in a 1969 revised edition of The Morality of Law. Summers subsequently recanted and took a more favorable view of Fuller’s position. See Summers, supra note 2, at 436 (stating that his book pays tribute to Fuller and to all that people miss in Fuller’s work).

\textsuperscript{162} MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1969).

\textsuperscript{163} MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1969). There is a danger in looking at parts of the Code in isolation from the whole of Fuller’s thought. We run the risk of atomizing what Fuller always saw as a social task. For example, confidentiality is important to the “proper” functioning of the adversary system. That proper functioning
Fuller argued that the lawyer must be faithful to the ideals of the legal system. The Canons and the Ethical Considerations are explicit as to what principles and attitudes the lawyer must be committed. Canon 9 enjoins lawyers to avoid even the appearance of impropriety.\textsuperscript{164} The Ethical Considerations explain that lawyers must promote confidence in the system of justice.\textsuperscript{165} This confidence can be eroded when lawyers conduct themselves improperly or irresponsibly.\textsuperscript{166} Whenever a lawyer is in doubt about the ethical propriety of an action, the lawyer "should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."\textsuperscript{167} In the end, the "lawyer owes a solemn duty to uphold the integrity and honor of his profession."\textsuperscript{168}

In addition, the Canons and Ethical Considerations provide the background against which the Disciplinary Rules achieve meaning. Fuller felt there was a middle ground between pure logical deduction and pure empiricism.\textsuperscript{169}

There is, I submit, a third area of rational discourse, not embraced by empirical fact or logical implication. This is the area where men seek to trace out and articulate the implications of shared purposes. The intellectual activity that takes place in this area resembles logical deduction, but it also differs in important respects from it. In logical deduction, the greater the clarity of the premise, the more secure will be the deduction. In the process I have in mind the discussion often proceeds most helpfully when the purposes, which serve as 'premises' or starting points, are stated generally and are held in intellectual contact with other related or competing purposes. The end result is not a mere demonstration of what follows from a given purpose but a reorganization and clarification of the purposes that constituted the starting point of enquiry.\textsuperscript{170}

\begin{itemize}
\item \textsuperscript{164} \textit{Model Code of Professional Responsibility} EC 7-8 (1969) (stating lawyer may withdraw from non-adjudicatory matter when client pursues legal but undesirable action) \textit{with} EC 7-10 (stating lawyer may ask client to forego legal but morally unjust action) \textit{and} EC 7-25 (stating lawyer should not verify inaccurate pleadings, make statements about the evidence unless facts supported by admissible evidence, not harass or embarrass a witness, and not use trickery to put inadmissible evidence before the jury).
\item \textsuperscript{165} \textit{Model Code of Professional Responsibility} EC 9 (1969).
\item \textsuperscript{166} \textit{Model Code of Professional Responsibility} EC 9-1 (1969).
\item \textsuperscript{167} \textit{Model Code of Professional Responsibility} EC 9-2 (1969).
\item \textsuperscript{168} \textit{Model Code of Professional Responsibility} EC 9-2 (1969).
\item \textsuperscript{169} \textit{Forms and Limits, supra} note 59, at 380–81.
\item \textsuperscript{170} \textit{Forms and Limits, supra} note 59, at 381.
\end{itemize}
It is not a formal process of finding the "law" nor is it the political process of imposing the strongest's will. Rather, it is a form of rationality in which means and ends, Word and Deed, combine.\textsuperscript{171} It requires, in the end, the exercise of human reason and judgment.\textsuperscript{172}

This could be a description of the process of interpreting the Code's provisions in new and unanticipated situations. The Canons and the Ethical Considerations are held in contact with the minimally stated Disciplinary Rules. It accepts that there will be multiple and sometimes conflicting purposes for lawyering. Nevertheless, it avoids the temptation to oversimplify legal ethics. Lawyers, in fidelity to the legal system and the goals outlined in the Code, will be able to reach acceptable conclusions when confronted with a new and unanticipated situations. These cannot be prescribed in advance. Rather, the rules must be developed on a case-by-case basis, as it were, in the fashion of the legal system itself.

For Fuller, the specific goals of a social group also generated the specific moral principles embodied in their legal processes. The Ethical Considerations served this purpose in the Code. They "represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many situations."\textsuperscript{173} Although aspirational in character, they are more specific than the Canons. They are analogous to the special rules that parties may come up with to govern their business relations. They reflect in some specific way the more general societal principles which they uphold. But they are applicable to a more specific context. At the same time they are not so specific as to lose their utility. They are capable of guiding conduct by the same kind of actors in different situations. Thus, while two parties may decide that a certain arbitration proceeding is appropriate for their dealings, the general principles that suggest arbitration as useful will also be applicable to other similar business dealings even if the specific kind of arbitration is not.\textsuperscript{174}

The Disciplinary Rules are the floor below which lawyers may not go. They represent the minimum standards of conduct. The rules, like Fullerian duties, are minimal and prohibitory. They do not exhaust the moral possibilities, however. Lawyers who simply comply with the bare minimum of the rules are "ethical lawyer[s] only in a

\textsuperscript{171} \textit{Anatomy}, \textit{supra} note 49, at 6.
\textsuperscript{172} \textit{Anatomy}, \textit{supra} note 49, at 40.
\textsuperscript{174} \textit{See generally Mediation}, \textit{supra} note 65 (discussing the diverse application of the theoretical inspiration behind mediation).
marginal sense."  

The rules should be fairly enforced "but a lawyer, to be deserving of the approbation of his fellow man, must conform to higher standards than those set forth in the Rules."

This distinction served two purposes. First, these minimums make it possible for lawyers to pursue the lofty ideals of the profession stated in the Canons and the Ethical Considerations. The Canons and Ethical Considerations help define the specific meaning and application of the Disciplinary Rules. The rules are the basis for discipline and should be applied uniformly to all lawyers, echoing Fuller's discussion of the inherent tension within the notion of justice between dispensation and application. Second, they establish a norm of reciprocity so that lawyers know that others are also adhering to the same minimum standards. In this way, they make the social organization of the legal profession possible. Lawyers are called to aspire to achieve their best and to achieve the best the law can be. At the same time, they are informed of the conduct that will bring punishment and condemnation.

Fuller believed that sufficiently motivated people would try to reach their potential. Similarly, a lawyer sufficiently dedicated to the principles of the legal system will naturally act so as to serve those principles. This has the dual effect of creating excellence in both the lawyer and the legal system. Thus, the Code's structure is designed for the morally self-reflective lawyer who wishes to achieve excellence at both the individual and at the institutional level. Compare that to a statutory model, like the Model Rules. Here the lawyer is expected to be a diligent rule-follower. The lawyer may, but is not required to, go beyond the requirements of the stated rule. The location of the line, that is, where the individual lawyer will draw the moral line, is left to individual decision. By contrast, Fuller and the Code both recognize that drawing the line will be difficult and somewhat personal but, nevertheless, a social decision. Fuller and the Code believe that the law can be ascertained, at least dimly, by reference to the goals and principles which animate the legal system. Thus, the Ethical Considerations provide a way to locate the line. They are like the pointer

175. History, supra note 120, at 11.
176. History, supra note 120, at 11.
179. Social Order, supra note 1, at 251.
Fuller used to describe the internal morality of made law. The Ethical Considerations, by clarifying the "natural law of lawyering," help excavate the location of the line for the individual lawyer in particular circumstances.

E. Simon's Critique of Fuller and the Code

Professor William Simon distinguished two approaches to professional ethics: The "Libertarian Approach" and the "Regulatory Approach."¹⁸⁰ Adherents of the libertarian view privilege procedure over substance and form over purpose. This is illustrated by pleading the statute of limitations to defeat substantively valid claims and arguing interpretations of rules that defeat their purpose.¹⁸¹ This is opposed by a viewpoint known as the "Regulatory Approach." Here the lawyer facilitates informed resolution of the substantive issues over procedure. The lawyer here distills and transmits information so as to "clarify the issues in ways that contribute to a decision on the merits, not to manipulate information to serve the client's goals."¹⁸² Here purpose is privileged over form.¹⁸³

The two approaches share a common method of reasoning, however. Categorical reasoning is the practice of restrictively specifying the factors that a decisionmaker may consider when she confronts a particular problem. In the categorical style, a rigid rule dictates a particular response in the presence of a small number of factors. The decisionmaker has no discretion to consider factors she encounters that are not specified or to evaluate specified factors in any way other than that given in the rule.¹⁸⁴

Simon asserts that in spite of Fuller's advocacy of a discretionary style for judicial decisions, he helped draft the "categorical lawyering norms" of the Model Code.¹⁸⁵ Simon goes on to use part of his article to criticize arguments he says Fuller made in support of the Code. Unfortunately, Simon does not provide any citation for either of these points. Even if these claims are true, Simon misunderstands the purpose of the Model Code's structure and mischaracterizes Fuller's jurisprudence.

¹⁸⁰ Simon, supra note 136, at 1085-87.
¹⁸¹ Simon, supra note 136, at 1085-87.
¹⁸² Simon, supra note 136, at 1086.
¹⁸³ Simon, supra note 136, at 1086.
¹⁸⁴ Simon, supra note 136, at 1086.
¹⁸⁵ Simon, supra note 136, at 1091 n.23.
Simon considers the Code's Disciplinary Rules as the most important feature of the Model Code. As such, they exemplified the categorical approach he criticizes in his article. In that respect, he is correct. The Disciplinary Rules are narrow and do indeed limit the lawyer's discretion. But, like the Model Rules' reformers, Simon identifies the Disciplinary Rules with the Model Code's entire regulatory and professional mission. The Disciplinary Rules, under a Fullerian view, are only the bare minimums needed to establish social order. They must be stated narrowly out of necessity. This narrowness creates the necessary reciprocity among lawyers but also preserves a large area of freedom above the Disciplinary Rules floor for lawyer discretionary conduct. That discretion is guided, but not directed, by the Ethical Considerations and, to a lesser degree, the Canons. This very much resembles the kind of discretionary lawyering that Simon prefers. Indeed, Simon at one point writes that his discretionary approach is grounded in the lawyer's commitment to legal values. He rejects the distinction between a professional ethic and a personal ethic. These are words that Fuller would undoubtedly have endorsed.

Simon also seems to misunderstand Fuller's jurisprudence. What emerges is a caricature. For example, he calls Fuller a natural lawyer but goes on to describe a kind of substantive natural law that Fuller rejected. He raises a number of arguments supposedly advanced by Fuller in support of the Code, most of which do not sound like

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186. Of course, there is still a difference between a focus on substance versus procedure. Simon, as I understand him, would focus more intently on the substantive outcomes. Nevertheless, Fuller's vision is still not that dissimilar. Fuller rejected rigid distinctions between substance and procedure and would seem to have allowed at least some consideration of outcome measured by how well it served the social order.

187. Simon, supra note 136, at 1113.

188. Simon, supra note 136, at 1113-14.

189. Simon, supra note 136, at 1115. “[A] ‘natural law lawyer’ in the style of, say, Lon Fuller would have to consider whether the decisions of the legislature were so plainly wrong and the values they affronted so fundamental that the lawyer should disregard the decisions.” Id. The question for Fuller was not the fundamental nature of values. He was morally pluralistic on that point. Rather the question was whether or not the legislature grossly violated one or more of his eight “laws of lawmaking.” See Morality, supra note 43, at 33 (stating that the eight laws of lawmaking are: 1) failure to achieve rules at all; 2) failure to publicize the rules expected to observe; 3) abuse of retroactive legislation; 4) failure to make rules understandable; 5) enactment of contradicting rules; 6) rules that require conduct beyond the powers of the affected party; 7) frequent changes in the rules; and 8) failure of congruence between the rules as announced and their actual administration).
Fuller. Although a complete discussion of this point is beyond the scope of this article, one example should suffice to show the difference between Fuller and Simon’s version. Simon claims that Fuller would have argued in favor of “categorical rules” and against a discretionary approach by saying that the discretionary approach would dangerously increase lawyer power. Fuller, on the other hand, was simply not concerned with this problem. For Fuller, the legal system already gave lawyers a great deal of power. The question was its proper use and distribution. This was done not by micro-managing lawyer conduct but properly educating lawyers in the principles of social architecture. In addition, legal ethics had to provide the material for lawyers to properly apply these general principles to a broad and unanticipated range of circumstances. For Fuller, the power lawyers had was comparable to the power architects had to build buildings. Both were devoted to important and necessary social tasks and both were allowed a great deal of discretion to pursue their legitimate ends.

In the end, it is difficult to focus on Simon’s critique of Fuller because it so little resembles the richness of Fuller’s thought. He places Fuller in a related but still alien theoretical camp and uses language that Fuller would not have used. The problem is that Fuller is neither a natural lawyer nor a positivist, neither libertarian nor regula-

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190. Simon, supra note 136, at 1119. For example, in the section where he says he will refute Fuller’s arguments, he cites Fuller once for the proposition that lawyers should not be responsible for the substantive outcomes. Id. at 1139 n.122. It is not clear, however, that Fuller would have gone so far. First, Fuller’s cited remarks on the subject pertained mostly to criminal representation. Second, even then, he recognized that the lawyer’s obligation was to the process. This required that the lawyer respect both the adversary role and the integrity of the system. Thus, lawyer advocacy ensured that a decision was “properly grounded” and “takes account of all the facts and relevant rules.” Adversary System, supra note 110, at 39. At the same time, the lawyer can withdraw when the client wants to engage in unethical conduct. Id. at 38. Moreover, the lawyer should never “so abandon himself in advocacy that he loses the power to comprehend sympathetically the views of those with different interests.” Id. at 42. It is true that Fuller sometimes claimed that a kind of neutrality toward outcomes was important for a proper adversarial presentation. Nevertheless, he did not make this his exclusive criterion for the justification of the adversary system. Fuller’s thought on this subject is more nuanced, some would say confused, than Simon’s representation of it.

Simon does not provide citations for any of the other arguments claimed to be Fuller’s. A detailed discussion of these arguments is beyond the scope of this article. A few examples will show, I believe, that Simon has Fuller in the wrong camp. For example, contrary to Simon’s assertion, Fuller believed that social morality provided an adequate basis for making discretionary judgments, particularly in the area of counseling clients. Fuller believed that a great deal of ethical conduct was discretionary in the sense that no rule could anticipate the range of its applications in advance. Thus, proper ethical decisions must rest on the mature judgment of lawyers schooled in the purposes of the legal system in the context of the larger society. See Law Schools, supra note 30, at 203.
tory, neither categorical nor discretionary. His jurisprudence rejects and encompasses these kinds of antimonies.

IV. The Model Rules and the New Orthodoxy

A. The Problems With the Model Code

The Code reflected some of Fuller's basic insights. Fuller saw a natural law of particular enterprises. His modest claim was that each enterprise needed to examine its nature to better understand the rules it chooses to govern itself. The adversary system was the source of this natural law for Fuller and the Code's drafters. Fuller, however, might have gone farther. He recognized that only some lawyers litigated, and even then, only some of the time. Yet the Code only addressed the lawyer as an advocate. Perhaps the drafters believed that stating minimum duties were necessary only for litigation. Other lawyer functions like counseling, negotiation, drafting, and planning, were too multivariate to be addressed by minimum rules. Fuller certainly suggested something like this when he warned that placing too many duties will stifle creativity and spontaneity, qualities he found necessary for lawyers to be good social architects. On the other hand, this flaw may have resulted from the assumption that the Canons were substantively sound and simply needed a more modern statement. Nevertheless, this inability to acknowledge the many roles of the lawyer became a central focus in the effort to revise the Code.

191. See, e.g., Joint Conference, supra note 121, at 1161-62 (discussing the lawyer's role as a counselor and a designer of social structures). See generally Mediation, supra note 65 (comparing adjudication and mediation). See also Forms and Limits, supra note 59, at 370 (discussing arbitration, mediation, and adjudication).

192. Compare Morality, supra note 43, at 42 (discussing the optimum location of the dividing line between duty and aspiration) with Social Order, supra note 1, at 271-81 (describing the reforms needed in legal education to properly prepare lawyers for reconciling "irreconcilable" conflicts).

193. See Study, supra note 143, at 323.

194. See, e.g., Ethics, supra note 118, at 7. It is doubtful that the Model Rules do much better. Although sections acknowledge the counseling function, for example, the specific rules are vapid or unworkable. Compare Model Rules of Professional Conduct Rule 2.1 (a lawyer may refer to "non-legal" matters) with Model Rules of Professional Conduct Rule 2.2 (setting up an arduous process for "intermediation" among clients). For a thorough discussion of Rule 2.2, see John S. Dzienkowski, Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession, 1992 U. ILL. L. REV. 741 (1992).

The section on negotiations was modified beyond recognition so that the rules serve to validate the adversary function, even when lawyers are not being advocates. For an early and influential criticism of the proposed negotiation rules, see James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 AM. B. FOUND. RES. J. 926.
Fuller's focus on the natural law of legal processes turned the lawyer's gaze inward. This produced another flaw in the Code. While bowing in the direction of other legal and social developments, it proceeded in the end to ignore them. While the drafters proclaimed that the changed context of modern legal practice required a new statement of the lawyer's ethical responsibilities, the Code seemed not to recognize this development. The small town solo practitioner still seemed to be the model on which the Code's provisions were based. Moreover, the Code acknowledged the changing legal structure of practice but did little to accommodate it. The Code did little to encourage *pro bono* service, restated the soon-to-be unconstitutional restrictions on advertising, and only grudgingly accepted the developing area of third-party payors. It was as though the drafters chose to recite a mantra—we are lawyers and we have our own way of doing things—instead of more deeply analyzing social and legal trends.

Finally, the Code's three part structure proved too confusing for many lawyers, judges, and disciplinary committees. Some critics claimed that the Code's structure was irrational and unworkable. Critics claimed the Disciplinary Rules were too vague to serve as the basis of discipline while others charged that the Ethical Considerations stated duties that conflicted with the Disciplinary Rules. Some courts and disciplinary authorities began to enforce the Canons, a development clearly not in keeping with the drafters' intent.


197. Canon 9's language that a "lawyer should avoid even the appearance of impropriety" was a prime example of this anomaly. See ANNOTATED MODEL CODE OF PROFESSIONAL RESPONSIBILITY, supra note 135, at 400–16 for a discussion of Canon 9's use and misuse. The Model Rules specifically eliminated any reference to the vague impropriety language. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9 cmt. 5 (1983). For an example of a court resurrecting the "Appearance of Impropriety" standard in a jurisdiction that adopted the Model Rules, see First American Carriers, Inc. v. Kroger Co., 787 S.W.2d
All of the above flaws in the Code could have been remedied. They could simply be the result of poor drafting. Moreover, the Code could have been amended to better reflect the changing legal climate. Surely, lawyers would understand the evolution of the law's demands. But the quick demise of the Code suggests that more was going on than quibbles about words or social trends. In discussing the problems of understanding the first draft of the Model Rules, James Lindgren commented that if the drafters of the Model Rules were trying to reduce current law to writing merely to update the Code, then "not enough has happened in the last decade to turn a supposedly good Code into an almost completely obsolete Code."\textsuperscript{198}

Instead, it was a change in the prevailing jurisprudential orthodoxy that led to the Code's demise. The post-World War II consensus that law rested, indeed, that it had to rest, on a normative basis crumbled. The idea that law was somehow special died. In its place legal realism was reborn and positivism got a second look. It is not inaccurate to say that the Model Rules represent the triumph of realism and positivism over the modest normative claims of Fuller and others.

\textit{B. The Different Assumptions of the Model Rules}

The foregoing points out how the jurisprudential presuppositions of the Model Rules differ from the Model Code's. For the drafters of the Model Rules, the Canons and the Ethical Considerations were clutter. They were meaningless obstacles to the quick and common sense resolution of lawyers' professional problems. The positivist conception of the lawyer is technical and individual. Fuller's conception was purposive and social. The Model Rules produced general statements of categorical rules designed to guide the lawyer in these technical questions. On the other hand, the Model Code provided goals and ethical guidelines to inform the lawyer of the range of potential choices and to facilitate the most socially worthy choice. This conforms to Fuller's belief that law cannot be reduced to a pattern or series of patterns. Law is conducted on a thousand fronts. Lawyers must attend to a complex social reality.

Morality is external to the Model Rules. The rules are not ethical teachings and are not meant to be so. They are a body of regulatory law laying down the rules by which law practice is conducted. The

\textsuperscript{669} (Ark. 1990) (requiring disqualification of law firm because they were retained to represent two parties out of the same accident).

question they ask is practical: What shall I (the lawyer) do in a particular circumstance? The answer is, "Follow the rules." How do lawyers know what the rules require? They will be interpreted and applied just like statutes by authoritative bodies charged with that responsibility. The interpretation is the law. Whether or not it is morally right is a matter of private, and not public, concern.

The Model Rules do not function as a creedal statement of the lawyers' beliefs. The good lawyer is defined as the person who follows the rules. Being a good person requires defining and following some independent and private moral standard. If they conflict, the person must either compromise his standards or find another profession. The Model Rules represent the triumph of a new jurisprudential orthodoxy which combined realism and positivism. This can be seen in the Model Rules' conception as the law of lawyering, the rejection of the Code's three-part structure, and the Rules' disconnection of law and ethics.

C. Drafting the Model Rules Under the Influence of the New Orthodoxy

Following World War II, Fuller and others attempted to state a normative basis for jurisprudence. Although rejecting Langdellian formalism, they nevertheless wanted to avoid the nihilism of the radical realists and the potential amorality of the positivists. In this re-

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199. Two scholars described this new orthodoxy in similar ways at about the same time. Professor Robert S. Summers described the new jurisprudence as "pragmatic instrumentalism." Summers, supra note 2, at 433. Summers was an original critic of Fuller. After rereading Fuller's work, Summers changed his mind. Summers' new thesis is that Fuller's jurisprudence provides necessary correctives to pragmatic instrumentalism. The dominant form rejects formalism, sees law as a means to external goals, and is pragmatic in its reliance in its focus on the actual context of things as opposed to their nature. Id. at 435. Like Summers, I also believe that a weak form of positivism is included in the prevailing jurisprudence. Id. at 436. Of course, strong positivism has never enjoyed much of a reception on this side of the Atlantic so, for all practical purposes, the prevailing jurisprudence includes almost all strands of American positivism. For the view that positivism is the dominant form of American jurisprudence, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

Roger Cramton also described the new orthodoxy in similar terms and at about the same point in time. See Cramton, supra note 2, at 252 (concluding that the prevalent orthodoxy of legal education is a mix of legal positivism, social jurisprudence, legal realism, and the functional approach).

200. See MINDA, supra note 34, at 24–61. Professor Minda also quotes Francis Lucey who argued that legal realism bred totalitarianism. Id. at 278 n.41. See also James Boyle, Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance, 78 CORNELL L. REV. 371, 381 (1993) (stating that World War II era American legal scholars believed that realism undermined the rule of law).
gard, Fuller argued that there was no difference between realism and positivism. The Code represented the high water mark of this anti-realism/positivism reaction. By 1978, however, Roger Cramton described the “prevailing orthodoxy” in anything but normative terms. Writing about the “Ordinary Religion” of law schools, Cramton listed the ingredients of contemporary understandings of law:

1. A skeptical attitude toward generalizations;
2. An instrumental approach to law and lawyering;
3. A tough-minded and analytical attitude toward legal tasks and professional roles; and
4. Faith in reason and the democratic process.

Cramton concluded that the modern conception of law was a blend of legal positivism, sociological jurisprudence, legal realism, and the “functional approach.” This latter approach turned lawyers into “apologist(s) and technician(s) for established institutions and things as they are [and] to view change as a form of tinkering rather than a reexamination of basic premises.”

All of these factors can be seen in the development of the Model Rules of Professional Conduct. Robert Kutak, the chair of the ABA Commission assigned to draft the new rules, argued that the rules needed to be seen as legislation. Kutak claimed that the commission took the bifurcated structure of the Code to its next logical step “by drafting rules that are the legal foundation of good professional conduct, although not necessarily exhaustive.” Kutak saw the rules as stating the “law of lawyering”:

201. Quest, supra note 36, at 47. Whether or not realism and positivism are “contradictory approaches to law,” as Minda concludes, the reaction against them was real. Minda, supra note 34, at 42. The postwar attempt to state a theory of law as against realism and positivism is reflected, I believe, in the Code of Professional Responsibility.
202. Cramton, supra note 2, at 248.
203. Cramton, supra note 2, at 252.
204. Cramton, supra note 2, at 254.
206. The drafters took the “underlying structural thrust of the Code of Professional Responsibility—its bifurcation of disciplinary rules and ethical considerations—to its next logical step by drafting rules that are the legal foundation of good professional conduct, although not necessarily exhaustive. The effort is to state the necessary, but not the entire, content of ethical lawyer behavior.” Robert J. Kutak, Coming: The New Model Rules of Professional Conduct, A.B.A. J., Jan. 1980, at 46, 47 [hereinafter New Rules]. One wonders what Fuller would have called the Code’s structural thrust to “bifurcate” ethics and law. Fuller’s jurisprudence insisted that there could not be sharp distinctions between means and ends, law and ethics, and the like. Fuller most likely would not have understood the Code to separate anything. Rather, Fuller would have seen the Code as more
The law of lawyering . . . is a body of regulatory law as distinct, real and compelling as the law of agency contracts . . . [T]he commission was not discussing a mere revision of a list of ethical do’s and don’ts for lawyers, but rather was responding to a significant development . . . in the law of lawyering . . . The Model Rules do not constitute a new code of ethics but instead, concern the law of lawyering. 207

The Rules should be seen as a piece of legislation. Like all legislation, they only dimly reflect morality and ethics. Instead, they reflect the ways lawyers practice and therefore provide the general principles by which lawyers can structure their daily activities.

Severing the link between aspiration and enforcement was deliberate. The Model Rules clearly intended to sever the connection between law and ethics.

[The] change is neither stylistic nor fortuitous. It represents a considered decision about the nature of professional standards. As a whole, the Model Rules deliberately eschew references to ethics; they are at least in form more a set of detailed requirements for a regulated industry than a set of ethical principles. 208

The first reporter for the Rules declared that the “time has come to renounce completely the fiction that ethical problems for lawyers are matters of ethics rather than law.”209 The Model Code presented a confusing picture to lawyers who were not sure if the Code stated rules of ethics or rules of law. 210 This threatened the lawyer’s autonomy.211 At the same time, lawyers given the discretion to be ethical clearly integrating the dependent relationships of aspirations and duties. See Teachout, supra note 42, at 1076.

For the view that the Model Rules represent a “third level” code see Nancy J. Moore, The Usefulness of Ethical Codes, 1989 ANN. SURV. AM. L. 7, 15 (1990). Professor Moore sees this third level as an improvement over “simpler” codes. In her view, aspirational statements of professionalism are regressions to an earlier, “less mature format.” Id. at 17.


210. Id.

211. “To treat ethical rules of conduct as legal rules denies [the lawyer] the choice the former gives, and so constitutes a threat to his exercise of discretion and hence his independence and authority.” Patterson, supra note 196, at 522. See also American Legal Philosophy, supra note 52, at 463 (“Understanding [of the rules] must be vitalized by an appreciation of the reasons why these rules are necessary.”). Cf. Lon L. Fuller, House of Intellect, 14 J. LEGAL. EDUC. 153, 156 (1961–62) (arguing that a lawyer’s autonomy comes from the lawyers right “to resist the demands of clients that violate the ethics of [his] profession”)


also had the discretion to be unethical. Without rules of law, lawyers would not act correctly. Thus, the Model Code failed because it did not recognize the proper function of rules of professional conduct: "to define more precisely the nature of rights and duties stated only generally in rules of positive law." Breaking the tie between professional regulation and ethics was seen as a sign of progress. The substitution of rules of law for standards of ethics was the end of the naive effort to state aspirational professional standards.

In contrast, the Code asserted the link between ethics and professional regulation. Indeed, the very structure of the Code demonstrated the inescapable connection between ethics and a lawyer's tasks. Kutak claimed that the Code's connection of exhortation and enforcement was the central problem prompting revision. According to Kutak, the Wright Commission "misinterpreted" the evolution of professional standards. Instead of two parallel sets of rules, what was emerging was "a body of regulatory law to govern the conduct of lawyers." The Model Rules attempt to codify the body of regulatory law governing lawyers. Kutak concluded that "[t]he final draft of the Model Rules is most of all a legal document. It rests on law and expresses the interplay of legal concepts. Like any piece of serious

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212. "The paradox is that to give the lawyer discretion to be ethical . . . is also to give him the discretion to be unethical. Thus, unless we correlate rules of ethical and legal conduct for the lawyer, the result will often be less than either." Patterson, supra note 196, at 522. Cf. Philosophy, supra note 152, at 917 (stating that when professional conduct is understood as maintaining social order "we are no more free to follow our whims and impulses of the moment than is an electrical engineer who undertakes to design a circuit for a specified purpose").

213. Cf. Teaching, supra note 31, at 37 (stating that purposive discipline comes from within—"Its object is not constraint but freedom. Its sanction is not habit, but insight.").

214. Patterson, supra note 196, at 526–27.

215. Patterson, supra note 196, at 526–27. See also Moore, supra note 206, at 15–17 (viewing this higher level as an improvement over simpler codes).

216. Patterson, supra note 196, at 521; Schwartz, supra note 208, at 959.

217. Patterson's critique suggests that the Code's drafters may not have pursued Fuller's insights far enough. For example, it is not enough to identify aspirations without more closely correlating them to the duties imposed. See Morality, supra note 43, at 9. If lawyers were to make legal services available as per Canon 2 of the Model Code, then the very restrictive Disciplinary Rules under Canon 2 are at best misguided and at worst hypocritical. Perhaps because the drafters spent so much time on this section, they were unable to develop the other side of Fuller's ideas on professional conduct—counseling and private resolutions.

218. Lawyering, supra note 207, at 415.

219. Lawyering, supra note 207, at 416.

220. Observations, supra note 205, at 5.
legal work, the Model Rules require and deserve careful legal study.\footnote{221}

Kutak saw the Rules not simply as a form of law but as a statement of the existing law. The rules were not embodiments of the underlying morality of the legal system and professional practice. Rather, they were quite simply the recognition of the law as it applied to lawyers. They were the “command of the sovereign” as it related to lawyers.\footnote{222}

D. Comparing Fuller and the Model Rules

Geoffrey Hazard, the final Reporter for the Kutak Commission, asserted that the Code made legal ethics a serious “legal” subject.\footnote{223} Unfortunately, according to Hazard, the Code failed to realize its promise because the Code’s drafters were either cynical or innocent about the nature of legal rules.\footnote{224} Instead of illuminating ethical questions, the Code’s three part structure obfuscated them. The Canons and the Ethical Considerations narrow the meaning of the black-letter Disciplinary Rules. They do this by preempting any extensive interpretation that the Disciplinary Rules might be given in penumbral cases around the black letter rules.\footnote{225}

This depresses the rules to the lowest level of meaning that the literal text admits.\footnote{226} This makes them less than law: they purport to be rules but they contain anti-contextual provisions and contrary commentary.\footnote{227}

Hazard’s critique joins issue with Fuller’s duty/aspiration distinction. For Fuller, duties should be stated at their lowest level of meaning because they are the bare minimum necessary for social life. Hence the Disciplinary Rules are largely prohibitory. At the same time, lawyers dedicated to the ideals of their profession needed to be given the freedom to aspire to achieve those ideals. Hence, the Ethical Considerations and the Canons provide the explicit statement of those ideals.

\footnote{221}{Lawyering, supra note 207, at 413.}
\footnote{222}{For discussion of the positivist style in legal ethics as it was found in the Model Code’s Disciplinary Rules, see William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29, 39-61.}
\footnote{223}{Geoffrey C. Hazard, Jr., Rules of Legal Ethics: The Drafting Task, 36 The Rec. of the Ass’n of the Bar of the City of New York 77, 85 (1981) [hereinafter Drafting Task].}
\footnote{224}{Drafting Task, supra note 223, at 87.}
\footnote{225}{Drafting Task, supra note 223, at 88.}
\footnote{226}{Drafting Task, supra note 223, at 89.}
\footnote{227}{Drafting Task, supra note 223, at 89–90.}
Hazard rejected this model. The Disciplinary Rules were not the floor necessary for lawyers to hope to achieve the highest ideals of the legal profession. They were the “essential corpus” of the Code.\textsuperscript{228} The vaguer and broader Ethical Considerations and Canons only made it difficult for the diligent lawyer to know how to proceed by obscuring the interpretation necessary for “penumbral cases.”\textsuperscript{229}

These cases may seldom exist in a Fullerian profession. Fuller argued that “made rules” were normative propositions projected onto conduct from some authoritative source. Implicit rules, on the other hand, arose from conduct and could rarely be captured by verbal formulations.\textsuperscript{230} “[M]odern law is continuous with, and fundamentally dependent upon, informal social practices.”\textsuperscript{231} These social practices which embody implicit law are brought into being and kept in place by the purposive effort of the parties to this social interaction and by the way the parties understand the purposes of others.\textsuperscript{232} If lawyers sufficiently understand and are devoted to the aspirations of the profession, then rules can be kept to a minimum.\textsuperscript{233} If the rules are only the minimum standard, then most lawyers will obey them and their compliance will not be a matter of interpretation. Instead, like the lawyer who comes to appreciate his or her role in the quest for truth, the Code’s lawyer will avoid the close calls because the ethos of the implicit rules of the bar, imperfectly stated by the Ethical Considerations, will impel the lawyer toward a higher standard of practice.\textsuperscript{234}

\begin{itemize}
\item \textsuperscript{228} \textit{Ethics}, supra note 118, at 6. Of course, Fuller did not understand the morality of duty as any more important than the morality of aspiration. \textit{See Morality}, supra note 43, at 18–19 (discussing the balance between aspiration and duty).
\item \textsuperscript{229} Patterson, supra note 196, at 557; \textit{Drafting Task}, supra note 223, at 89–90. \textit{See also} Theodore J. Schneyer, \textit{The Model Rules and Problems of Code Interpretation and Enforcement}, 1980 AM. B. FOUND. RES. J. 939, 943 (discussing the problem in a more favorable light but nevertheless concluding that the three part structure causes unnecessary confusion).
\item \textsuperscript{231} \textit{Id.} at 362.
\item \textsuperscript{232} \textit{Id.} at 363–64.
\item \textsuperscript{233} Schwartz, supra note 208, at 957 (stating that conformity to standards depends on clarity of standards, homogeneity of group, communications within group, the extent to which standards are consonant with commonly shared values and positively and negatively reinforced). Schwartz concludes, however, that these conditions probably never applied to the American Bar. \textit{Id.} at 958.
\item \textsuperscript{234} “Those who participate in the enterprise of law must acquire a sense of institutional role and give thought to how that role may most effectively be discharged without transcending its essential restraints. All of these are matters of perception and understanding and need not simply reflect personal predilection or inherited tradition.” \textit{Anatomy}, supra note 49, at 116.
\end{itemize}
For Hazard, the Code’s structure was “disastrous.” The connection between the regulatory “law of lawyering” and its aspirational purposes made the Code unintelligible and unreliable. Such comments echo the debate between H.L.A. Hart and Lon Fuller in the pages of the Harvard Law Review. Hart argued that legal rules have a core of settled meaning and a penumbra of possible meanings. The easy cases are those which fall squarely within the settled core. The hard cases arise when the particular matter falls within the penumbra. Judges in the first case should only apply the settled meaning of the law while judges in the second case should choose meaning by making one or another policy choice about the outcome of the case.

Fuller responded with his notion of purposive interpretation. Fuller noted that there are relatively few easy cases. Instead, many cases exist in the penumbra. The judge would be unable to even ascertain this boundary without some knowledge of the purpose that the legal text aimed to serve. Only in this way would the interpretation of the law be attached to its moral content. The internal morality of the law was tied to its effort to achieve its particular purposes. Interpretation without a consideration of purpose cut law off from its moral core.

Hazard echoed Hart’s sentiments. There must be clear, positive rules of lawyering to guide lawyer decision making. The morality of the lawyer’s actions are an entirely separate matter. Instead, the primary concern is the diligence with which the lawyer can understand and then follow the law. In a passage that trumpets the disjunction of duty and aspiration in the Model Rules, Hazard wrote:

[O]n any given subject, the Model Rules provide a black letter rule and an explanatory comment. The Rules, in other words, seek to be rules of the lawyer’s legal obligations and not expressions of hope as to what a lawyer ought to do.


236. Aspirations, supra note 235, at 574 (stating that Model Rules rely on the more familiar and reliable mode of the Restatements).

237. See generally H. L. A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958) (examining the various interpretations of law between which judges must select in rendering a decision).

238. See generally Fidelity, supra note 37 (rejecting Professor Hart’s theory of statutory interpretation in favor of a more purposive view).

239. “Very close to the surface in quandary ethics is the presupposition that there is an essence of morality—that being moral can be reduced to being rule responsible.” EDMUND L. PINCOFFS, QUANDARIES AND VIRTUES: AGAINST REDUCTIVISM IN ETHICS (1986). Cf. American Legal Philosophy, supra note 52, at 463 (stating that rote knowledge of rules is insufficient without understanding of rule’s purpose).
The practicing lawyer needs and is entitled to legal rules that are not confounded by appeals for moral regeneration. . . . The law itself—the stuff lawyers work with—defines legal rights and wrongs.240

Aspiration should be left for the award ceremonies and to fictional lawyer stories.241

By following Hazard’s lead, the Model Rules settled the debate in Hart’s favor. Compliance with the Model Rules depends on both the coercive structure of the bar and the presence of the background law. Thus, not only are the rules identified as law, they are conditioned by law. The penumbral cases can be decided by the distinctly legal process of statutory interpretation. This interpretation proceeds internally by reference to the text of the rules, the explanatory comments, and the authoritative interpretations of those rules. It proceeds externally by reference to that larger body of law that gives context to the penumbral cases. Thus, principles of agency law, constitutional law, contract law, and criminal law all can be enlisted in the interpretation of the rules.242 In some ways, this view suggests that there are correct answers to the various ethical dilemmas in which lawyers find themselves. The answer is found by the correct application of the law to the facts.243

In contrast, the Code anticipates a more purposive interpretive process.244 The Disciplinary Rules form the floor. Any question about their application to individual lawyer practices is resolved by understanding the reasons behind the rules and the goals toward which they point.245 That lawyers may reach different decisions is im-

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240. Aspirations, supra note 235, at 574.
242. Cf. Patterson, supra note 196, at 526–27 (stating the Code’s failure is traced to inability to recognize that ethical standards are derived from general statements of rights and duties in positive law).
243. Patterson, supra note 196, at 557 (concluding that most lawyers are probably disciplined for violations of substantive law and not for violating independent standard of professional conduct).
244. William Simon contends that the instrumental justification for advocacy achieved formal recognition in the Model Code. Simon, supra note 222, at 61–62. Although there are many variants of this instrumental approach, at its core lies something Simon calls “Purposivism.” Id. at 62. Simon defines Purposivism by comparing it to Positivism: “In the Purposivist view, society is populated not by atomistic egoists but by people held together by shared experiences and norms. The purpose of law is not just to maintain order, but also to coordinate the actions of citizens so as to further their common purposes as effectively as possible.” Id.
245. Cf. American Legal Philosophy, supra note 52, at 470 (“A Purpose is a fact, but it is a fact that sets a target; it is a direction-giving fact. . . . [It] is at once a fact and a standard for judging facts.”).
material. In fact, it is to be expected that reasonable people will resolve the various contingencies involved in any given situation in different ways. The important question is whether or not the decision points toward the overall purposes of the system.  

The Model Rules also represent a different conception of the function that rules of conduct perform. Whereas Fuller and the Model Code understood the minimum rules as necessarily prohibitory, Hazard argued that many legal rules are organic and constitutive. Under this view, the Model Rules were a great improvement, by affirmatively stating lawyer obligations. Of course, Hazard’s view makes sense only if one views the Disciplinary Rules as the “essential corpus” part of the Code. If they are, then Hazard’s critique is correct. If they are not, then it misses the mark. Hazard sees the Code through the prism of the prevailing orthodoxy, which is skeptical of broad statements of principle, views law as instrumental, and takes a no-nonsense view of legal tasks. Seen from this vantage point, the Code is misguided and incoherent.

It fails to clearly state governing rules for lawyers who need answers to immediate problems. Leading a good professional life is subsumed in a series of daily judgments about immediate issues.

In short, the Model Rules are the progeny of realism and positivism. The Model Rules separate law from morality. They find talk of aspirational goals meaningless. The adversary system both defines and justifies the very law laid out to govern conduct. Ideally, they provide clear, no-nonsense guidance for lawyers. At worst, they concede that legal theory has nothing to add to our understanding of professional roles.

V. Effects on the Practice of Law

A. Different Forms, Different Moralities

The decision to abandon the three part structure of the Model Code in favor of the Restatement-like Model Rules resulted from the
jurisprudential presuppositions of the drafters and the bar. This much seems clear. Whether or not this choice makes a practical difference in lawyers' lives is another matter. Fuller understood that the job of the legal philosopher is to decide how lawyers may best spend their professional lives.\textsuperscript{250} In this light, Fuller said the proper way to evaluate a legal philosophy was to ask: "Would the adoption of the one view or the other affect the way in which the judge, the lawyer, the law teacher, or the law student spends his working day?"\textsuperscript{251} For Fuller, choosing the most socially useful jurisprudence was an important professional matter. He noted in a related context that "working within the institutional forms of the game generates the moral qualities necessary to make the game playable."\textsuperscript{252} Different institutional forms will lead to different moral qualities:

Surely the man who conceives his task as that of reducing the relations of men to a reasoned harmony will be a different kind of lawyer from one who regards his task as that of charting the behavior sequences of certain elderly state officials. And if the lawyer shapes himself by his conception of the law, so also, to the extent of his influence, does he in turn shape the society in which he lives. . . . If definitions of law are mere words, they are words which may significantly direct the application of human energies. . . .\textsuperscript{253}

Thus, Fuller would agree that the jurisprudence behind the institutional statements of professional standards will significantly affect the way lawyers practice law. Accordingly, the adoption of the more positivistic Model Rules over the more purposive\textsuperscript{254} Model Code suggests several different ways of viewing the lawyer, the legal system and the lawyer's role that may effect the way lawyers practice law.

\textsuperscript{250} Quest, \textit{supra} note 36, at 2.
\textsuperscript{251} Quest, \textit{supra} note 36, at 2-3.
\textsuperscript{252} Irrigation, \textit{supra} note 17, at 1033.
\textsuperscript{253} Quest, \textit{supra} note 36, at 3-4.
\textsuperscript{254} Professor Simon defines purposivism as a conception of law that understands law's purpose is to both maintain order and to coordinate the social actions of individuals so as to further common aims as much as is possible. Simon, \textit{supra} note 222, at 62. He argues that positivism and purposivism have been the two dominant ideological forms justifying professional ethics. \textit{Id.} at 32. Professor Simon properly locates Fuller within the purposive camp. \textit{Id.} at 62. Because Professor Simon defines purposivism as an ideal type which includes the work of multiple purposivists, his withering critique of purposivism does not entirely apply to Fuller. It is beyond the purpose of this paper to fully engage Simon's critique by distinguishing Fuller from Simon's ideal of purposivism. Nevertheless, many of Simon's insights into the implications of purposivism for professional ethics are applicable to Fuller which I will develop in this section.
B. Clients' Interests v. System's Interests: The Moral Community

First, a Fullerian jurisprudence emphasizes the system’s goals while a positivistic ethics will emphasize the individual client’s goals. This leads directly to a kind of ethics in which lawyers are not the clients’ champions so much as they are the legal system’s champions:

If the primary duty of the lawyer is to the processes, procedures and institutions of the law, then the lawyer is the client’s “champion” only within that realm and only in ways the laws, social mores, and moral traditions of lawyering within that realm allow.

Richard Posner noted that “[o]nce lawyers could be said to serve ‘the law.’ Now they serve the client. It is a profound difference.” The lawyer is no longer part of a moral community and therefore can no longer find moral assurance that he is or she is providing morally efficacious service. For Fuller, understanding the true (moral) nature of the adversary system and the lawyer’s role within it assured the lawyer that his or her role was ethically proper. The adversary system provided a morally proper and an instrumentally efficient resolution of social disputes. Fuller said that a lawyer did not simply represent a client. Rather, “[h]e represents a vital interest of society itself, he plays an essential role in one of the fundamental processes of an ordered community.” The adversary role allowed lawyers to

255. Adversary System, supra note 110, at 37–38 (“At no time is the lawyer a mere agent of his client.”); Simon, supra note 222, at 73 (stating that the purposivist lawyer is not an extension of the client like the positivist lawyer, but rather, is an “agent of social welfare”).

256. Lawry, supra note 134, at 320–21. Cf. Simon, supra note 222, at 66 (asking whether “the lawyer’s membership in the community merely enables him to manipulate it more effectively; or does it constrain his activities”).

257. Posner, supra note 4, at 36.


259. Schauer, supra note 29, at 304 (explaining that “[j]ust as one method of legitimizing moral instruction in carpentry school is to make the claim that joinery necessarily involves morality, so too is one way of legitimizing moral instruction to . . . lawyers to make the claim that law, legal positivism notwithstanding, necessarily involves morality”).

260. Problems, supra note 143, at 719 (stating that Nuremberg trials showed that “process of adjudication can itself be a moral force in men’s lives and that this moral force is not necessarily derived from some other, higher principle, such as established law or government”).

261. Adversary System, supra note 110, at 37.
“preserve the integrity of society itself. It aims at keeping sound and wholesome the procedures by which society visits its condemnation on an erring member.”

Kenneth Winston believes Fuller rejected the instrumental view because:

it turns lawyers into masters of technique without regard to the ends they serve. Law becomes merely a means to ends that originate outside itself. It thereby excludes from the scope of professional competence the idea that lawyers have a duty to think about what the law ought to be. The separation of means and ends is contrary to everything Fuller believes about the responsibilities of professionals—and even contrary to what lawyers actually do.

If, contrary to Fuller, the lawyer’s sole task is to champion a client’s cause, then the only limits are those imposed by the substantive law and, even then, only if the lawyer gets caught. Another member of the joint committee, Harry W. Jones, noted the limited moral vision associated with this jurisprudential viewpoint: “Anyone who is not a super-Austinian positivist knows that there is much immoral and unfair commercial and social behavior that can be engaged in without going beyond the ‘bounds of the law.’”

C. Clients’ Interests v. System’s Interests: Counseling

A vision of professional conduct that posits the lawyer as champion of only the client provides little basis for moral counseling. Fuller, like other purposivists, saw counseling as the prototypical lawyer function. Purposivists saw partisan advocacy as legitimate only in light of the checking function performed by counseling. If the
lawyer serves only the client and has no responsibilities to the legal system, then there is nothing left to say to a client who wishes to do a perfectly legal but morally troubling action. Professor Jones explained it this way: "The [positivist] lawyer as counselor is answerable only for the positive legality, and not for the fairness and moral propriety, of what he accomplishes for the clients he serves."

A Fullerian would have no concept of the oft-repeated admonition that lawyers should not impose their own morality on their clients. Such a client-centered neutrality is incomprehensible inside Fuller's legal system in which moral values are embodied in the very processes themselves and in the society these processes create. The lawyer who refuses to follow a client's directive to engage in combative, deceptive, but technically "legal" discovery would not be imposing his morality on the client; rather, he or she simply would be translating the morality of the legal process into the client's case.

D. Clients' Interests v. System's Interests: Getting Clients

Removing the focus from the system to the client tends to obscure the traditional distinction between a profession and a business. If client (consumer) satisfaction is the only goal, then traditional restrictions on advertising, solicitation, unauthorized practice, referral fees, excessive fees, and bar admission seem dubious. Without a jurisprudence that sees the legal system as embodying moral values
(indeed without a jurisprudence that recognizes moral values at all), there is precious little to be said for restraining the client-seeking activities of lawyers in ways different than the business seeking activities of anyone else.\textsuperscript{273} If lawyer ethics are coexistent with the "boundaries of the law," then the only justification for any of the restrictions listed above rests in the power of the lawyer lobby to enforce its cartel-like restrictions to guarantee a fixed and high price for the lawyers' service.\textsuperscript{274} If the bar's power collapses completely and the law becomes largely an unregulated service like business management or retail selling, we can expect a profound change in the reigning conception of law: a change from the idea of law as an autonomous realm of thought to the idea of law as a heterogenous medley of rhetorical thrusts and parries, of advice and mediation by wise elders, of policy analyses and investigations, of miscellaneous clerical and bureaucratic tasks.\textsuperscript{275}

\textbf{E. Clients' Interests v. System's Interests: The Lawyer's Creed}

Fourth, Fuller's ethics describe the "central moral tradition of lawyering."\textsuperscript{276} The Canons and the Ethical Considerations form a kind of confession of faith. Like religious credal statements, they are texts to which lawyers can turn to understand, affirm, and reaffirm their basic commitments. Also, like credal statements, they form the basis for specific moral rules, yet they themselves are not formal rules. Just as a creed tells an adherent what foundational things to believe while constraining other beliefs and activities, the Canons and Ethical Considerations tell the lawyer what the system expects them to believe and suggest limits to their professional behavior. They set the basis and the boundaries in which a person becomes and remains a lawyer.

\textit{Legal Services,} 58 N.Y.U. L. REV. 1084 (1983) [hereinafter Market Analysis] (recognizing legal services as market commodity leads to conclusion in favor of advertising).

\textsuperscript{273} See Market Analysis, supra note 272, at 1086 (arguing that anxiety over lawyer advertising may stem from portrayal of the legal profession as a business, but that ideology and market forces favor advertising of standardized legal services).

\textsuperscript{274} Posner, supra note 4, at 1–2.

\textsuperscript{275} Posner, supra note 4, at 2. I should note that this is a description from someone in favor of such development. I take no position on the specific kinds of regulations. Rather, I am only pointing out the consequences of one or another conception. Further, Posner argues that the practice creates the jurisprudence. I believe the relationship is more complicated. See, e.g., \textit{Kuhn}, supra note 3, at 176 (paradigms define scientific community while community defines paradigms); \textit{Moral Enquiry}, supra note 7, at 17 (cannot characterize data except in terms of prior theoretical commitment).

\textsuperscript{276} Lawry, supra note 134, at 311.
In the Joint Statement, Fuller and Randall made this connection explicitly:

Understanding may enable the lawyer to see the goal toward which he should strive, but it will not furnish the motive power that will impel him toward it. For this the lawyer requires a sense of attachment to something larger than himself. . . . For some this will be attainable only through religious faith. For others it may come from a feeling of identification with the legal profession and its great leaders of the past.277

F. Clients’ Interests v. System’s Interests: The Good Lawyer

This creates a particular conception of the “good lawyer.” The good lawyer will not simply follow rules. Rather, the good lawyer lives her professional life striving to serve the legal system’s goals, shaped and guided by the Canons and the Ethical Considerations.278

The good lawyer here is an autonomous moral agent trusted to fulfill her basic duties and invested with the freedom to find her own “goodness within the law.”279

For Fuller, the morality of the lawyer’s practice must flow from the reality of the lawyer’s beliefs about the law.280 The moral quality of a person’s professional life cannot be measured by something exter-

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277. Joint Conference, supra note 121, at 1218. See Rob Atkinson, Beyond the New Role Morality for Lawyer’s, 51 Mo. L. Rev. 853, 978 (1992) (arguing that the “new wine” of individual moral responsibility must be drunk “sacramentally, in congregations of those who believe in shared goals, and celebratorily, in symposia whose members are bound together by their friendship to own another.”)


279. Positivists also can make this claim. They will argue that the moral goodness of the lawyer is always in question. The rules simply establish the way lawyers play the game. They are morally neutral. The individual lawyer can always use his own moral calculus to evaluate the moral quality of the actions to be taken. This is always true but especially so when the rules themselves give the lawyer significant discretion. The moral quality of the act is measured by some gauge external to the legal system. Cf. Coder, supra note 277, at 332–333 (broader statement of professional ethics might lead to more active moral reflection and development).

For Fuller, on the other hand, insisted on looking at the moral quality of the lawyer’s actions from the perspective of the legal system and the social function it served. Schauer, supra note 29, at 302 (“If the definition of ‘law,’ and therefore to Fuller the job description of lawyer, judge, law teacher, and law student, is prescriptive, then the lawyer or judge who does not, as part of her job performance try to make the law better is, by definition, not merely a less good person, but is also a less good lawyer.”).

280. Schauer, supra note 29, at 306 (stating that a legal positivist cannot claim to hold moral beliefs by virtue of her belief in positivism).
nal to the system in which lawyers operate.\textsuperscript{281} Means and ends, law and morality, public and private did not exist as purely "either-or" propositions. Instead, they existed in complicated and mutually reciprocal relationships. Peter Teachout says on this point:

\begin{quote}
[Antimonies mysteriously disappear] and just as mysteriously recombine in the liberating alchemy of his jurisprudence. [This is not accidental] but a reflection—indeed, a deliberate consequence—of what he took to be his central jurisprudential task: to free us from the phony oppositions that shackle inherited language and thought.\textsuperscript{282}
\end{quote}

Teachout claims that Fuller has been misread. Instead of searching for some theoretical structure, readers should investigate Fuller as an ethical writer.\textsuperscript{283} He suggests looking for instruction in Fuller’s writing at both surface level arguments and from their performance.\textsuperscript{284} Fuller’s works should be regarded as “ethical performances that collectively give expression to an integrated ethical vision.”\textsuperscript{285}

For Fuller, a life in the law was a calling, a vocation.\textsuperscript{286} As such, it constituted who that person was. One could not be a good lawyer and do bad things.\textsuperscript{287} One could only be a good person as that person was defined in the context of the particular legal system. Just as means and ends exist in a complex and reciprocal relationship, so also does a person and her vocation as a lawyer. Fuller’s account of law links law and morality in the same way that a lawyer is linked to her practice.

\textsuperscript{281} Schauer, supra note 29, at 305 (“Nothing about legal positivism, of course, says anything about the moral views of someone who subscribes to the tenets of positivism.”).
\textsuperscript{282} Teachout, supra note 42, at 1079.
\textsuperscript{283} Teachout, supra note 42, at 1075.
\textsuperscript{284} Teachout, supra note 42, at 1075. By this, Teachout means we should bring to bear on Fuller’s work the kinds of questions one might ask about a novel or a play: “we should seek to discover the vision toward which Fuller’s jurisprudence aspires.” Id. at 1093. Instead of looking for evidence of some grand system, “[w]e should ask about the characteristic mode of his intelligence” as it is was brought to bear upon experience.” Id.
\textsuperscript{285} Teachout, supra note 42, at 1092.
\textsuperscript{286} “In all of the lay callings—in law, engineering, medicine, and business administration—we are training men to make a good living for themselves, but we are not, it is said, doing enough to train them to advance the Good Life for all men.” Law Schools, supra note 30, at 202. For Fuller, this presented a practical problem of how to inculcate this sense of vocation without ideological indoctrination. Id. Fuller’s solution: “return to the Socratic conception that men find virtue best, not through faith or exhortation, but through understanding.” Id. at 202-03.
\textsuperscript{287} Schauer, supra note 29, at 305 (stating that Fuller was “intensely concerned with morality, and intensely concerned ... with lawyers who would use their lawyerly talents for immoral purposes, or, more commonly and more importantly, with lawyers who would not use their lawyerly talent in the service of moral optimization”). Cf. Simon, supra note 222, at 65 (“Purposivism’s emphasis on individual responsibility ... raise[s] the question of how the lawyer can be blameless when he defends conduct for which the client can be punished.”).
The moral justification in the practice of law lies in channeling client activities into socially useful paths. If the only coherent way to interpret a statute is to understand its purpose, so also the only sensible way to morally justify the practice of law is to understand the purposes of the system in which it is performed.

Fidelity to law requires a devotion to the legal system. To Fuller, law alone carried with it the forms that attracted our allegiance without regard to ends. This devotion is played out through the representation of clients. Client representation is the tangible form in which the internal and the external morality of the law is manifested. In this conception, client interests are not independent of and paramount to the legal system's interests. The client has only those interests that the system allows. A client has no interest in (or, to put it in a slightly different jurisprudence, right to) representation that involves dishonesty, fraud, and illegal activity. What I believe distinguishes Fuller and the Code is that the client has no interest in representation that distorts the decision making process of the legal system either. Although Fuller argued that lawyers should not take responsibility for the substantive outcomes of client representation, this does not mean that lawyers are free to represent clients without regard for any of the means chosen or the ends pursued. If legal representation distorts the legal process, which embodies the morality of the legal system, then lawyers are bound to decline such representation. Because this could arise in a multitude of contexts, no single rule will be able to capture its essence. Instead, lawyers, guided by their fidelity to the system, must exercise their judgment in the particular cases in which the question arises. Here the lawyer, almost priest-like, mediates the revelation of the legal system for the client.

288. Simon, supra note 222, at 71 (stating the lawyer can reconcile obligations to client and the public by "focusing on the points of congruence between the particular interest of the client and the general welfare").

289. Carried to an extreme this leads to what Simon calls "The Sanctification of Ceremony." Simon, supra note 222, at 91.


291. Cf. SHAFFER & SHAFFER, supra note 258, at 15.

The focus on rights—on isolation from moral influence—brings a new assumption to the law on lawyers. Behavioral influence runs... from clients to lawyers. ... Clients want lawyers to do the wrong thing; lawyers act as agents for their clients and do for their clients things they would never for themselves. That's why, in 1983, we got a new beginning for the law on lawyers. The law on lawyers is now concerned with whether lawyers are obliged to refuse to do the wrong actions clients want them to do.

Id.
G. *Clients’ Interests v. System’s Interests: Lawyers as Agents of Freedom*

In the end, the crucial difference between a Fullerian Code and the Positivist Model Rules rests in their different normative focus. One of Fuller’s enduring contributions was to recast the debate between natural lawyers and positivists.\(^{292}\) Instead of asking whether or not law aimed at some norm, Fuller focused attention on the question: to which norm should the law be aimed. He offered the choice of either “the minimal ideal of order (favored by positivists) or the more demanding ideal of justice (favored by natural lawyers).”\(^{293}\) Fuller would not construct a false dichotomy, however. Law favored both. The preeminent condition of human beings was freedom. Both order and justice were necessary for human freedom. Legal institutions were the vehicles for freedom in all of its diversity and plurality.\(^{294}\) The lawyer’s participation in the creation of these institutions was itself a moral good. Winston describes Fuller’s justification of the work of legislators in words that apply equally well to the work of a lawyer: Law is not a necessary evil but is intimately connected to freedom. “[T]he special affinity of law to freedom secures the moral importance of the legislator’s role in society.”\(^{295}\)

Lawyers, as the most active participants in legislation, litigation, and legal counseling were therefore inextricably tied to the morality of freedom. Because lawyers devise workable social structures in which citizens’ interests can be accommodated, they must simultaneously focus on means and ends.\(^{296}\) Thus, “their job is not simply to think about ‘What legally can be done’ but about ‘What should be done, all things considered.’”\(^{297}\) This recognition gives intrinsic moral value to the lawyer’s work and provides the model for the highest aspirations of the legal profession. When lawyers lose this focus and instead see only the individual client’s goals, they quite literally lose their way.\(^{298}\)


\(^{295}\) Winston, *supra* note 263, at 391.


VI. Conclusion: Choosing Our Illusions

If the way we think about law is an illusion, then we should pick our illusions with care. Fuller's jurisprudence integrates the lawyer's activities and morality in a way that is not possible under a jurisprudential regime that separates legal practice and morality. Fuller's vision, as embodied in the Model Code, calls lawyers to ethical performance, instead of ethical distance. He offers us an integrated jurisprudence where dichotomies of thought, language, and activity are exploded. He invites us to consider means and ends, substance and procedure, individuals and society, law and ethics in a way that blurs their conventional boundaries. The question is whether or not lawyers should prefer Fuller's illusions to the ones we have been using.