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PROCESS AND SUBSTANCE AS ASPECTS OF THE PUBLIC LAW FORM

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ABSTRACT. *I argue that process and substance are two aspects of the public law form and that the form conditions the content of the law. The reduction of a political programme to the explicit terms of a statute involves a conversion of policy into public standards, which produces a kind of legal surplus value. It brings into being a particular type of public standard – one that permits the operation of the principles identified by Lon L. Fuller as the desiderata of the inner morality of law, and which enables individual claims of right based on legal principle to be adjudicated.*

KEYWORDS: *legality, formalism, public law, process, substance, rule of law.*

I. INTRODUCTION

Debate in public law about process and substance is largely about the question of whether there is an intrinsic connection between the two. Most abstractly, it arises as a question about whether public law procedures condition the content of the law. If the answer is "no", we would have to conclude that procedural constraints on the power to make law or to make legally binding decisions are normatively vacuous. But that conclusion is in tension with the focus of much of public law on the development of procedures as a safeguard for the protection of important individual interests. I shall try to resolve that tension in an argument that there is an intrinsic connection between process and substance because they are two aspects of the public law form.

However, the thought that there is no intrinsic connection between process and substance is quite pervasive in public law. For example, judges traditionally have felt more comfortable reviewing administrative decisions on procedural than on substantive grounds on the basis that procedural

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review does not interfere with the democratic mandate of the legislature both to make substantive decisions and to delegate authority to make such decisions to administrative officials; and this administrative law sensibility has its counterpart in those theories of constitutional judicial review in the US that try to carve out a supposedly less contentious procedural review jurisdiction for judges.

Consider, in addition, that, after the Canadian Supreme Court had found a duty on the part of administrative officials to give reasons for decisions that affect important individual interests in one decision,[1] it subsequently conceived the duty in wholly procedural terms. Judges, it held, should stay out of the business of reweighing the reasons given by the official – a substantive exercise – and confine themselves to the allegedly procedural exercise of checking that reasons were given.[2] Conversely, the House of Lords in decisions such as *Begum*[3] and *Misbehaving*[4] held that, when the issue is whether public officials have violated the rights protected by the Human Rights Act (1998), the issue for the reviewing judge is not the process whereby the official made the decision, but the substantive issue of whether the right has been violated.

It is important to appreciate that the debate in public law is echoed in debates in legal theory about the same constellation of issues. Consider H.L.A. Hart versus Lon L. Fuller on whether the principles of the rule of law Fuller identified make up an "inner morality of law" such that law that complies with the desiderata has a moral quality to it.[5] In addition, within political theory, roughly the same contest occurs between democratic proceduralists, such as Jeremy Waldron, and liberal substantivists, such as Dworkin, with clear implications for issues such as the legitimacy of judicial review.[6]

There are three obvious difficulties in the face of my argument because of some standard connotations of legal formalism. First, formalism in public law is often associated with the claim that the rule of law requires a rigid separation of powers. Parliament's monopoly on legislative power requires that the law be such that judges are able to interpret it by a formal process of reasoning – one that brings out the content that the law as a matter of fact has without the intrusion of the judges' views about the merits of the law. When judges supervise the implementation of the law by public officials,

1 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817.
2 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3.
3 *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v Headteacher and Governors of Denbigh High School (Appellants)* [2006] UKHL 15.
4 *Belfast City Council v Miss Behavin' Ltd.* [2007] 1 W.L.R. 1420.
5 H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard L.R. 593; Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harv.L.Rev. 630.
6 J. Waldron, "The Core of the Case against Judicial Review" (2006) 115 Yale L.J. 1346. R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard 1996).

they thus enforce the limits that the legislature intended as a matter of fact when it delegated authority to those officials.

No philosopher of law or public law theorist thinks that this kind of formalism describes the real world. But it still exercises a tenacious grip on the legal imagination of many judges. Moreover, it survives to the extent that a reference to legislative intent still figures as a trope in the general rhetoric of judges when they justify review, and is thought by some public law theorists to be a necessary reference point for judicial review, as only it can support the claim that officials have acted *ultra vires* – outside the scope of their delegated authority.[7]

Second, to the extent that formalism has any credibility in public law, it is through the claim that formalism and proceduralism are roughly the same. Consider the term "rules of manner and form" to describe the rules that govern the process of legislation in a system of parliamentary supremacy.

Third, whilst there has been a revival of formalism in legal theory, it has taken place in private law in the argument that attention to the formal features of a private law regime will bring to light the moral structure intrinsic to it.[8] On this account, the formal features of private law presuppose an immanent morality organised around the Kantian idea of the purposive agent whose freedom to enact his own purposes has to be made consistent with the same freedom of all other agents. Only such consistency can achieve the ideal that each individual is to be his own master, not subject to the will of any other, and legal institutions have to be in place for the ideal to be realised.[9] That same account is alleged to be a basis for public law and, in his recent work, *The Sovereignty of Law*, Trevor Allan has endorsed the idea as the moral foundation of his powerful version of common law constitutionalism.[10] This Kantian framework might, however, seem not well suited to public law, even particularly vulnerable to the critiques of democratic proceduralists who will see formalism of this sort in public

7 See the debates in C. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford 2000).

8 A large and instructive exception is R.S. Summers, *Form and Function in a Legal System: A General Study* (Cambridge 2006). Summers studies the "functional legal units" of a legal order and the formal features of each, such as the judiciary and the legislature, and the way the formal features structure both the operation of each and their interaction with each other. See Part One. My argument is much more limited, as it has to do only with the form of public law. Whilst I share much with Summers, in particular, the aim of showing the connection between form and substance (see pp. 61–63), I have a different view of the role of formalism in legal positivism and of the way in which law's compliance with criteria of form gives law a moral quality. In this second regard, I take more seriously than he does the wonderful quote from Jhering at p. 187 – "form is the twin sister of liberty, and the sworn enemy of the arbitrary" – as, unlike him, I think the idea in this quote is not only about constraining official power, but also about constituting the power that officials have. But the main difference is that, in my approach, the issue is not that legal positivism fails to notice the importance of legal form, but that it conceives form in a particular way because of the normative commitments of its tradition.

9 E.J. Weinrib, *The Idea of Private Law* (Harvard 1995); A. Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard 2009).

10 T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford 2013), 128–31.

law as a covert libertarianism – a liberal substantive position – designed to constrict the state.

Given these three difficulties, the prospects for making any headway on the process/substance distinction through the idea of public law's form will seem rather dim. But I shall argue that form helps to show how process and substance are intrinsically connected. That connection comes about because in public law process and substance are two aspects of legal form rather than distinct phenomena. On the one hand, there is the process by with the decision is reached, on the other, the content of the decision.

I shall start with the first difficulty just sketched – the association of formalism with the rigid view of the separation of powers, itself made possible by an account of law as having a content discoverable as a matter of fact. I shall show how this view of law influences legal positivism's formal account of the rule of law. But, whilst I reject some of legal positivism's key claims, I also find that there is much in the positivist account that is essential to understanding the formal structure of public law. In the following section, I explore this theme in setting out what I take to be the extensive common ground between Hart, Fuller, and Dworkin.

This common ground provides the basis for an appreciation of both the primacy of form in public law and the way in which process and substance are aspects of the legal form of public law. It also provides the basis for responding to the second and third difficulties sketched above – the elision of form and process and the covert libertarianism of formal theories of private law. Finally, it provides the basis for a new understanding of the moral quality of public law, which I sketch in the final section.

II. Positivism and Formalism

The first difficulty, recall, has to do with the association of formalism with a combination of a rigid doctrine of the separation of powers and an understanding of the judicial role that has judges confined to bringing out the content that the law in fact has, which is the way Hart understood the formalist position. Hart, however, indignantly rejected any association of legal positivism with the view that legal reasoning consists "in deduction from premises in which the judges' practical choices or decisions play no part". It was, he thought, plainly absurd to conceive of the judge as a "formalist", "automatic", a "slot machine". Indeed, his positivist predecessors, Hart said, had insisted that, in cases where it was controversial what the law required, judges are in a "penumbra" of unsettled law and they have to legislate an answer; and John Austin, unlike Jeremy Bentham, had welcomed judicial legislation.[11] Moreover, Hart suggested that the formalist understanding of legal reasoning and its accompanying rigid doctrine of the

11 Hart, "Positivism and the Separation of Law and Morals", pp. 609–10.

separation of powers were part of the natural law and common law traditions.[12]

However, in an influential essay on conceptions of the rule of law in public law, Paul Craig argued that such conceptions are either formal or substantive and, in his view, Joseph Raz's legal positivism provides the exemplar of a formal theory.[13] Craig finds that are four marks of a formal theory. I shall show that all are important to a theory of public law form, albeit in a way that legal positivists for the most part would deny.

According to Craig, the marks of a formal theory it that it addresses

> the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met.[14]

In contrast,

> substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws which do not.[15]

Raz's account of the rule of law is formal, in Craig's view, because it avoids making the mistake of collapsing an account of the rule of law into an account of the rule of good law and thus preserves its "*independence*" from political theory. Raz thus delivers the "important" "message" that, if you wish to defend a right, you should do so directly through an argument in political theory, and not through a claim that the right is somehow part and parcel of the rule of law.[16]

In Craig's account, then, form is, first, a property of a theory of the rule of law that is independent of political theory and takes no stand on the issue whether the content of the law is good or bad. I shall call this "form as independence". Second, a formal theory focuses on marks of law that have not to do with law's substance but with law's validity – whether the person

12 Ibid.
13 P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) P.L. 467.
14 Ibid., at p. 467.
15 Ibid.
16 Ibid., at pp. 468–69, emphasis in original.

or body who made the law was entitled to do so and whether he or it did so in the right way. I shall call this "form as pedigree", as it has to do with the manner in which the law came about. The third has to do with the clarity of the law that is promulgated and it does have to do with content – that is, the law must have a content that is clear enough to guide those subject to it. I shall call this "form as fact". Finally, there are characteristics of law that have to do with the legal quality of the law that is produced by those with authority to make law – for example, that it is directed at future conduct. I shall call these characteristics "form as legality".

I agree with Craig that these four marks are among the marks of a formal conception. He is also correct to observe that the phrase the "rule of law" is "dependent upon what one understands by the term 'law'", so that "what ultimately divides the formal and substantive conceptions of the rule of law is disagreement about the way in which we identify legal norms".[17] But he goes wrong, in my view, because the important division in not between formal and substantive conceptions of the rule of law, but between different formal conceptions, which differ most fundamentally at the level of normative argument about the appropriate design of legal order.[18]

Despite Hart's claim that it is plainly absurd to conceive of the judge as a "formalist", he relied throughout his published work on the idea that law properly so called governs when and only when it has a content that can be determined by factual reasoning. And this reliance carries over into Raz's "Sources Thesis", which Craig refers to in rebuttal of Dworkin's claim that legal positivism cannot account for the way in which judicial interpretation of the law must refer to moral principles that are embedded in the law:

> According to . . . [the Sources Thesis], the law on a question is settled when legally binding sources provide its solution. In such cases judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from those sources and does not call for moral acumen. If a legal question is not answered from legal sources then it lacks a legal answer – the law on the question is unsettled. In deciding such cases courts

17 Ibid., at p. 487.

18 Dworkin for much of his career hardly talked about the "rule of law" or "legality" and, when he did, it seemed to be little more than a synonym for "integrity", where the integrity is a coherence constraint on what one should take the substantive morality implicit in the law of a particular system to be. See e.g. R. Dworkin, *Law's Empire* (London 1986), 93, and, for criticism, D. Dyzenhaus, "The Rule of Law as the Rule of Liberal Principle" in A. Ripstein (ed.), *Ronald Dworkin* (Cambridge 2007), 56. Whilst I cannot go into this point here, I think that Dworkin's legal theory could be productively reconceived as a formal conception of the rule of law, thought this requires a rapprochement with Fuller which he always resisted. John Gardner argues that Craig is badly mistaken in supposing that theories of the rule of law can be divided between formal and substantive positions; "The Supposed Formality of the Rule of Law" in J. Gardner, *Law as a Leap of Faith* (Oxford 2012), 195, 198–204. But Gardner fails to recognise the implications for his own legal positivist conception of the rule of law that follow from seeing the complex links between form, procedure, and substance, and, in these regards, Craig's analysis remains most helpful.

> inevitably break new (legal) ground and their decision develops the law (at least in precedent-based legal systems). Naturally, their decisions in such cases rely at least partly on moral and other extra-legal considerations.[19]

In other words, legal positivists acknowledge that judges often have to rely on moral principles in interpreting the law, but they insist that, in such cases, the law on the question is unsettled – that is, judges have to legislate or exercise a discretion. As Raz makes clear, the Sources Thesis requires that the content of the law be determinable "without using moral arguments"; it has, that is, to be determined by resort to facts.[20] Hence the distinction between settled and unsettled law presupposes precisely the formalist view of law that Hart was so anxious to disown.

But why accept the positivist way of making the distinction between settled and unsettled law – that the law is unsettled when judges have to rely on their moral acumen? The answer to this question is, according to Raz, supposed to come out of a theory of authority and a feature of authority that Hart described when he said that the authoritative nature of legal reasons resides in their "peremptory" quality: that such reasons are intended to get one to act as they stipulate without consideration of the merits of the content of the reasons.[21] Hart sought to capture by this term the feature of authority that Hobbes introduced into political and legal theory when he said that the distinction between command and advice is that with command one obeys because the commander says so, not on the basis of one's evaluation of the content of the command, whereas advice offers one a reason to evaluate.[22]

Hart suggested a second feature of authoritative reasons – that they are "content independent". By this term, he meant that one who has authority to command can issue commands with very different content, but in each case the content is "intended to function as a reason independently of the nature or character of the actions to be done".[23] The term "content independence" is however rather misleading. In order for a reason to function as Hart suggested, it has to have a very particular kind of content – one determinable as a social fact. In other words, as soon as one has to rely on moral acumen to work out the content of a reason, the reason ceases to function as an authoritative reason. And it this account of authority that Craig presupposes in his adoption of Raz's framework for understanding a formal conception of the rule of law.

19 J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford 1979), 49–50; Craig, "Formal and Substantive Conceptions of the Rule of Law", p. 483.
20 Raz, *The Authority of Law*, pp. 47–48.
21 H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford 1982), 252–53.
22 T. Hobbes, *Leviathan*, in R. Tuck (ed.) (Cambridge 1996), 176.
23 Hart, *Essays on Bentham*, at p. 254.

However, this account of authority elides a general feature of authority (that one acts because the authority said so) with the positivist claim that a law offers an authoritative reason only when it has a particular kind of content – one that can be determined by factual tests mandated by the law.[24] In making this elision, Hart and Raz fail to see that this general feature of authority is consistent with the family of interpretive theories whose most prominent member is Dworkin. That moral acumen is required to work out the content of the law permits the stance that one should obey the law with that content because it is the law and not because one would endorse that content. Even when, as Dworkin advises, judges interpret the law in a way that seeks to show the law in its best moral light, the result might well be morally far from ideal. But we can still think that the law has to be obeyed because it is the law of our land – because our legislature spoke. And that leaves intact the distinction between command and advice. That thought, of course, must be backed by some further reason for supposing that the law of our land has to be obeyed and here only some normative argument will suffice. It follows that something like moral acumen is required to supply the reason why we think that we are under an obligation to obey the law, even when its content is morally far from ideal.

Hobbes himself set out a list of 19 laws of nature, "the true and onely Moral Philosophy",[25] and argued that judges are under a duty to interpret the positive law in their light. Moreover, when he distinguished between *legal* authority and advice, he said "Law in general, is not Counsell, but Command; nor a Command of any man to any man; but only of him, whose command is addressed to one formerly obliged to obey him".[26] Hence, not only did Hobbes think that this feature of authority is consistent with moral acumen being required to work out the content of the law; he also thought it was consistent with the view that a legal authority is such only if there is a basis for holding that legal subjects are under a prior obligation to obey the authority.

On my interpretation of Hobbes's legal theory, the two issues are connected in that one of the reasons that one has a prior obligation to obey legal authority is that legal authority is constituted in such a way that its exercise is conditioned by Hobbes's laws of nature.[27] Here it is important to note that one of Hobbes's major innovations in legal theory was to conceive the laws of nature not as God-given moral principles external to legal

24 Hart implicitly recognised this point when he seemed to express his openness to "soft" or "inclusive" legal positivism in the Postscript to H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford 1994), 250.
25 Hobbes, *Leviathan*, p. 110.
26 Ibid., at p. 183.
27 See D. Dyzenhaus, "Hobbes on the Authority of Law" in D. Dyzenhaus and T. Poole (eds.), *Hobbes and the Law* (Cambridge 2012), 186.

order used to judge the content of human positive law,[28] but as what we more readily think of today as principles of legality or of government according to law. Put differently, principles of legality constitute the form government takes when it is according to law. Together, such principles provide the basis for the construction of a theory of the public law form.

Craig is correct that contemporary legal positivism provides such a theory, but he does not take into account, first, that it is in contention with other theories of the public law form, second, that the way the Sources Thesis shapes its understanding of the marks of form is irreducibly dependent on a normative argument about how best to understand law. That dependence is consistent with the feature of authority that one obeys not because of the merits of the content of the law, but because it is the law. But it is not consistent with Craig's contrast between form and substance since it does not permit the distinction between a theory of the rule of law and political theory that Craig envisages, since a theory of law is always at base a political theory. And, because neither correspondence with brute facts about the law nor features of authority can ground the positivist conception of law, the obvious candidate is a normative argument, which in the history of British political and legal thought is supplied by Bentham's utilitarianism.

For Bentham, the way to calculate overall utility is to have the masses elect representatives to Parliament who will translate the preferences of the majority into legislation. It is thus illegitimate for judges to superimpose their moral views on law that has a content that in fact reflects the outcomes of legislative calculation. As I have argued elsewhere, the positivist distinction between law and morality, or Craig's distinction between a theory of the rule of law and political theory, is not best understood as making a claim that there is no necessary connection between law and morality.[29] Rather, it is a relic of Bentham's utilitarianism, which for reasons of political morality argued that the content of the law should be identified by factual tests. Hence, a substantive political morality – democratic utilitarianism – lies behind the positivist tradition's commitment to the Sources Thesis.

We can now appreciate why legal positivism is committed to a particular understanding of form as pedigree. If judges and other legal officials are to avoid imposing their moral views on the content of statutes, they should stick to tests that have to do not only with "the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.)",[30] but also which sustain a claim about what that person or set of persons as a matter of fact intended. Similarly,

28 Though Hobbes insists with other early modern thinkers that the principles are also those that God must be taken to have willed.

29 D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford 2010, revised edition), ch. 8.

30 Craig, "Formal and Substantive Conceptions of the Rule of Law", p. 467.

when it comes to form as legality, whatever principles of legality are identified, their function is to help in ensuring that a factual content is produced, identified, and implemented.

The way that the Sources Thesis shapes contemporary legal positivism's understanding of form creates two major problems. First, the view of law as unsettled when it cannot be determined by factual tests has the result that large areas of what public officials do, including judicial supervision of other public officials, must be described as a discretionary or law-making activity because the officials have to rely on non-factual considerations. These are from the positivist perspective areas of official arbitrariness, ungoverned by law. Such a result is intolerable to judges and other public officials, and so, if they are drawn to a positivistic conception of law and the rule of law, they will deny that they have discretion and try to deploy tests for determining the content of the law that correspond to the Sources Thesis. Contemporary legal positivism's life in practice is thus in severe tension with its theory of that practice.

Second, the Sources Thesis permits laws with a content that is in gross violation of form as legality. A law that clearly requires retroactive punishment is perfectly valid from the positivist perspective, but much it violates form as legality. Now Raz claims that this feature of legal positivism is a virtue of the theory because it shows that law does not, as Fuller claimed, have to conform in any significant way to legality.[31] But this claim is in tension with the guidance function Raz attributes to both law and to the rule of law to which we saw Craig refer – that the law should be "sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life".[32] As suggested above, on a positivist understanding of the principles of legality, they exist in order to make law a more effective instrument of guidance. But, in order for law to guide in this way, it has to conform to both the Social Thesis and the principle against retroactive punishment. A judge faced with a law that seemed to require retroactive punishment and who regarded it as her duty to uphold the rule of law must seek to show that the content of the law conforms to legality despite its apparent non-conformity. Put differently, in a case in which the content of the law seems to conflict with legality, a legal problem arises that a judge must try to resolve in an exercise of interpretation driven by a sense of fidelity to principles of legality. The issue here is not that what I called above "form as fact" is unimportant, but that the facts of the law are facts disciplined by the public law form.

If such facts seem incongruous with that form, the problem that arises is a moral as well as a legal problem. The interpretative exercise to determine such facts involves moral acumen because it requires delicate choices to be

31 J. Raz, "The Rule of Law and Its Virtue", in Raz, *The Authority of Law*, p. 210.
32 Ibid., at pp. 213–14.

made between reasons for taking seriously what appears to be a clear legislative statement and the reasons that underpin maintaining respect for the rule of law. Indeed, Raz recognises that the rule of law is a necessary condition of individual autonomy or dignity as these values require the ability to plan ahead and law that conforms to the rule of law is an essential basis for such planning.[33] But, since he thinks that it is obvious that the law can on its face violate dignity and autonomy, and, moreover, can do so whilst conforming meticulously to the rule of law, he also thinks that compliance with the rule of law is not sufficient for law to have any moral quality to it.[34] However, as I shall now show, his argument on this score is riddled with ambiguities that also plague Hart's legal positivism.

III. Fuller's Formalism

Craig does not refer in his essay to Fuller, whose analysis of the rule of law is one of the major contributions in the twentieth century to our understanding of the idea of government according to law. Fuller set out eight "desiderata" or principles of the rule of law: generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time, and the one which Fuller took to be the most complex, congruence between official action and declared rule.[35] A system that fails completely to meet one of these requirements, or fails substantially to meet several, would not, in his view, be a legal system. It would not qualify as government under law – as government subject to the rule of law. Fuller's claim is that compliance with the eight principles expressed in the desiderata imbues law with an "inner" or "internal" morality. He thus argues that compliance with the principles makes a positive moral and substantive difference to all legal systems. Even a tyrant who wanted to govern through the medium of law would have to comply with the principles, and this would preclude rule by arbitrary decree and secret terror, which, Fuller says, is the most effective medium for tyranny.[36]

Now Fuller worked up these principles from a fable of a sovereign, Rex, who wished to govern his subjects in accordance with law, but whose ineptness in various respects leads to the identification of one of the principles. By and large, these principles are accepted as items that should figure on any list of rule-of-law principles – for example, an equivalent of each appears on Raz's own list. But Raz rejects Fuller's claim that compliance with the principles gives law a moral quality and also finds it necessary to add to the list.

33 Ibid., at p. 221.
34 Ibid.
35 These are set out in detail in L.L. Fuller, *The Morality of Law* (New Haven 1969, revised edition), ch. 2.
36 Ibid., at pp. 157–59.

Raz rejects the claim about moral quality because, on his account, the principles of the rule of law serve to make law into a better instrument for transmitting to legal subjects the content injected into the law by those with authority to make law. Compliance with the rule of law thus makes the law a more efficient instrument of rule. But, since law that so complies merely transmits the content as determined by the rulers, the content can be morally atrocious as well as morally meritorious.[37] In Kelsen's dramatic formulation, law can have any content.

Raz's additions to the list have to do with the interpretation and implementation of the law: that judges should be independent and impartial, that officials including judges should observe the principles of natural justice, and so on.[38] Further, Jeremy Waldron has elaborated an even longer list of such "procedural principles" in order to contrast them with what he calls the "formal" principles on Fuller's list.[39] However, as Waldron notes,[40] Fuller thought that such principles are implicit in the principle of congruence. Indeed, their presence there is a large part of the reason Fuller took the principle of congruence to be the most complex of the eight.[41] And, as Waldron also notes, it is clear from Fuller's other work that he had such principles and more in mind, notably in his essay "The Forms and Limits of Adjudication".[42]

Waldron argues, however, that Fuller made a couple of mistakes that obscured his contribution to our appreciation of the rule of law. First, Fuller himself called the principles on his list "procedural" in order to provide a contrast with "substantive", thus failing to see that there are two different contrasts in play – the procedural/substantive contrast as well as the formal/substantive contrast. This "patent" error is not merely terminological, since Fuller neglected the procedural dimension in his debate with Hart about what law is and the relationship of law to morality. Fuller's focus on "legislative form" rather than "judicial procedure" allowed, Waldron says, Hart to "set the agenda" in that debate because if we are to establish a connection between law and morality, it is more likely that we will find such a connection in the institutional procedures of the

37 Raz, "The Rule of Law and Its Virtue", pp. 224–26.

38 Ibid., at pp. 215–18.

39 For example, Jeremy Waldron says that "we radically sell short the idea of the Rule of Law if we understand it to comprise a list like Fuller's list … without also including something like the procedural list …", which on his own account has 10 principles; see Waldron, "The Rule of Law and the Importance of Procedure" in J. Fleming (ed.), *Getting to the Rule of Law* (New York 2011), 3, 6–7.

40 Ibid., at p. 8.

41 See Fuller, *The Morality of Law*, p. 81: "This congruence may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive towards personal power. Just as the threats towards this congruence are manifold, so the procedural devices designed to maintain it take, of necessity, a variety of forms. We may count here most of the elements of 'procedural due process'."

42 L.L. Fuller, "The Forms and Limits of Adjudication" in K.I. Winston (ed.), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford 2001), 101.

law than in substantive theories about how to interpret the content of legal rules.[43]

It is not altogether clear why Waldron thinks that the formal features of law are so lacking in resources to establish a connection between law and morality. As he points out, Fuller argued that "to embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults". Further, "every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent" – for example, to judge someone by "unpublished and retrospective rules, or to order him to do an act that is impossible, is to convey . . . your indifference to his powers of self-determination".[44] Waldron suggests that the connection Fuller establishes here between "his formal principles and dignity can be said to apply even more to the connection between procedure and dignity" because the "essential idea of procedure" is that there are two parties who confront each other in open court before an impartial judge who is under a duty to attend and respond appropriately to their arguments and the evidence.[45]

These remarks occur in a little-read chapter of Fuller's book, "The Substantive Aims of Law", and, as Waldron acknowledges, there is a full treatment of the procedure–moral connection in the "The Forms and Limits of Adjudication". There, Fuller emphasises the importance of impartial adjudicators in a rule-of-law order, in which the issues submitted to the adjudicators "[tend] to be *converted* into a claim of right or an accusation of guilt. This conversion is effected by the institutional framework within which both the litigant and the adjudicator function".[46] The process of reasoned argument involved requires that the claim be presented as more than a "naked demand". It has to be presented as a "claim of right" – that is, as "supported by a principle". And that has the consequence that "issues tried before an adjudicator tend to become claims of rights or accusations of fault".[47] Thus, Fuller regards courts and other adjudicative institutions as "essential to the rule of law". The "object of the rule of law is to substitute for violence peaceful ways of settling disputes. . . . There must be some agency capable of determining the rights of the parties in concrete situations of controversy".[48]

43 Waldron, "The Rule of Law and the Importance of Procedure", p. 11.
44 Ibid., at p. 15; Fuller, *The Morality of Law*, p. 162. In the second sentence, Waldron quoted from Fuller the words omitted are "to him" in Fuller's "convey to him". This omission does rather weaken the point Fuller is making – that justification has to be to the person affected by the law.
45 Waldron, "The Rule of Law and the Importance of Procedure", p. 15.
46 Fuller, "The Forms and Limits of Adjudication", p. 111, emphasis added.
47 Ibid.
48 Ibid., at p. 114.

Notice that, in order for this adjudicative conversion process to take place, the enacted law has to be convertible and that requires a prior conversion process. The latter process involves the reduction of a political programme to the explicit terms of a statute and thus a conversion of policy into public standards, which produces a kind of legal surplus value. By this I mean that the legitimacy of official action in compliance with the statute does not simply stem from its compliance with a political policy that the demos or polis has determined to be appropriate. It is also the case that this conversion process adds value because it brings into being a particular type of *public* standard – one that permits the operation of the principles identified by Fuller as the desiderata of the inner morality of law, and which enables claims of right based on legal principle to be adjudicated. And, if, as is often (even usually) the case in the administrative state, the statute delegates in large part to public officials the task of developing the policy of the statute, the officials will be responsible for producing in appropriate form the public standards that will govern their administrative regime. Hence, there is also often an administrative conversion process that mediates between statute and judicial review.

In a democratic political order, we should then distinguish between democratic legitimacy and legal legitimacy. The former has to do with the fact that what we can think of as compulsory public policy (the public standards that govern a society) has been determined by the representatives of the people in an open deliberative political process – a legitimacy which might be taken to be transmitted to the policy developed by public officials who have been delegated that task. Legal legitimacy, in contrast, has to do not with the political warrant for the policy, but with its legal warrant – the fact that that policy has been put into legal form.

If legality has is own legitimacy, it follows that the law of an undemocratic legal order will be to some extent legitimate. We might think that legal legitimacy does not suffice for legalised public policy to be fully legitimate, because full legitimacy requires that the policy be made democratically, but still recognise that legalised public policy has some legitimacy just because it has been legalised. But, conversely, we should also think that democratic legitimacy does not suffice for full legitimacy, since democratically determined policy has to be put into legal form before it is fully legitimate.

Now legal positivists are officially committed to denying that legality has its own legitimacy. But they agree, although at times ambiguously, with most of the elements of the Fullerian case for the legitimacy of legality. First, and unambiguously, there is the idea that the institutions of government in a legal order are legally constituted artificial persons. As Hart was to note in 1958, there is no such thing in a legal order as an "uncommanded commander" because "nothing which legislators do makes law

unless they comply with fundamental rules specifying the essential law-making procedures".[49]

Second, legal positivists agree that the law made by the institutions of government has to live up to principles of legality and it is here that ambiguities arise. At times, positivists seem willing to accept that compliance with the principles does give law a moral quality, but they assert that law does not have to comply to any great extent with such principles so might lack the moral quality that compliance creates. At other times, they suggest that the compliance has to be quite full but they deny that compliance leads to law having any moral quality to it because, as Hart insisted, it is "compatible with very great iniquity".[50] Put differently, since law can have any content, and since full compliance serves to transmit that content more effectively, compliance with the rule of law can make things morally worse.

However, Hart considerably qualified that insistence in *The Concept of Law*, chapter 9, "Laws and Morals". In that chapter, Hart says that "a minimum of justice is realised whenever human behaviour is controlled by general rules publicly announced and judicially applied". If law is to function as a system of social control, its rules "must be intelligible and within the capacity of most to obey, and in general they must not be retrospective".[51] His Hobbesian argument is that both law and morals have to have a minimum content if they are to "forward the minimum purpose of survival which men have in associating with each other" and that, "in the absence of this content", men would have "no reason for obeying voluntarily any rules".[52] The point about reason is important because we have to understand law as operating with reasons, not causes.[53] These reasons must be addressed at least to the natural facts of human vulnerability, approximate equality, limited resources, and limited understanding and will.[54] This "natural necessity", he thus says, has to qualify the "positivist thesis that 'law may have any content'".[55] Moreover, when judges interpret the law, they should avoid "arbitrary or mechanical" choices and seek to display what Hart calls "the judicial virtues": "impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable principle as a reasoned basis for decision."[56]

Hart, therefore, accepts that law has to be convertible in the ways Fuller's theory suggests – it requires the conversion of public policy into legal form and that process in turn makes possible the conversion of law into claims of

49 Hart, "Positivism and the Separation of Law and Morals", p. 603.
50 J. Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller" (2008) 83 N.Y.U.L.Rev. 1135.
51 Hart, *The Concept of Law*, pp. 206–07.
52 Ibid., at p. 193.
53 Ibid., at p. 194.
54 Ibid., at pp. 194–200.
55 Ibid., at p. 199.
56 Ibid., at p. 205.

right. In particular, the form that law takes in the first process or processes makes it possible for particular judgments about how the law applies to individuals to be presented to the individuals as offering them reasons that respond to their interests. Moreover, the officials who are charged with the ultimate responsibility for showing that law is responsive in this fashion – the judiciary – must seek to show how a particular law is reasonable in that it offers reasons responsive to the interests of legal subjects. In doing so, the judges search for some general principle drawing on the resources offered by the law beyond the law that directly is in question. Put differently, the judges must seek to show that the answer given to the individual is one that displays the full law in its best light.

To put things this way is provocative both because it seeks to make Dworkinian interpretivism – a substantive theory of adjudication – fall out, as it were, from law's form, and because it attributes endorsement of such a theory to Hart. The provocation is minor when it comes to Fuller, as he had set out the main elements of such an interpretive theory well before Dworkin developed his interpretivism as a full-blown challenge to Hart's legal positivism.[57] The provocation is more dramatic when it comes to Hart and legal positivism in general.

However, the drama has little to do with disagreement about law. In this respect, the only real disagreement is in regard to the positivist claim that official discretion is required to resolve unsettled law. But, in retrospect, debate about this issue might appear a tremendous waste of energy. The debate makes sense if with Bentham one argues that judicial interpretation should be marginalised to the extent possible in legal order because, from the perspective of democratic utilitarianism, such interpretation is an arbitrary intervention in the law-making process. But from Austin on legal positivists have conceded to judges a legitimate role in settling questions of unsettled law by resort to standard common law methods of interpretation. And, as Hart's take on the judicial virtues shows, discretion seems to vanish from the positivist vocabulary when it comes to describing what judges do. As I shall now argue, the real disagreement has to do with legal positivism's conception of morality.

IV. The Moral Quality of Formal Public Law

Fundamentally at stake is not positivism's conception of law, but its conception of morality as a set of standards external to law.[58] These standards, "used in the moral criticism of society itself",[59] provide the tools for

57 L.L. Fuller, *Anatomy of the Law* (Westport, CT 1976), first published in 1968.

58 See M. Stone, "Legal Positivism as an Idea about Morality" (2011) 61 University of Toronto L.J. 313. Stone's diagnosis of the problem is, I think correct, but his Kantian antidote, which argues that morality is incomplete without the law, shares with legal positivists the mistake of making morality prior to both politics and law.

59 Hart, *The Concept of Law*, p. 173.

evaluating the content of the law. They are the standards of what Hart called "critical morality" in contrast to the "social" or "positive morality" that one finds in social conventions and the law.[60] Since the latter is entirely contingent on what people happen to think, the former might well condemn it as immoral.[61]

Note that positivists can agree that the standards are external to law, whilst disagreeing about what the standards are – they could be what utility demands (Bentham), what the demos decides (Waldron), or what a liberal political theory prescribes (Raz). And they can also agree that law has to be conceived as a vehicle for content determined outside of the law and that principles of legality are those principles that help to transmit such content. But, as we have seen, contemporary legal positivism cannot stick to this rather flat conception of law in which law's normative force comes from the correspondence of its content with external standards of morality. And it cannot do so because Hart set out to understand the way in which legal order generates a kind of internal normativity or authority. That journey took him very close to developing the main elements of the account of law of his critics, though he tended to obscure this because of the drag of the Separation Thesis on this development.

Consider in this regard that Hart alludes to the basis for establishing the connection between the processes of conversion in his discussion of the legal constitution of ultimate legislative authority. His argument on this score in both "Positivism and the Separation of Law and Morals" and in *The Concept of Law* proceeds from private to public law. The first step is that law includes legal rules that provide "facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law".[62] The second step is that such "power-conferring"[63] rules are not confined to rules that confer power on private individuals, since they are to be found also in public law in the rules that confer power on public officials to legislate, adjudicate, and administer.[64] In the public law context, if officials are to legislate, adjudicate, and administer, they must abide by these rules, just as a private individual has to act in accordance with the law of contracts to succeed in contracting. It follows that even the highest legislative authority has to be understood as legally constituted.

60 For the distinction between "critical" and "positive", see H.L.A. Hart, *Law, Liberty, and Morality* (Oxford 1962), 20.

61 For illuminating discussion of Hart's views about morality, see P. Cane, "Morality, Law and Conflicting Reasons for Action" [2012] C.L.J. 59. And see more generally, Hart, *The Concept of Law*, pp. 167–84.

62 Hart, "Positivism and the Separation of Law and Morals", pp. 60–61; Hart, *The Concept of Law*, pp. 27–29. For more detailed discussion, see D. Dyzenhaus "Liberty and Legal Form" in L. Austin and D. Klimchuk (eds.), *Private Law and the Rule of Law* (Oxford 2014), 92.

63 Hart, *The Concept of Law*, p. 33.

64 Ibid., at pp. 28–33.

Hart thought that this kind of rule can explain not only the way that legislation is a rule-bound or legally regulated activity in the same way that promising is, but also how legislation can be self-binding in the same way as promising. He did note some differences. The rules governing legislation

> are very much more complex and the bilateral character of a promise is not present. Moreover, there is no person in the special position of the promisee *to whom* the promise is made and who has a special, if not the only claim, to its performance. In these respects, certain other forms of self-imposition known to English law, such as that whereby a person declares himself trustee of property for other persons, offer a closer analogy to the self-binding aspect of legislation. Yet, in general, making of law by enactment is something we shall understand best by considering such private ways of creating particular legal obligations.[65]

Compare this passage to Fuller who, after setting out his eight principles of the inner morality of law, says that the morality is better understood in terms of a morality of aspiration than a morality of duty and hence that its "primary appeal must be to a sense of trusteeship and to the pride of a craftsman".[66] Both Hart and Fuller, in appealing to these private law ideas, evoke the attempts by early modern scholars to come up with a juridical notion of public power that appealed to ideas from Roman private law. The common thread that ran through these early modern ideas was that the sovereign, the ultimate legal authority, did not have dominium or absolute rights over his power, but rather exercised that power on behalf of another – "the people" who are subject to that power. One of the problems they encountered was that, in private law, if a usufructuary goes beyond his right to use the fruits of someone else's property or a guardian does not act in good faith to serve the interests of his ward, a judge could be asked to enforce the rights of the owner or the interests of the ward. When translated into public law, these ideas can no longer be understood as rules of enforceable positive law or *lex*, so they are understood in terms of unenforceable standards of public right or *ius*, which boils down to the sovereign's sense of what will best secure the safety of the people. *Salus rei publicae suprema lex* – the safety of the state is the supreme law – becomes in later theorists the organising principle of public law.[67] The sovereign is recognised as the ultimate interpreter of what the safety of the people demands, perhaps with a nod (as in Locke) in the direction of "the people" asserting their judgment in an act of revolt against a sovereign who steps too far out of line with popular sensibilities.

An additional problem is that, at most, private law provides a fruitful source of analogies for trying to understand the public law relationship between ruler and subject as a reciprocal rather than a unilateral relationship.

65 Hart, *The Concept of Law*, pp. 43–44, emphasis in original.
66 Ibid., at p. 43.
67 See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA, 1988) and M. Loughlin, *Foundations of Public Law* (Oxford 2010).

Any attempt to go further, to try to understand public law in private law terms, risks imposing the inherent libertarianism of private law on public law by restricting public authority to two roles: clarifying though without distorting the corrective justice framework of private law and acting as the enforcement mechanism for the reciprocal relationship. And, to the extent that public law cannot be understood in these private law terms, it seems to be envisaged as an unconstrained realm of distributive justice.

Something like that result might also flow from Dworkin's interpretivism. If the principles that underpin the full law have to be understood in terms of "right as trumps",[68] then, to the extent that public law cannot so be understood, that is, to the extent that public law is not a matter of judges protecting entrenched constitutional rights, it is a realm of policy decisions with legal effect that escape the discipline of judicially guarded principle.

The demotion of public law to this lesser status in theories that accord a special status to private right in their understanding of legal form is, in my view, a relic of the classical natural law argument that *iniusta lex non est lex* – an unjust law is not a law. Law that does not correspond to the justice of private law is not law properly so called. However, public law of this sort is ubiquitous, entrenched, and the law that most affects people in their day-to-day lives. Moreover, it has been "colonising" private law regimes for decades. So it is difficult to declare it not law by some standard external to it, even if the standard is argued to be internal to law properly so called – to the regimes of private law.[69]

However, *iniusta lex non est lex* can have a more fruitful afterlife in public law if one adopts a different and more complex account of morality from that suggested by Hart's idea of authentic morality as critical morality – the external unchanging, universal standards for evaluating the contingent, variable, and often immoral content of the positive law.

This conception of morality is different because it identifies another set of moral standards in the internal morality of law. And it is more complex because of the argument that the substantive content of public law is authentically moral. It is the product of contingent agreement, but it is also an agreement that has survived the screening of the internal morality of law in both conversion processes. The content of the law is thus more than Hart's "positive morality". It has a quality to it that exerts a moral pull on those subject to it which complicates their situation should they judge

68 R. Dworkin, *Taking Rights Seriously*, 3rd impression (London 1981), xi.

69 For a more elaborate argument to this effect, see Dyzenhaus, "Liberty and Legal Form". In general, this kind of argument does presuppose the priority of the public law form and indeed might suggest that legal theory in general should be reconceived as a theory of public law along the lines of the German *Staatsrechtslehre* tradition. Instructive in this regard is P. Cane, "Public Law in *The Concept of Law*" (2013) 33 O.J.L.S. 649.

in good faith that the content of the law fails by what they take to be the external standards of critical morality.

The situation is morally complicated just by virtue of the fact that legal subjects will find themselves in a dilemma about which pull to heed, that of what they take critical morality to be or that exerted by the law. But it is also complicated by the fact that it is not possible completely to disentangle the moral perspectives in play. The moral quality of the content of the law comes about because that content can be presented as offering reasons to legal subjects in a way that makes it plausible for them to understand the law as responsive to their dignity as responsible agents. Even if they think that the content of the law should be very different from the content it has been determined to have, the fact that the content offers them reasons of this sort constitutes a reason within their own perspective to grant the law its moral quality.[70]

Moreover, to the extent that those charged with determining the content of the law cannot come up with a determination that offers such reasons, there is a legal as well as a moral problem. Legislators who wish to address the individuals subject to their power as lacking dignity have to adopt one of two strategies. Either they can explicitly state that aim, or they can delegate power to officials that permit the officials to achieve the same end, not because this end is explicitly stated in the empowering statute, but because official implementation of the statute is explicitly stated to be unreviewable by judges. Both strategies use law to place individuals or groups of individuals beyond the reach of the law. But they do so in a way that does not comply with law's form, in the first case by negating generality and its implicit commitment to formal equality before the law, in the second case by ensuring that there is no law with which official action has to be congruent.[71] If the legislators adopt one or both of the strategies in not altogether explicit fashion, judges are under a duty to treat the law the legislators make as if it were intended to comply with their legislative ethos. As a result, if the form of law is to some extent respected, to that extent it will be interpretable in a way that respects the dignity of those subject to the law.[72]

This conclusion shows why the principle of publicity exercises a moral discipline on the content of the law and thus, as Fuller argued, why a tyrant

70 Here I glide over a distinction between an individual's personal moral code and critical morality, where the latter seems to be in some sense public in that it has to do with standards that transcend any particular individual's personal code, without being reducible to convention. For discussion, see Cane, "Morality, Law and Conflicting Reasons for Action".

71 Strictly speaking, this strategy works by interfering with procedural principles and that has the effect that legal subjects cannot access the law. But that effect removes the possibility of demanding that an official show a legal warrant for his action, which means that there is no law that binds him.

72 The leading account of this kind of Fullerian claim is N. Simmonds, *Law as a Moral Idea* (Oxford 2008). For exploration of similar ideas, see J. Waldron, "How Law Protects Dignity" (2012) 71 C.L.J. 200 and K. Rundle, "Form and Agency in Raz's Legal Positivism" (2012) 32 Law and Philosophy 767.

who wishes to govern through law will find himself both legally and morally constrained. In addition, it helps to show why it is not merely a contingent fact that where law is present, so there will be interpretive resources available to judges of the sort on which Dworkin staked his challenge to legal positivism. These resources might fall well short of providing the basis for the kind of liberal political theory Dworkin argued was to be found in the full law of the US legal order. But it remains significant that, where law's form is respected, there will be interpretive resources that sustain a claim that law provides a moral kind of reason to those subject to it.

I want thus to suggest that Fuller was right to give formal principles of the rule-of-law primacy in his treatment of the rule of law. It is these principles that give law its moral quality and the procedural principles are principles that are required to put into effect that quality. This is not to say the procedural principles are unimportant. The adjudication of claims of right requires that the legal order have institutions organised around the procedural principles. It is such principles that accord individuals the right to ask an independent official for reasons why the law applies to them in a way that addresses them as persons with dignity as responsible agents, concretely, to ask a judge or other impartial adjudicator "But how can that be law for me?".

If the adjudicator is able to give an answer to that question, he is able to satisfy what Bernard Williams called "the Basic Legitimation Demand" that every legitimate state has to satisfy if it is to show that it wields authority rather than sheer coercive power over those subject to its rule. In order to meet that demand, he says, the state "has to be able to offer a justification of its power *to each subject*".[73] Williams opposes political theories that make morality prior to politics, either by taking politics to be the instrument of the moral – Bentham and Raz would be examples here – or as structurally constrained by moral principles – here Kant, Rawls, and Dworkin would be examples.[74] However, Williams is willing to countenance that the Basic Legitimation Demand is a moral principle as long as one understands that it is inherent in politics – that is, in the Hobbesian political question of how to secure "order, protection, safety, trust, and the conditions of social cooperation".[75] This, he says, is the "first" political question because it has to be solved before any other questions can be posed, let alone solved.[76] And, although he barely discusses law, it is clear that he regards law and the rule of law as part of the answer to that question.[77]

73 See B. Williams, "Realism and Moralism" in B. Williams (ed.), *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton 2005), 1, at p. 5, emphasis in original.
74 Ibid., at pp. 1–3.
75 Ibid., at p. 3.
76 Ibid.
77 See his remarks about Habermas, ibid., at pp. 15–16.

Whilst I cannot develop the full implications of these ideas for a formal theory of public law here, I think their salience to my argument is clear.[78] A formal theory of public law is independent from moral theory, thus preserving what I called earlier form as independence – the independence of a theory of public law from, say, a theory of human rights. But it cannot be independent from political theory because it is part and parcel of a theory about how to answer the most fundamental political question – how to create and maintain order. Moreover, the part it takes in answering that question explains why the authoritative reasons the law conveys to its subjects have a moral quality to them. That is, the state's decisions found in the content of legal law will have the quality that comes about through the conversion processes sketched above.

Law of that sort will fulfil the guidance function identified by Raz but not quite in the way he sees. My account recognises the importance of the guidance function and that law must be determinate in order for law to be capable of exercising that function. Both of these features are essential to any account of law as serving the interest of legal subjects in being treated as subjects or agents rather than objects. However, the authority of law does not come about because, as in Raz, the content of the legislators' views injected into law coincides with the demands of morality.[79] Rather, authority comes about because of the normativity that the legislators' views accrue through conversion – the surplus value I referred to above.

The content of the law is the content that is produced through legislation, which is quite different from the positivist idea that content is injected into the law and then transmitted from law-maker to legal subject. And, whilst the rule of statute law requires that by and large statutes are capable of guiding individuals prior to any judicial determination, what the individuals take from the content of that guidance is always provisional in that it is subject to the other conversion processes. Indeed, even prior to a judicial determination, the content is so subject since, in a rule-of-law order, namely a legal order, individuals should understand the law that governs their lives in accordance with their expectation that law is legal.

Another way of putting this point is to say that legislators, as public officials who have a law-making role, intend that more than a particular policy be implemented. They intend that their policy be implemented through law, hence legally or in accordance with the rule of law. It is for this reason that Hobbes said that it would be a "great contumely" or insult for a judge to suppose that the intention of the legislature is other than to comply with the laws of nature.[80] "He ought therefore, if the Words of the Law doe not

78 For an insightful overview of Williams's position on politics and morality, see S. Freeman, "The Case against Moralism" (2014) 61 (12) New York Review of Books 50.

79 J. Raz, "Authority, Law, and Morality", in J. Raz (ed.), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford 1994), 194.

80 Hobbes, *Leviathan*, p. 194.

fully authorize a reasonable Sentence to supply it with the Law of Nature."[81] But it follows that legal subjects have a legitimate expectation when it comes to understanding the law prior to judicial interpretation that its content is reasonable in this way. If it does not seem understandable in this way, they will be entitled to argue to a judge or other impartial official that the content of the law is different from what might be taken to be its literal or prima facie meaning.

Following the argument of the last section, if the subject cannot get a plausible answer to the question "But how can that be law for me?", the situation will be legally as well as morally problematic. The law, as Hart was on occasion inclined to recognise, will make a defective authority claim on the individual and, as he was less inclined to recognize, it will also be legally defective. Such a law might be defective to the point of not counting as law, even though it meets the formal pedigreed tests for what counts as law in legal order, such as a bill of attainder. For formal principles can, on occasion, yield conflicting results. But if such conflict arises, it should be resolved in the way most respectful of the dignity of those subject to the law.[82]

V. Conclusion

I have set out only the rudiments of a theory of the public law form. But I hope to have shown how it may be understood as constituted by principles of legality. These principles require that institutions be in place organised around procedural principles that make it possible for the political decisions of the community to answer to the Basic Legitimation Demand. I believe there to be direct implications of such a formal theory for the practice of public law, although I shall not develop this argument here.[83] Suffice it to say that the argument that process and substance are aspects of the form of public law casts into doubt the dichotomies between process and substance that often seem to drive the jurisprudence of public law and requires that decisions in public law be justified by reasons to those subject to law's force.

81 Ibid.

82 For example, in "Positivism and the Separation of Law and Morals", p. 622, Hart mentions "the normally fulfilled assumption that a legal system aims at some form of justice colours the whole way in which we interpret specific rules in particular cases, and if this normally fulfilled assumption were not fulfilled no one would have any reason to obey except fear (and probably not that) and still less, of course, any moral obligation to obey". He goes on to say that, if there were not some group that received the benefit of protection from the law, the system would "sink to the status of a set of meaningless taboos" and that "no one denied those benefits would have any reason to obey except fear and would have every moral reason to revolt": ibid., at p. 624.

83 One important implication is that, when administrative officials perform the conversion process appropriately, the question for a reviewing court is not whether the court thinks the product is correct, but whether it is reasonable. In other words, judges must defer to reasonable decisions administrative decisions about what legality requires. See e.g. D. Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Review of Constitutional Studies 87.