

# Legal Form and Agency

## Variations on Two Central Themes in Fuller's Legal Theory\*

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### 1. Introduction

In *Forms Liberate*,<sup>1</sup> Kristen Rundle closely engages with Lon L. Fuller's jurisprudence, her primary goal being to reconstruct Fuller's theory of law. By adopting a methodology both descriptive and analytical, Rundle sets out to revise the mainstream understanding of Fuller as 'an outsider within the intellectual climate of mid-twentieth century legal philosophy' and as a 'natural lawyer who apparently lost the debate about the connection between law and morality to his analytically superior opponent', namely, H. L. A. Hart (1). In a rigorous, beautifully written and carefully designed monograph, Rundle draws on both Fuller's published works and archival material to reconstruct a number of Fuller's theses whose interest lies not just in their historical significance but also, and indeed primarily, in the role they can play in the contemporary debate in the philosophy of law.

Rundle's project to reclaim Fuller's jurisprudence essentially unfolds through a detailed critical discussion of the exchange between Hart and Fuller that was begun in 1958 on the *Harvard Law Review* and came to a close eleven years later with the publication of the second edition of *The Morality of Law*.<sup>2</sup> Rundle's treatment of the Hart-Fuller debate makes up the core of the book and is functional to bringing to the fore the claims around which Rundle's attempt to rescue Fuller's jurisprudence is organised. In building on this core, the book covers two additional grounds, conceptually independent but coherently integrated into the main argument: on the

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<sup>1</sup> Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Hart, 2012). From here on out all page references having no further indication are to be understood as references to Rundle's book.

<sup>2</sup> The key contributions to this debate are HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review*, 593–629; Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review*, 630–72; HLA Hart, *The Concept of Law* (Oxford University Press, 1961); Lon Fuller, *The Morality of Law* (Yale University Press, 1964); HLA. Hart, 'Lon L. Fuller: The Morality of Law' (1965) 78 *Harvard Law Review*, 1281–1296; and Lon Fuller, 'A Reply to Critics', in *The Morality of Law* (2nd ed., Yale University Press, 1969).

one hand Rundle offers an account of Fuller's early work—with which contemporary legal theorists do not appear to be too conversant, despite Kenneth Winston's valuable contribution,<sup>3</sup> and which they do not much discuss—and on the other she makes an original effort to resituate Fuller's account of law within contemporary analytical jurisprudence, revisiting Ronald Dworkin's and Joseph Raz's legal theories in light of Fuller's.

Fuller's position is reinterpreted by Rundle as a kind of 'third theory of law', for it cannot be reduced to either legal positivism or natural law and is instead driven by a unique interest in those principles of social order which explain how we can live together in a peaceful and fruitful way. I think this interpretation is both justified on a textual basis and insightful from a theoretical point of view. Indeed, it may well be that Fuller's longstanding opposition to Hart may lead one, for that reason alone, to situate Fuller in the natural law tradition of legal thought. But this is jumping to conclusions. Fuller is not mainly concerned with disclosing a putative higher law grounded in abstract moral principles: he is rather interested in singling out the organizing standards, distinctive design, and pre-commitments associated with the existence of that specific form of social ordering which is the law. And Rundle convincingly argues in this respect that Fuller is best understood not as championing an existing school of legal thought—say, natural law in a qualified, procedural sense over against a substantive one—but as offering what she argues is a 'game-changer' (48), namely, a view concerned with the question of social architecture, in an effort to 'move the agenda of legal philosophy away from its preoccupation with source-based imperative theories and their instrumentalist commitments and towards questions relating to the form, limits and opportunities for agency afforded by different modes of social ordering' (49).

Central to Fuller's third theory of law are two theses: that law has a distinctive form, and that its existence and normative force are conceptually tied to human agency. And herein, in Rundle's assessment, lies the originality of Fuller's theory: it lies in this view of law's distinctiveness as a form specifically bound up with agency. This means that, on the one hand, law occupies its own place as a kind of social

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<sup>3</sup> See in particular the introduction to the revised edition of Kenneth Winston (ed.), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Hart, 2001). See also Kenneth Winston, 'Legislators and Liberty' (1994) 13 *Law and Philosophy*, 389–418; and Kenneth Winston, 'Three Models for the Study of Law', in W. Witteveen and W. van der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999), 51-78.

governance formally and procedurally distinguished from other modes of governance, such as managerial direction and rule by the issuance of commands, which legal positivists and other legal theorists tend to instead regard as indistinguishable from law. And, on the other hand, law requires a specific view of the agents it considers to be its addressees: a legal agent is viewed as a ‘participant in a distinctly constituted social condition’ (2), a condition that constitutes agents as responsible persons who can engage in purposive action, can understand and follow practical standards, and are held accountable for the decisions they make with respect to what the law requires of them. Legal agents, in other words, are possessed of capacities by virtue of which they are recognised as ends in themselves, and as authors of their own lives, and are thus empowered in a way that distinguishes them from someone who simply does what a lawgiver requires.<sup>4</sup>

This connection between the form and the agency peculiar to law—a connection by virtue of which law gains its distinctive status—not only offers ‘a crucial and yet under-explored resource for both interpreting Fuller’s claims in his debate with Hart, and for developing the insights of his jurisprudence more generally’ (9), but also points out what it is that makes Fuller’s work significant going forward: what makes it so is the idea of an unbroken line connecting agency to the distinctiveness, existence, and directive force of law, for this makes Fuller an obvious reference point for those legal theorists today who feel dissatisfied with the legal-positivist concept of law—an accommodating concept that takes in more than what can legitimately be called “law”—and who think that no adequate understanding of law is possible without taking into account the agency of law’s addressees.

The two intertwined theses just introduced should figure as essential elements in any comprehensive attempt to reclaim Fuller’s jurisprudence. This is what Rundle claims, and the reason for it, an argument that should become clearer as the discussion unfolds, is that in this way we can break out of the binary mode of thinking that has us choose between legal positivism and natural law. To this end we need (a) a discriminating criterion or set of criteria satisfying which a form of social governance can non-arbitrarily be qualified as law—a label that legal positivism applies liberally, even to phenomena that do not meet those criteria which uniquely identify something as law—and so, consequently we also need (b) a concept that will help us understand

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<sup>4</sup> For a similar concise restatement of Fuller’s conception of agency, see Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Hart, 2012) 8–11.

what it is that makes law unique, or what explains its specific mode of existence and normativity, and that thing is the concept of agency, a concept around which we can build an account of law as a phenomenon having a set of characteristics that distinguish it from other law-like forms of governance. If we can do that, it means that Fuller's jurisprudence not only offers an authentic alternative to the legal-positivist account of law, but does so innovatively contributing to the current debate on central issues in legal theory, especially the whole question of the concept of law as something that can uniquely identify and explain that thing which we call law.

So in this essay I will primarily be concerned with illustrating how Fuller's theses can be used to advance our understanding of the concept of law. Specifically, I will show how the accommodating legal-positivist concept falls short in light of Fuller's conception, and how we can rely on that conception—one centred on agency—to move forward and reset the agenda in contemporary jurisprudence.

## *2. The Concept of Law*

A central part of jurisprudence—especially when understood as the philosophical study of the essential features common to legal systems having comparable degrees of maturity—lies in the effort to elucidate the concept of law. This concept tells us about the *nature* of law: from it we reason about the existence and functioning of law, and on that basis we tackle a host of other legal issues. And so the concept and nature of law—on the conception of jurisprudence just mentioned, a conception widely accepted within the analytical tradition—will ideally precede our study of other, more-specific questions of law.<sup>5</sup>

The debate on the concept of law in mainstream jurisprudence is dominated by the controversy between legal positivism and nonpositivism. The former view, the more influential of the two among contemporary authors, actually designates not one but a cluster of theories of law, and it is a great deal of nuance and deep level of sophistication that these several bring to the concept of law. Yet, for all their

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<sup>5</sup> More to the point, the idea is that once we have a grasp of the *nature* of law, we will have a basis on which to say what counts as law and what doesn't—a determination that in turn will figure into the way cases are decided. So, in adjudication, for example, we need a concept of law before we can say whether and to what extent a given rule or statement of law can or should apply to the case at hand, or again whether the judge should apply an existing rule or should decide the case by filling a gap the case exposes in the system. So it is not just the legal theorists who will benefit by starting out in their investigations from a concept of law: the same also applies to the work of judges and legal practitioners.

diversity, these positivist theories all share a basic tenet about what law essentially is, in that they all subscribe to a concept of law as an autonomous realm consisting mainly of norms produced by competent institutions through appropriate procedures. Which in turn means that laws, on this view, are valid so long as they meet certain systemic and procedural criteria: these criteria are socially established (some would say that they are established by convention), but the point is that such procedurally compliant law is valid regardless of whether the procedure or its outcome (the law itself) meets any moral criteria. This idea is aptly summarised in Jeremy Waldron's statement that, on a legal-positivist view, 'law can be understood in terms of rules and standards whose authority derives from their provenance in some human source, sociologically defined, and which can be identified as law in terms of that provenance. Thus statements about what the law is—whether in describing a legal system, offering legal advice, or disposing of particular cases—can be made without exercising moral or other evaluative judgement'.<sup>6</sup>

Another way to arrive at the same conclusion is to frame the positivist concept of law through what has come to be called the limited-domain thesis.<sup>7</sup> According to this thesis law is an independent realm of practical reason: it is centrally concerned with using reason to determine what ought to be done. So the law is an activity both practical and rational: practical because concerned with action; rational because conceived in and guided (though not fully determined) by reason. It also marks out an autonomous sphere of activity in that it cannot be reduced to other forms of practical reason, by which is meant that law's guidance is owed exclusively to its satisfying certain criteria independently established by authoritative legal institutions having the power to compel obedience. It follows that law may well not recognise as valid a whole range of standards, arguments, and decision-making mechanisms that by contrast do count as valid in other practical domains. So this thesis in effect grounds the positivist concept of law in two defining elements: due enactment and social efficacy. Which takes us back to the original point: on a positivist conception, law is limited to that which a political authority has enacted, so long as the authority is

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<sup>6</sup> Jeremy Waldron, 'The Irrelevance of Moral Objectivity', in Robert George (ed.), *Natural Law Theory* (Clarendon, 1992), 158-187, 160.

<sup>7</sup> A thorough discussion of this thesis is offered in Federick Schauer, 'Constitutional Positivism' (1992) 25 *Connecticut Law Review*, 797-828, and Federick Schauer, 'The Limited Domain of the Law' (2004) 90 *Virginia Law Review*, 1909-1956.

socially efficacious—enjoying wide recognition among a given social group—and its enactments are issued in accordance with certain forms and procedures.

However, as much as the positivist concept of law restricts law in a very specific way—by making law subject to criteria of procedural correctness and effective action—what we get in the outcome, as Fuller sees it, is still an under-discriminating, overly accommodating concept of law. Indeed, this concept makes law into a social institution fundamentally shaped by the political decisions of those in power: these decisions may even be arbitrary, yet they will still be valid and will fill the law with the most disparate contents.<sup>8</sup> At the cost of some oversimplification, then, legal positivism can be said to reduce law to what is enacted by the political authority.<sup>9</sup> This way of conceptualizing law, Fuller argues, may be convenient for its striking simplicity but turns out to be too broad, for it gives us no way to distinguish law from law-like forms of governance that, despite their similarity to law, cannot without distortion be described as law. This applies in particular to such constitutively vertical forms of authoritative governance as rule by command. Indeed, the main distinction we will not be able to make on a positivist conception is that between law and managerial governance.<sup>10</sup> These two types of social ordering share some general features, in that they both ‘involve the direction and control of human activity’, and they both ‘imply subordination to authority’.<sup>11</sup> But the differences carry more weight than the similarities, making these two forms irreducible to one another. Indeed, these two forms can importantly be distinguished by purpose, scope, and structure. So, to begin with, ‘the directives issued in managerial contexts are applied by the subordinate in order to serve a purpose set by his superior’.<sup>12</sup> This in turn restricts the

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<sup>8</sup> This argument was forcefully made early on by Hans Kelsen, *The Pure Theory of Law* (University of California Press, 1967), 198. But there are many legal positivists besides Kelsen who have since raised the same criticism.

<sup>9</sup> We can see this in Hart’s discussion of the internal point of view, where he observes that a legal system can be said to exist, and will be *recognised* as such, even if its rules make sense (from an internal point of view) only to those who make and enforce them (the officials). See, among other places, HLA Hart, *The Concept of Law* (2nd ed. Clarendon, 1994), 116–17. For a recent statement in the same tenor, see Matthew Kramer, *In Defence of Legal Positivism* (Oxford University Press, 1999), 83–92, where a monstrous system called Despotia qualifies as legal even though it is explicitly designed to enable a few to serve their own interests by exploiting everyone else.

<sup>10</sup> As Fuller himself points out, the distinction is somewhat artificial, since “the two forms of social ordering present themselves in actual life in many mixed, ambiguous, and distorted forms” (Lon Fuller, *The Morality of Law* (2nd ed. Yale University Press, 1969) 208). Still, a distinction does exist, as can be appreciated from certain essential features embodying which a given ordering can be said to belong to one or the other of the two forms.

<sup>11</sup> Lon Fuller, *The Morality of Law* (2nd ed. Yale University Press, 1969) 207.

<sup>12</sup> Lon Fuller, *The Morality of Law* (2nd ed. Yale University Press, 1969) 207.

scope of the interests a managerial system is intended to serve (those of the superior) and the object of governance, in that these systems are primarily concerned with managing relationships between superiors and subordinates, and only residually and accessorially those among subordinates. And, finally, this arrangement imposes a vertical structure of subordination. Not so in the case of legal systems, where the reason why people comply with the law is not to further the lawgiver's agenda: they instead behave that way (lawfully) on the understanding that laws serve the interests of society as a whole. So the purpose and scope of law are broader, its primary object being to govern relationships among persons interacting with one another on an equal footing as citizens; and only as a means to this end does a legal system also regulate the relations that citizens have with their governing institutions.<sup>13</sup> From which follows a different structure: not a constitutively vertical one of subordination (as is the case with systems of managerial governance) but a horizontal one appropriate for people interacting on a more cooperative and reciprocal basis.

This last point can be developed a little further by noting the different decision-making mechanism involved in vertical as opposed to horizontal governance: in the former case we have 'a one-way projection of authority, originating with government and imposing itself upon citizens'; in the latter case decisions are instead made by a two-way mode of communication involving 'an interplay of purposive orientations between the citizen and his government', and the interaction between the two sides is accordingly grounded in reciprocity.<sup>14</sup> That is because the equal citizens whose social interaction this scheme is designed to govern are understood as autonomous agents having a capacity to make responsible decisions. For this reason it would be not just simplistic but deeply misleading to regard law as functioning through a chain of command where those who wield power compel everyone else to act according to their will. Yes, managerial direction may exist within a legal system, and may even be necessary for its proper functioning, but it does not form the system's core: it rather sits on the periphery of law and would make something no longer recognizable as law if it were made to bear an essential connection to the purpose and nature of law. So it is a mistake, for Fuller, to construe law as a generic form of social governance that may take the shape of a vertical structure primarily designed for managerial direction. The concept of law should identify a *specific* mode of social governance capable of

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<sup>13</sup> Lon Fuller, *The Morality of Law* (2nd ed. Yale University Press, 1969) 207–10.

<sup>14</sup> Lon Fuller, *The Morality of Law* (2nd ed. Yale University Press, 1969) 204.

excluding what one would not say is a legal system, such as a top-down command-and-control system of management. Fuller believes to have found this specific mode in the idea of reciprocative interaction among equal agents.

Fuller's insistence on the distinctiveness of law—its peculiarity as a form on which basis to organise and regulate social relationships—is significant precisely because it introduces a concept of law more specific than the content-neutral conception whereby something counts as a legal order so long as we find in it a political authority having the power to issue directives that most people in the relative territory obey as a matter of fact. On Fuller's more-specific conception, law is more demanding than that, requiring as its underlying premise a basic relationship of mutual recognition and respect between the governed and those who govern. So, while law does involve the use of directives as a tool for governing the action of many, it does not entail a relation of subordination subjecting these many (the citizenry, society at large) to those who set policy and make and enforce the laws (the officials). This is important, among other reasons, because on this conception we can clearly distinguish—in a way that contemporary legal positivism cannot—the typical, or physiological, functioning of law from its pathological forms. Related, the legal mode of governance should be conceptualised as the product of a set of mutual interactions and reciprocal exchanges between governors and governed, as opposed to the projection of the legal officials' will on the rest of the society. On this basis, Fuller's conceptual framework enables us to clearly distinguish, to an extent that even contemporary legal positivism is not capable to do, the typical, or physiological, functioning of law from its pathological forms, to wit, the abuse of legality and its exploitation for objectives that are in effect hardly compatible with the legal mode of governing social interactions.<sup>15</sup>

### *3. Law and Agency*

We can now begin to appreciate the connection Fuller theorises between law and agency, or rather between law as a distinctive form of social governance bound up with a specific view of human agency. The reason why we need this connection is that it would be impossible to have a conception of law without a companion conception of law's addressees and, consequently, of their agency. This companion conception

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<sup>15</sup> One can use this criterion to distinguish between the use and abuse of legality (the former physiological, the latter pathological), a distinction to which Rundle offers an excellent introduction In Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Hart, 2012) 73–74 and 115–17.

may not be explicitly stated, but it is still there in the background. Fuller recognises this fact and spells out his own conception by contrasting it with the one presupposed by legal positivism: on the one hand we have a behaviouristic view of the agent as one who simply responds to a scheme of reward and punishment, or at least to incentives and disincentives, regardless of the reasons people may have for behaving that way; on the other hand we have a practical view of agency that by contrast does take reasons into account. This view recognises that, while people do respond to stimuli, this is not an *essential* part of what it means to be an agent, for this is someone who instead fundamentally responds to *practical reasons*,<sup>16</sup> and it is therefore by proffering such reasons that law can shape conduct. So, instead of understanding law as something that moves people to action by laying out a menu of requirements, expecting people to respond to them in a passive way—or else for reasons the lawmaker need not be concerned with, the real question being whether the system commands compliance—Fuller starts out from the quite different premise that if law is to achieve its ultimate aim, namely, to enable people in society to interact in ways beneficial to all, or at least without strife, it should engage with them by engaging in practical deliberation, that is, by reasoning with them as autonomous agents capable of making independent decisions about what ought to be done in this or that circumstance.

This is an element both constitutive of and distinctive to law. Which means that, on the one hand, nothing can be law if it does not relate to its addressees as agents, and, on the other, that we need to specify a view of agency if we are to develop an intelligible and workable conception of law. And it is to this latter task that I will be devoting the rest of the discussion. I start out by noting that Fuller never quite fully fleshed out a conception of agency in any systematic way, other than to say that an agent is one who is responsible, purposive, and autonomous. So, as much as I agree with Rundle that Fuller's lasting legacy in jurisprudence consists in making explicit the premise just stated—namely, we cannot decouple law from agency—I do think it necessary to move the discussion forward by pursuing the idea of agency, something that Rundle cannot be said to have done, in that she seems content with Fuller's elemental account of agency, without really taking up the research avenue Fuller indicated looking ahead.

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<sup>16</sup> This conception of agency is summarised by Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Hart, 2012) 1–11.

So the premise going forward will be that no conception of law can stand on its own without specifying who its “subjects” are, that is, without specifying a view of agency; and the argument will be that it will not suffice, to this end, to say that these agents are those to whom legal provisions apply, because that is simply not informative: it does not tell us much other than that these agents are individuals who may or may not comply with the law, a statement that is at best trivial. We thus need to come up with something more meaningful. And the basic view I will be developing in this regard is that the moment we recognise a necessary nexus between law and agency, we will have to also recognise that law’s addressees are more than just obeyers of law: they are agents who *understand* the laws addressed to them and treat the laws as reasons for action, that is, they engage with law by *reasoning* about law.<sup>17</sup>

But what specifically does it mean to view someone as an agent in the sense just stated? Or rather, how can we proceed in fleshing out a conception of agency? I suggest that we do this by drawing on action theory, the branch of practical philosophy that systematically reflects on what it means for one to *act* and so to be an agent. And in the process I will deepen and articulate in greater detail Fuller’s basic insight that the law calls for a specific conception of agents as responsible, purposive, and autonomous beings. To be fair, Fuller does give us an idea of the sense we are to make of these three traits, noting that we have to do with agents who do not simply take the lawgiver’s directives as plain instructions (‘Do this’, ‘Do not do that’) but rather approach legal standards through an understanding of their underlying rationale and can be held to answer for the corresponding choices they make, which choices they make on their own and on which basis they each gain a dignity of their own.<sup>18</sup> But Fuller leaves it at that, without relating these three traits to one another or showing us where they come from. And this is where one can come in, picking up from where Fuller left off.

I begin in this endeavour by broadly defining an agent as someone who is capable of performing action. This is something an agent can do relying on a set of action-enabling capacities, understood as conditions absent which no action could take place. Action thus gives us the natural starting point from which to work in constructing a

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<sup>17</sup> This is a point that legal scholars often fail to appreciate even today. There are, however, a few notable exceptions. See, for example, Alan Gewirth, *Reason and Morality* (University of Chicago, 1978), esp. 21–42; Joseph Raz, *Engaging Reason* (Oxford University Press, 2002), esp. 5–116; and, more recently, Scott Shapiro, *Legality* (Harvard University Press, 2011), esp. 193–233.

<sup>18</sup> See in particular Lon Fuller, *The Morality of Law* (2nd ed. Yale University Press, 1969) 162–67.

structured conception of agency, one that is more than impressionistic. But what exactly is meant by *action*? To answer this question I will now turn to Velleman's work, which, as it will be made clear below, can share some fundamental presuppositions underpinning Fuller's account of agency and so can be used to supplement that account from within, as it were.

Velleman's strategy is to arrive at action by looking at the broader notion of conduct and exploring what it means for someone to engage in conduct.<sup>19</sup> We can think of this as a sort of 'sliding' notion designating any thing or any deed done, but on a continuum that ranges from the spontaneous to the principled, such that only on the latter end of this continuum can we place *action*. We thus arrive at action by working from the most primary case of conduct to what might be called conduct *par excellence*, or fully reasoned conduct. On one end of the spectrum we find spontaneous conduct, which essentially amounts to any thoughtlessly or mindlessly performed act, in the sense that these are acts we do without any purpose or intention, and so without any real control over our behaviour, or at least without having a specific reason for so behaving. And from this basic case we make our way forward by adding in elements that make for principled conduct, or action proper. These elements are purpose, control, and the practical guidance of a general standard, or principle, and they come together in a plan. So principled conduct—the paradigmatic case of doing—consists in controlled behaviour that is set out in advance (it has been reasoned out) under a plan in keeping with a practical standard. And this is how we can define action: it consists in intentional, purposive, controlled behaviour guided by a general standard concretised into a plan that is first devised and then carried out. Or, stated otherwise, a person can be said to engage in action, and hence be an agent, if he or she carries out actions intentionally and with a purpose set out in advance according to a plan that gives control to that behaviour and ensures its conformity with one or more general standards.

We can see how this coheres with Fuller's account of an agent as one who is responsible, purposive, and autonomous. But we can also see how in this way we can integrate his account, grounding it in a concept of action and structuring that concept by singling out the capacities through which action is enabled. The advantage we gain

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<sup>19</sup> The strategy is expounded in D. Velleman, *Practical Reflection* (Princeton University Press, 1989) and *The Possibility of Practical Reason* (Oxford University Press, 2000). For a specific defence of the strategy, see D. Velleman, 'Replies to Discussion on the Possibility of Practical Reason' (2004) 121 *Philosophical Studies* 277–98, at 281–83.

by so proceeding is twofold: for if we look at an agent's capacities (rather than focusing on his or her traits), we will be in a better position to spell out the way these capacities relate to one another as conditions of action (this gives us a more structured account), and at the same time we can view agency from the standpoint of what is possible, that is, we can think about the possibilities the dispositional capacities open up for an agent considering alternative courses of action. Having said that, we can consider two such capacities that are fundamental to agency and yet do not have an account in Fuller's conception: reflectivity and rationality.

The first of these, reflectivity, is the basic capacity to think before we act. Again, the idea can be framed by envisioning a continuum describing the way we respond to the environment. On one end of the continuum is mere perception, which figures as an indispensable component of action—for we cannot act if we cannot respond to the environment, and we cannot respond to the environment if we cannot perceive it, that is, if we cannot take in any sensory data—but this is only the beginning: perception tells us what to respond to but does so at a very basic level; it gives us the raw data and identifies them as being of one sort or another, but it doesn't tell us what to make of that material, and it is for this reason that we need to move up to a higher level of response than what spontaneous conduct allows. That is, we need to *reflect* on what lies before us if we are to respond to it in any sort of thoughtful way, and that is the capacity I am calling reflectivity. We have moved further along in the continuum, so we can step back from the situation before us and respond to it not by virtue of what excites our pleasure or displeasure but by reference to a general standard we endorse and in light of which we have previously chosen to act, a general standard that can mediate between stimulus and response, giving us the perspective or critical standpoint from which to think in deciding on a course of action.<sup>20</sup>

But it takes more than reflectivity to account for the principled conduct distinctive to agency. Which is to say that we have to move even further along in the continuum in order to be recognised as agents proper. We can see why that is so if we consider that reflectivity, in enabling us to each reflect on our own conduct, also gives us an ability to reflect on ourselves. Self-reflection in turn gives us self-consciousness, a

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<sup>20</sup> As Connie Rosati puts it (in 'Naturalism, Normativity, and the Open Question Argument' (1995) 29 *Nous* 46–70, 61), a reflecting self 'comes to dissociate herself from some of her desires, motivations, and traits, while identifying with others. This capacity to step back, to engage in self-reflection, gives persons a kind of freedom from identity with their immediate activities or their immediate motivational tendencies'.

turning inward on our inner states,<sup>21</sup> and that in turn gives rise to another form of awareness (conceptually connected with self-consciousness but independent of it): this is an awareness of our self as composite, that is, as made up of mutually irreducible components. So self-consciousness, via self-awareness, enables us to see that even though the self functions as a whole, it does not form a single, undifferentiated substance but is rather compound, its components being the different incentives (the instincts, impulses, inclinations, desires, drives, and so on) operating within the self. These elements exert on us forces that drive our conduct in different directions not necessarily coherent or even compatible with one another. Hence the synthesis needed to achieve continuity of action: we will not have any coherent conduct unless we can reduce to unity (or at least to a working whole) the forces operating within our self.<sup>22</sup> And unity, or wholeness, is something to accomplish which we must prioritise, and do so consciously, by establishing among the elements of the self a ranking on which basis to determine what course of conduct we should take on any given occasion.<sup>23</sup>

This effort in turn requires reasoning and deliberation. For if we are to prioritise the constituents of our composite self, we cannot just confine ourselves to an *awareness* of those constituents, these being the instincts and drives that prod us to behave in one way or another: we must also consider what that behaviour would mean; which is to say that in contemplating the kind of conduct our particular instincts would lead to if heeded, we must also consider the implications of such conduct, weighing the advantages and disadvantages of so behaving, or the reasons for and against conducting oneself in this or that way. Agents thus have the additional capacity for reasoned conduct. This further capacity is what I am calling rationality, or responsiveness to reasons. We can see what this means if we only compare rationality with reflectivity, noting that while rationality can ultimately be said to *originate* in reflectivity, it moves beyond that point. Indeed, as much as we need to be cognizant of the components of the self (the instincts), and *reflect* on them before acting on them (this reflection is what reflectivity makes possible through self-consciousness), that still cannot be our *only* basis of action: we need to bring in a

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<sup>21</sup> Self-consciousness is considered a distinctive element of agents in Christine Korsgaard, *Self-Constitution* (University Press, 2009) 109–32. The argument presented in what follows owes much to Korsgaard’s philosophical account of the self and to her idea of self-constitution.

<sup>22</sup> On this requirement, calling for unity of action, see Christine Korsgaard, *Self-Constitution* (University Press, 2009) 18–26.

<sup>23</sup> On the need to prioritise, see Christine Korsgaard, *Self-Constitution* (University Press, 2009) 107–8.

general standard through which to fashion those incentives into reasons proper. Only then will we have achieved reasoned conduct, when we can use reason to mediate between the promptings of the environment and our response to these promptings;<sup>24</sup> which is to say that instead of responding reflexively on an instinctual basis, we respond critically in light of the general standards we espouse, which standards accordingly overtake our immediate inclinations as the ultimate basis of action.<sup>25</sup> Only once these conditions are satisfied can we be described as agents proper engaged in action.

So, in brief, on the account just sketched out, agency can be understood as the capacity to act on principles arrived at by reflective and rational choice: agents are individuals capable of acting on self-imposed standards operating as reasons agents have worked out for themselves by exercising their capacity for rational reflection. We can see here the continuity with Fuller's account of agency, but we can also see how that account can be made richer and more robust. Indeed, on the one hand, the agent as just described is very much consistent with Fuller's responsible, purposive, and autonomous individual whom we accordingly recognise as a bearer of dignity. And so far my own agent can be equated with Fuller's, for in either case we have someone who instead of mindlessly responding to input from the environment—here, the directives issued by political authority—actually *reasons* about those directives and decides on that basis whether or not they ought to be obeyed. But by setting Fuller's account within an account of action such as the one just outlined, we can move beyond that point by fleshing out in a more comprehensive fashion what it is that makes an agent, at least within the context of a legal system. This is achieved by providing a framework for thinking about agency, a framework obtained by giving agency a foundation in the theory of action.

The advantage of so proceeding is twofold. For if we know what agency develops out of (an account of action), we can gain a clearer understanding of it by appreciating its source, at which point the defining traits of agency will seem less arbitrary to us: they will not look as if they came out of nowhere. But at the same time we will also

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<sup>24</sup> As Korsgaard puts it, 'I perceive, and I find myself with a powerful impulse to believe. But I back up and bring that impulse into view and then I have a certain distance. Now the impulse doesn't dominate me.' In Christine Korsgaard, *The Sources of Normativity* (Cambridge University Press, 1996), 93. Cf. Christine Korsgaard, *Self-Constitution* (University Press, 2009) 109–32.

<sup>25</sup> This is not to say that our likings and inclinations have no role at all in shaping action: they do, only not as the *final* determinants of action (a role instead entrusted to practical reason as a capacity to decide what to do by relying on general standards).

be able to appreciate what the ‘mechanics’ of agency are: we can go under the hood, as it were, and ‘tinker’ with the engine until we achieve a fit between agency and the sphere of action for which we are constructing it, namely, law as a distinctive form requiring its own kind of agency.

The mechanics of agency, as I suggest that we think about them, are those of the enabling capacities of action. And the moment we understand what these capacities are and where they come from, we can also understand how they relate to one another. The two basic capacities we have looked at are reflectivity and rationality, or responsiveness to reasons, and as I have explained, we can understand how they relate to one another by placing them along a continuum that ranges from spontaneous conduct to principled action: reflectivity enables us to move along that continuum by thinking about what the reason is for a given legal mandate; rationality enables us to do the same by thinking about whether that is a *good* reason (in light of the principles we espouse); in combination, reflectivity and rationality enable us to view legal mandates from a distance, not in the sense that an agent under the law is one who acts *outside* the law but in the sense that this is the distance or perspective needed to think *critically* about the rules and requirements of law, that is, to think about them not as plain incentives but as reasons for action, not as instructions for us to carry out but as requests for action that we can and should *interact* with.

#### 4. Conclusion

The one point I would like the reader to take away from this discussion, should all else fade into the background, is an appreciation of why it makes sense to think about the law in the manner described, that is, through the lens of agency or, better yet, *in combination with* an account of agency. The reason for it, as I hope to have compellingly argued, is that we do not want to reduce law to a set of directives that will apply to humans no differently than they might apply to nonhuman beings whose only relevant trait (where law is concerned) is a set predisposition to react in a certain manner to a certain configuration of rewards and punishments. Indeed, as much as it may turn out that people do in fact, on the whole, predictably respond that way to the incentives and stimuli of political authority, this is not what is interesting about the legal phenomenon; or rather, it is not what one should appeal to in order to shed light on the *concept* of law. Which takes us right back to the original point, namely, the need for a conception of agency to go along with that concept of law.

And that is where the significance of Fuller's legal theory lies. It lies in the view that Rundle has convincingly identified as the core Fuller's legal theory—namely, the view of the distinctiveness of law as a form that presupposes and is bound up with a specific conception of agency—a view that, as we have seen, actually emerges from a combination of two components. The first of these—the thesis of the distinctive form of law—is a theme that Fuller consistently carries throughout his work, and even though the work he has done in developing this theme has failed to draw much interest, and for a long time was even neglected, I agree with Rundle that no one who aspires to a comprehensive treatment of law can afford to ignore the contribution Fuller has made in this regard. This is why I think Rundle has done a valuable service to contemporary legal theory in her endeavour to reclaim Fuller's jurisprudence. Less convincing is the way Fuller develops the second basic component of his theory, by which is meant his companion conception of agency. While this conception does give us an idea of the kind of agent we should be envisioning in thinking about the law—something more in line with the way we conceive of ourselves whenever we set out to engage in an interactive activity such as the law, where we think of ourselves as autonomous participants responding not simply to stimuli but to reasons that we and others can accept—we are still left to wonder how exactly this conception comes into being and why it looks the way it does: this is why I have sought to ground a conception of agency in a theory of action, so as to make that conception more systematic, all the while providing a justification for it. The idea was not to replace Fuller's conception but to expand it, and this is where I would hope that others will come in, carrying forward the research programme which Fuller laid out and which Rundle has importantly drawn our attention to.