

Lecture Notes – Lon Fuller *The Morality of Law* (“Eight Ways to Fail to Make Law”)

- Fuller’s theory falls somewhere between natural law and legal positivism.
 - It is positivistic insofar as he does not think that morality determines the content of the law.
 - It is a natural law theory in that he does believe that there are “moral” constraints on the structure of law and how it is made.
- Fuller’s focus is on what he calls the “inner morality of law.”
 - The external morality of law would be the application of moral standards distinct from law to the law itself, much like the traditional natural law theorist does.
 - The inner morality of law instead derives constraints on law from the ends or goals of making law.
 - He argues that this is a kind of natural law theory, and, in fact, one that we see in the opinions of British jurists and in the writings of the US Founding Fathers, who aimed to “avoid repugnancies” in their institutions.
 - For example, in defending the power of the courts to declare acts of Congress unconstitutional, Hamilton argues that even in the absence a written constitution judges are compelled to set a rule for dealing with contradictory enactments of law, but that such a rule is derived “not from any positive law, but from the nature and reason of the thing.”
- In further describing the inner morality of law, Fuller calls his account a “procedural” rather than a “substantive” natural law theory.
 - Procedural: “Concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.”
 - A procedural natural law account provides “lower” rather than a “higher” laws...it is not concerned with any “brooding omnipresence in the skies.”
 - Rather, it’s laws are like the laws of carpentry...if you want to build a good house, there are certain rules and procedures you will have to follow.
- The rules and procedures for successfully making law are not best understood as imposing duties on the lawmaker.
 - Rather, they are a kind of affirmative or aspirational morality. They set aims that the lawmaker should strive for, but not duties that are somehow binding on them.
 - There is one exception: There is a duty to promulgate the laws.
- The eight particular rules and procedures for making law that Fuller defends are laid out in the allegory of Rex, the failed king.
 - One should actually make/achieve rules.
 - One must publicize those rules and make them available to the affected parties.
 - One should avoid retroactive legislation.
 - One should aim to make rules understandable by those who they affect.
 - One should not enact contradictory rules.
 - One should not enact rules that require conduct beyond what is possible or within the powers of the affected parties.

- One should not frequently change the rules.
 - One should aim for congruence between the rules as announced and their actual administration.
- The common link between these is that laws (or a system of laws) that don't meet these requirements will not serve to guide the conduct or shape the behavior of those who are subject to the laws.
 - Failure to provide this guidance in a clear way constitutes a failure of reciprocity between government and governed:
 - Gov't says: These are the rules we expect you to follow. If you follow them, you have assurance that they are the rules that will be applied to your conduct.
 - When this reciprocity is ruptured, nothing is left to ground the citizens duty to obey the rules.