

Exploring Legal Philosophical and Criminological Knowledge Production Through H. L. A. Hart  
and Lon L. Fuller

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A thesis submitted to the  
Faculty of Graduate and Postdoctoral Studies  
in partial fulfillment of the requirements for the  
Master of Arts in Criminology

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## **Acknowledgements**

First, I would like to thank the members of my jury: Jonathan Frauley and Alvaro Pires. Your comments were not only probing, but insightful and demanding. You have forced me to engage aspects of my work that remained hidden to me, making this piece stronger.

I cannot overstate my gratitude to my supervisor, Prashan Ranasinghe. His wisdom and guidance are what pulled me through this project. His bottomless patience for my bloated writing – a vice that I have yet to conquer – was effort not required, but freely and supportively given. My sincere and heartfelt thanks will never be repayment enough for the path you have guided me through.

Finally, I would like to thank my family and friends for their unending love and support. Above and beyond their kindness and understanding, I relish their presence in my life.

Thank you all.

## **Abstract**

Criminology and legal philosophy still have much to gain from the exchange of ideas. However, attention must be paid to how this exchange is being made and what is being transferred. This project attempts to examine a currently unacknowledged exchange between the disciplines; that of an historicist, logos-centric method of knowledge production. Specifically, using a refashioned dialectic method, the debate between H.L.A. Hart and Lon L. Fuller will be compared and contrasted with Robert Agnew's representation of criminology. This will give some clarity to the different ways by which the disciplines (re)produce knowledge. Importantly, the process of (re)production detailed here is characterized by a (dis)unity between how the disciplines rhetorically justify their methodology and the actual analyses being produced. To give this process colour, it will be examined in relation to criminology's crisis. Ultimately, the analysis presented here raises doubts about the truthfulness of legal philosophical and criminological knowledge produced in this way.

## Introduction

In the late 1950s H.L.A Hart and Lon L. Fuller began an exchange which would result in some of the most profound work conducted regarding law in the 20th century. This was a philosophical discussion about what constitutes law. Hart reinvigorated the legal positivist perspective while Fuller reshaped the natural law perspective. Where the authors engaged in debate, a number of frequently dismissed problems occurred. These problems, as it will be argued here, illuminate the historicist, logos-centric character of their method of knowledge production<sup>1</sup>. This method limits the scope of possible knowledge by prioritizing historicist, logos-centric ways of being and knowing over anti-logos ways of being and knowing. Consequently, the reason and order that stems from historicism and the logos are positioned as resolutions to the chaos and disorder that springs from the anti-logos. Importantly, this prioritization is maintained ideologically, not empirically. In fact, the authors' analyses appear to reflect dimensions of the logos *and* anti-logos<sup>2</sup>. This demonstrates that in the production of legal knowledge there exist dimensions of the anti-logos which historicism and the logos have not or cannot resolve. For this reason, it will be argued that the production of legal knowledge is (dis)unified. The legal theoretical consciousness attempts to bring order and reason to the production of legal knowledge by rhetorically prioritizing historicism and the logos. Yet, in so doing, the anti-logos dimensions of legal philosophical analyses are overlooked. As a result, historicist, logos-centric constructions of the law are (re)produced and the disorder and chaos of the production of legal knowledge is obscured. This one sided method of producing legal

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<sup>1</sup> The definition of historicism, its expression within the Hart-Fuller debate, and its (re)production within the legal theoretical consciousness will be addressed in Chapter 3. The definition of logos and its counterpart anti-logos will be explained below.

<sup>2</sup> The anti-logos aspects of their analyses will be detailed in Chapter 3.

knowledge *a priori* dismisses anti-logos knowledge and raises doubts about the truthfulness of legal philosophical knowledge. The importance of such a dismissal will become clear below when it is argued that the anti-logos is a crucial part of human life.

For criminology, the debate between Hart and Fuller is important and useful in two ways. First, its content can be used to inform re-conceptualizations of criminological concepts and perspectives – as was accomplished, for example, by Hunt’s (1993a/b) work on a constitutive theory of law and Lacey’s (1994) work on punishment. Second, and what is of interest to this project, exploring the debate reveals a method of historicist, logos-centric knowledge production present within some representations of criminology. Specifically, it will be argued that an examination of Hart and Fuller’s debate reveals this process within Robert Agnew’s<sup>3</sup> (2011) representation of criminology. This is demonstrated through the alignment between Hart and Fuller’s constructions of law and crime with Agnew’s constructions of mainstream and critical criminology. Through the transfer of knowledge between disciplines, these constructions interrelate and (re)produce, within Agnew’s representation of criminology, a similar state of (dis)unification between a theoretical consciousness that rhetorically prioritizes an historicist, logos-centric method and actual criminological analyses. Importantly, the (re)production of this method is not one sided. Criminological representations also influence the (re)production of this method within legal philosophy. This can occur due to the similarities between criminological and legal constructions of shared concepts as well as criminology’s origins in and connections with the law<sup>4</sup>. As criminological representations are (re)enforced by legal philosophical representations of shared concepts, so too are legal philosophical representations (re)enforced by

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<sup>3</sup> Robert Agnew is a highly cited and respected scholar. His work is highly influential on how other scholars think about and do criminology. For this reason, his work is highlighted here.

<sup>4</sup> More on this below.

criminological representations of shared concepts. Though this inversion cannot be fully engaged here, this project offers a starting point for future research into this area.

To demonstrate the effect of historicist, logos-centric representations of criminology, criminology's crisis<sup>5</sup> will be examined. It will be argued that these representations misinterpret criminology such that they mistake the inherent (dis)order of the discipline to be a crisis. Criminology's eclecticism and autonomy conflict with one another and result in a disciplinary self-image that is chaotic and messy. This is problematic for an historicist, logos-centric method of knowledge production because it lacks order and reason. As criminologists attempt to resolve the conflict between criminological eclecticism and autonomy, it is apparent that they do so out of an historicist, logos-centric reaction to the inherent (dis)unification of the discipline. Criminology's crisis is thus no more than an historicist, logos-centric reaction to the chaos of the criminological project. However, by reacting in this way, criminologists, and criminology's crisis, continue to (re)present the discipline and criminological knowledge production within the frame of historicism and the logos. In effect, criminology's crisis is simultaneously a product of this method and actively engaged in its (re)production. Ultimately, what is gleaned from comparing and contrasting Hart and Fuller with Agnew's representation of criminology is a snapshot of the interconnection between criminological and legal philosophical knowledge production; an interconnection that can be read as actively obfuscating the (dis)unified character of the criminological project by prioritizing historicism and the logos and *a priori* rejecting anti-logos knowledge.

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<sup>5</sup> More on this below.

The method that will be used is Henri Lefebvre's (see 1991[1974]) unique brand of dialecticism that reframes historical materialism through Nietzsche's logos/anti-logos schema. Here the dialectic method takes on an unorthodox definition. Typically, it is not messy. Dialecticism is rational as it traces the progression of history, resolving practical and theoretical conflicts and contradictions along the path toward logical structures of organized knowledge. This prioritization of time-, reason-, and organization-oriented knowledge is emblematic of the domination of the logos over the anti-logos. The concepts of 'logos' and 'anti-logos' were first introduced by Friedrich Nietzsche (2003) when he criticized Euripides for the destruction of the Greek tragic play. In *The Birth of Tragedy* (Nietzsche, 2003) the Greek figures of Apollo (logos) and Dionysus (anti-logos) represent mutual, yet opposite forces within human life. The logos is "[the] higher truth...perfection...in contrast to imperfectly comprehensible daily reality" (Nietzsche, 2003, pp.16). It is a reasoned, organized, technocratic way of knowing and being "...through which life is made both possible and worth living" (Nietzsche, 2003, pp.16). The anti-logos represents "...the bond between man and man..." (Nietzsche, 2003, pp.17). It is "...the *excess* of nature in delight, suffering and knowledge" [Emphasis in the original] (Nietzsche, 2003, pp.26). It is an unreasoned, (dis)organized, (dis)technocratic way of being and knowing.

These two very different tendencies walk side by side, usually in violent opposition to one another, inciting one another to ever more powerful births, perpetuating the struggle of the opposition...until, finally, by a metaphysical miracle of the Hellenic 'will', the two seem to be coupled... (Nietzsche, 2003, pp.14)

The coupling of these figures is so fundamental to the Greek tragedy that, by following in the footsteps of Socrates, Euripides prioritized Apollo (the logos) over Dionysus (the anti-logos) and destroyed the Greek tragic art:

If it was this that destroyed the older tragedy, then aesthetic Socratism is the principle behind its death. But in so far as the battle was directed against the Dionysiac elements of the older part, we may call Socrates the opponent of Dionysus, the new Orpheus who rose up against Dionysus and, although destined to be torn to pieces by the Maenads of the Athenian court, put the powerful god to flight. (Nietzsche, 2003, pp.64)

Lefebvre extended Nietzsche's concerns in *The Production of Space* (1991[1974]), where he reinterpreted historical materialism through the logos/anti-logos lens. The issue for Lefebvre was that historical materialism prioritizes the interpretive context of time and fails to fully engage space as a constitutive dimension of practical reality:

[Marx's] concern was no longer merely with works generated by knowledge, but now also with *things* in industrial practice. Following Hegel and the British economists, he worked his way back from the results of productive activity to productive activity itself. Marx concluded that any reality presenting itself in space can be expounded and explained in terms of its genesis in time. But any activity developed over (historical) time engenders (produces) a space, and can only attain practical 'reality' or concrete existence within that space. [Emphasis in the original] (Lefebvre, 1991[1974], pp.115)

Historical materialism presents space as a mere container of things. It is an object or phenomena's genesis over time that reveals its nature, not its relations to a particular space. This, Lefebvre argued, was a mistake. Spatial relations, as the milieu of 'things in industrial practice', have an intense explanatory power that historical materialism fails to fully recognize. This oversight results in an over-emphasis of temporal relations, producing an incomplete and potentially misleading picture of material reality:

Inasmuch as the quest for the relevant productive capacity or creative process leads us in many cases to political power, there arises the question of how such power is exercised...What we are concerned with, then, is the long *history of space*...It must account for both representational spaces [things in space] and representations of space [discourses about space], but above all for their interrelationships and their links with social practice. [Emphasis added] (Lefebvre, 1991[1974], pp.116)

Though space will not be taken up here, Lefebvre's concern for the dominance of the interpretive context of time within social theory raises the question of what effect this temporal

hegemony has on the production of knowledge. Lefebvre provides the issue of reduction as an example:

Reduction is a scientific procedure designed to deal with the complexity and chaos of brute observations. This kind of simplification is necessary at first, but it must be quickly followed by the gradual restoration of what has thus been temporarily set aside for the sake of analysis. Otherwise a methodological necessity may become...nothing but a veil for ideology. Reductionists are unstinting in their praise for basic scientific method, but they transform this method first into a mere posture and then, in the name of the 'science of science' (epistemology), into a supposed absolute knowledge. Eventually, critical thought (where it is not proscribed by the orthodox) wakes up to the fact that systemic reduction and reductionism are part and parcel of a political practice. The state and political power seek to become, and indeed succeed in becoming, reducers of contradictions. In this sense reduction and reductionism appear as tools in the service of the state and of power: not as ideologies but as established knowledge; and not in the service of any specific state or government, but rather in the service of the state and power in general. Indeed, how could the state and political power reduce contradictions (i.e. incipient and renewed intrasocial conflicts) other than via the mediation of knowledge, and this by means of a strategy based on an admixture of science and ideology? (Lefebvre, 1991[1974], pp.105-106)

What begins as an innocent step toward clear understanding can quickly turn into an imposition of particular thought structures, converting what began as a methodological necessity into, first, ideology, then into established knowledge. Importantly, Lefebvre's solution is neither to reject reduction and science, nor to exchange the conceptual importance of time for space. Rather, he has taken Nietzsche's agonism as principle. He has counterpoised – in a conflictual and contradictory, yet additive manner – time and space, reframing historical materialism within Nietzsche's conflictual schemata of human life<sup>6</sup>. His statement on the form of social space and the productive relationship between nature and society exemplifies this:

The form of social space is encounter, assembly, simultaneity. But what assembles, or what is assembled? The answer is: everything that there is in space, everything that is produced either by nature or by society, either through their *co-operation* or through their *conflicts*. Everything: living beings, things, objects, works, signs and symbols. [Emphasis added] (Lefebvre, 1991[1974], pp.101)

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<sup>6</sup> See Merrifield (1995) for more on the necessity of the anti-logos to understanding of *The Production of Space* (Lefebvre, 1991[1974]).

Lefebvre showed that Marx's form of historical materialism is typified by the domination of the logos over the anti-logos, of the time-ordered thought structures of Apollo over those empty spatial cries of Dionysus (see also Merrifield, 1995; Soja, 1989, pp.76-93). Where Nietzsche argued for the necessary relation between the logos and the anti-logos in Grecian tragic art, Lefebvre uncovered this same relation within the production of knowledge writ large and the correlative neglect that the Dionysiac mode has historically received within social theory. The relevance of Lefebvre's theorizing to this project is thus in his attempt to problematize the theretofore unequalled place of time within social theory by embracing the necessary existence of cooperation *and* conflict (the logos and the anti-logos) within the production of knowledge.

In response to the (re)turn of the anti-logos, others (see Ranasinghe, 2013, 2014, 2015 and Valverde, 2011 for examples within criminology; see Soja, 1989 for an example within spatial theory) have continued to demonstrate that it is possible to produce knowledge by allowing space for the anti-logos to surface. Crucially, this (re)turn should neither be read as, nor devolve into, a prioritization of the anti-logos over the logos. Rather, it is important to follow Lefebvre and embrace the existentialist style that Nietzsche's agonism addressed; namely, to engage "...the whole person rather than...our rational faculties alone" (Kohn, 1984, pp.383):

[E]xistentialism has challenged the *insufficiency* of reason and the hubris of positivism and scientism in their refusal to grant the legitimacy of other domains of human life. It is the exclusive emphasis on rationality, the imperial arrogance of its partisans, to which the existentialists have objected... [T]he point is balance rather than a swing to irrationality – or, more precisely, an attempt to illuminate the existing human who embodies both reason and unreason. [Emphasis in the original] (Kohn, 1984, pp.387)

In this light Ranasinghe notes that "...an attempt to embrace messiness [is] itself paramount to the production of knowledge..." (2015, pp.322).

Dialecticism, in this Lefebvorean sense, refers to an open method of knowledge production whereby contradictions and conflicts at all levels are brought to the fore “...not at the expense of logic, but to fuse disparate strands of intellectual enquiry” (Ranasinghe, 2015, pp.322). Within this framework, order and chaos, the past and the future, emotion and objectivity, reason and unreason are not simply isolated concepts fit to be constructed independently of one another and set off in the polemic coliseum to determine a victor. Rather, they exist within and because of each other – always together, yet always alone. Just as Apollo and Dionysus together generate the Greek tragedy (Nietzsche, 2003, pp.14-51), it is this lens of simultaneous togetherness and isolation that drives this refashioned dialectic method. Though an account of space within criminology or legal philosophy will not be forwarded here, this project will attempt to bring into view some of the tensions within the production of legal philosophical and criminological knowledge production that become apparent when the interpretive context of time is problematized and Nietzsche’s agonism is embraced. Therefore, it is in a (dis)continuous fashion that dialecticism, as a method of knowledge production which provides space for both the *logos* and the *anti-logos*, will here be understood.

Importantly, this brand of dialecticism is inherently reflexive, though reflexive in a way that criminology has not typically been. In criminology, reflexivity has relied upon minute ideological and/or political dynamics within or without the discipline to explain the (re)production of particular constructions of crime<sup>7</sup>. However, within this reworked dialectic frame, reflexivity takes on both macro dynamics (i.e. inter-disciplinary knowledge exchange and the ideological bias of the discipline(s) theoretical consciousness) and micro dynamics (i.e.

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<sup>7</sup> Examples of reflexive criminological work include Agnew, 2011; Arrigo, 2001; Arrigo and Williams, 2006; Einstadter and Henry, 2006; Hogeveen and Woolford, 2006; Hunt, 1993a/b; Lacey, 1994; Martel et al., 2006; Nelken, 1994; and Walsh, 2014.

independent researcher bias and the political and ideological dimensions of discrete theoretical models) to shed new light upon the primary problem about which the reflexive attitude seeks to attend: the (re)production of particular ways of being and knowing. It is in this sense that reflexivity will be understood, as a general attitude which underlies criminological analyses directed toward this common problem.

Responding to Ian Loader and Richard Spark's book *Public Criminology?* (2010), Loic Wacquant (2011, pp.441-444) identified three forms of reflexivity: the researcher, the text, and the epistemic conditions (i.e. the social conditions and techniques of production). Importantly, as we will later see, these forms are not clearly separated. The author, the text, and the epistemic conditions are (in)separable and (dis)continuous in such a way that robust and more complete knowledge can only come from an understanding of these reflexive dimensions in their sum *and* in their parts; that is, in simultaneous isolation and interconnection. In short, the reflexive whole must be engaged if insight into the production of knowledge is to be gleaned. Our reworked dialectic method will accomplish just this as we explore the interrelations and specificities between distinct legal and criminological theories and the disciplines and disciplinary practices themselves.

Philosophy has been coupled with reflexivity within criminology in response to criminology's crisis. Though criminology is a young discipline, having formal recognition for little more than a century, it has been and arguably still is facing a crisis (Pavarini, 1994, pp.43; see also Hogeveen and Woolford, 2006, pp.682; Martel et al., 2006, pp.636-637; Tift et al., 2006). This crisis has been belaboured within a variety of special journal issues, conferences, and conversations and has garnered a worried curiosity as to its existence, especially considering the relative youth of the discipline. This curiosity has birthed a conclave of academic work which

has argued that disciplinary reconciliation can be found in a more self-aware criminological practice, in other words, in a reflexive criminology. A subset of these scholars has championed the integration of philosophical concerns and methodologies in this endeavour. These scholars have uncovered assumptions within criminological work by using philosophy to critique criminological practices (for examples see Agnew, 2011; Arrigo, 2001; Arrigo and Williams, 2006; and Walsh, 2014) and re-think taken-for-granted criminological perspectives and concepts (for examples see Dearey, 2014; Hunt, 1993a/b; Lacey, 1994; and Lasslett, 2010). The dialectic method that will be used here is, at its core, reflexive. Its gaze is direct toward both content and structure in an attempt to see the interrelation between product and production. Using this method situates the project alongside the work of these scholars. With our theoretical and methodological roots now firmly planted, the proceeding section will outline how criminology's crisis has been represented. A dialectic (re)reading of the crisis will later be undertaken in Chapter 4.

*Criminology's Crisis: Fragmentation through Eclecticism*

Criminology is often described as inter-disciplinary, typified by its engagement with a range of research, methods, theories and perspectives outside its immediate domain (Hannah-Moffat, 2011, pp.441; see also Nelken, 1994, pp.10; Ericson, 1996, pp.14; Ericson and Carriere, 1994, pp.90; Garland and Sparks, 2000, pp.193). This proximity to other disciplines has been problematic for criminologists as they attempt to navigate, with some semblance of clarity, their discipline and its boundaries. Consequently, criminology has been represented in a variety of ways. It has often been depicted as a sub-field of sociology (Hannah-Moffat, 2011, pp.441-442; Ericson, 1996, pp.15), being practiced within faculties of Social Science. However, criminology has also been practiced within faculties of law or criminal justice, inter-disciplinary faculties, and autonomous faculties of criminology. It has even been found in a number of professional faculties such as the Warton School of Business or the Kennedy School of Government (Ericson, 1996, pp.14-15). Criminology's possible existence within a diversity of locations has raised many questions: is criminology a sociology or is it an off-shoot of law? Does its relation to the state make it a political science or a professional field of policy development? Observing the discipline's academic locations have not seemed to allow criminologists to settle these questions and accurately define the discipline's boundaries (see Ericson, 1996; Ericson and Carriere, 1994). This problem seems to persist even when examining criminology from outside of the academy (see Haggerty, 2004).

Compounding the issue are disputes over criminology's fundamental object of inquiry and the standard mode of engagement that criminology uses. For example, Shearing (1989) argues that criminology has never been the study of crime, rather it is the study of study of order. Hillyard and Tombs (2004) advocate for a shift from investigations of crime to investigations of

social harm whereas Lasslett (2010) argues that crime can be adequately investigated and ought not to be abandoned<sup>8</sup>. Braithwaite (2000, pp.225) depicts a criminology that is focused on strategies of state regulation, while O'Malley (1996) depicts a criminology that looks past the state's hegemonic grasp on the social toward more diffuse sites of post-social governance. Embracing all of these interpretations, Garland and Sparks (2000, pp.190) argue that criminology must continually reconstitute itself to deal with the unsettled nature of its object of investigation.

This mass of disciplinary representations is not to be overlooked because it speaks to an eclecticism that is rooted in very nature of the discipline (see Garland, 2011, pp.303-305; Pearson and Weiner, 1985, pp.116; Hannah-Moffat, 2011, pp.441-445). "Struggles over criminological terrain should not be dismissed as esoteric debates peculiar to the academy. Rather, they are an inevitable and necessary feature of the division of expert knowledge in an interdisciplinary field. Multiple criminologies are inevitable" (Ericson, 1996, pp.18). As the discipline has expanded this fracturing has become quite prevalent. Concerns have spread out past dimensions of crime and the criminal to more diverse areas of social control and sites of regulation such as the family, schools, health sectors, financial markets, etc. This eclecticism is both a strength and a weakness. On the one hand, when at its best, criminology becomes "...an integrative enterprise of translation and exchange [which]...undertakes the work of criminological inquiry in on-going conversation with the diverse academic disciplines that bear upon its subject-matter" (Garland, 2011, pp.304). This dialogue between disciplines allows criminology to freely bring outside ideas and concerns into its purview. This freedom ought to allow criminology to be critically engaged with other disciplines, to publish in and converse across disciplinary boundaries. In some ways this has happened. Specialized sub-divisions have

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<sup>8</sup> More on this below.

arisen such as corporate criminology, feminist criminology, the larger groupings of deviance literature and mental health literature, etc. “A Canadian Criminology Association has recently formed and although general criminological journals are still available, so are approximately thirty-one specialist criminology/penology journals and 104 law review journals” (Hannah-Moffat, 2011, pp.442). All of these sub-divisions are informed by concerns and research anchored firmly outside of criminology’s traditional focus on the criminal in the context of the law and the criminal justice system.

Hannah-Moffat (2011) argues that criminology’s open intellectual boundary is necessarily fluid. Some of the most effective criminological enquiries are directed outside the boundaries of legal and institutional limits and toward the investigation of alternatives (such as the recent turn toward investigations of regulation and security) (Hannah-Moffat, pp.442; see also Nelken, 1994, pp.10-11; Braithwaite, 2000). As the discipline progresses, however, it is becoming more autonomous, narrowing its conversations both internally and externally (Hannah-Moffat, pp.442; see also Garland, 2011). Hannah-Moffat (2011, pp.451) warns that this autonomy has begun to create more rigidity in the specialized sub-divisions. For example, specialists are frequently only publishing in their own research journals or speaking only to those interested in particular subfields (Hannah-Moffat, 2011, pp. 444-445, see also Garland, 2011, pp.300). Furthermore, institutional protectionism – where institutions such as governmental organizations or agencies selectively distribute and, at times, actively withhold information – can make certain areas of enquiry more or less appealing (Hannah-Moffat, 2011, pp.445-449). These organizations place potentially insurmountable barriers in the way of gathering critical research information, effectively de-incentivizing particular research questions. Instances such as these make it easy for specialized subdivisions to remain niche areas of interest, cut off from other

disciplines and from the rest of criminology. Such autonomy, however, risks abandoning the creativity that gave rise to these niche spaces.

Further complicating the issue, attempts to reach between these silos to synthesize criminological knowledge across topical divides have been questionable (Hannah-Moffat, 2011, pp.441-445; Martel et al., 2006, pp.637). In an effort to quickly enjoin knowledges, little attention has been paid to *how* these various perspectives and/or concepts, themselves based upon disparate theoretical positions coming from many different disciplines, can be synthesized. As a result, the few works that actually attempt to integrate knowledges haphazardly piece together concepts and perspectives, picking and choosing what superficially coheres while ignoring underlying theoretical (in)consistencies<sup>9</sup> (see, for example, Pearson and Weiner, 1985; see also Agnew, 2011 who demonstrates the superficial ways that mainstream and critical criminology attempt to integrate criticisms<sup>10</sup>). This makes it difficult to see criminology as a whole. Instead, it appears as a mess of splintered areas of interest roughly organized around an unsettled object of investigation.

It is therefore not a surprise that concerns and divisions have grown at criminology's very core. Now, more than ever, there are doubts about what criminology is and what it ought to be (c.f. Garland, 2011, pp.304-312; see also Agnew, 2011, pp.1-9; Hannah-Moffat, 2011; Pavarini, 1994) as criminologists try to make sense of and organize the discipline. Lines have been drawn between critical and mainstream criminology (Agnew, 2011, pp.1-9; Martel et al., 2006, pp. 634-636), between academic and vocational criminology (Chancer and McLaughlin, 2007, pp. 157-

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<sup>9</sup> Although this theoretical oversight is becoming the norm there are outliers. See Arrigo, 2001; Agnew, 2011; Taylor et. al, 1975 for examples of fruitful attempts.

<sup>10</sup> This will be problematized further in Chapter 4.

163; Garland, 2011, pp.308-309), and between the ever-increasing variety of specialized subfields mentioned above (see also Hannah-Moffat, 2011, pp.442-445). More general engagements with the discipline have depicted it as the study of order (Shearing, 1989), as a post-social project (O'Malley, 1996), or as the study of state regulation (Braithwaite, 2000). Each representation of the discipline embodies a different understanding of the criminological enterprise and a different way to organize the discipline. As it will be argued, these conflicts are rooted in various politics at a number of levels. To make this clear, Robert Agnew's (2011) characterization of the discipline will be examined in Chapter 4. Agnew depicts criminology as being generally divided into two camps: mainstream criminology and critical criminology. Mainstream criminology primarily focuses upon acts which are in violation of the criminal law. It understands criminology as an endeavour to explain the causality of individual deviance as a result of both individual factors (e.g. psychology, biology, etc.) and environmental factors (e.g. culture, individual histories, etc.) (Agnew, 2011, pp.2). This position typically brings with it a legal definition of crime, a deterministic view of the origins of crime, and an understanding of human beings as rational and self-interested (Agnew, 2011, pp.12-117). Conversely, critical criminology tends to focus upon a wider array of acts, observing deviancy more generally. It understands criminology as an endeavour to bring into focus various situations of domination and social conflict which together culminate in crime (Agnew, 2011, pp.2). This position typically brings with it a definition of crime as social control, a free choice view of the origins of crime, and an understanding of human beings as either socially concerned or blank-slates (Agnew, 2011, pp.12-117). These understandings of the criminological project imply particular assumptions about the nature of people, society, reality, law, crime, etc. These assumptions are important because they influence what researchers "... study, the causes they examine, the

control strategies they recommend, and how they test their theories and evaluate crime-control strategies” (Agnew, 2011, pp.vii-viii). In other words, they have a fairly substantive impact on how the discipline is organized and how knowledge is produced.

The threat of intellectual disorganization and disciplinary fragmentation still looms in the minds of criminologists and has contributed to their repeated attempts to answer the question “what is criminology?” This reaction, as it will be shown in Chapter 4, is an historicist, logos-centric response to the chaotic self-image that arises from the tension between criminology’s eclecticism and autonomy. This is particularly worrying because, as mentioned above, criminology has struggled to take define its boundaries and settle fundamental concepts and perspectives within the discipline. Left unexamined, the variety of disciplinary representations, as we will see, can have the effect of silently (re)producing and being (re)produced by an historicist, logos-centric method of knowledge production that will continue to push the discipline to resolve the chaos that is inherent to it. This is not to say that the discipline should not be organized. Rather, as it will become clear in later chapters, chaos is a fruitful and necessary part of the production of knowledge. The proceeding section serves to situate where precisely within criminology the law fits and where the Hart-Fuller debate might insert itself.

*The Ontology of Crime and the Necessity of Law*

Criminology, as the study of the criminal and its control, entails engagement with the criminal justice system (Garland, 2011, pp.303-306; Hogeveen and Woolford, 2006, pp.683-687; Lasslett, 2010, pp.2-10). It is here where an interconnection between criminology, the law, and legal ontology can be established. In what follows, two interrelated positions engaging the ontology of crime and its relevance to the criminological project will be presented. The first position is expressed in Hillyard and Tombs' (2004) critique that the category of crime lacks ontological reality and criminology's continued focus upon crime perpetuates the myth of crime's existence. As a result, the category of crime does a great deal of damage while remaining theoretically and practically deficient in explaining the circumstances surrounding a wide array of deviant behaviours. It ought therefore to be abandoned. The second position is developed in response to Hillyard and Tombs' (2004) critique. Lasslett (2010) argues that crime has an ontological reality which sets limits on the scope of criminological research. Lasslett (2010) concludes that a criminological project centered around the concept of crime is viable and it can engage a variety of harms, though admittedly less so than a social harm approach. By presenting these positions it will become apparent that any study of crime is intrinsically linked to understandings and processes of law and consequently to a host of potential legal ontologies which work to both (re)produce particular ways of knowing and structure the concept of crime. Insofar as criminology remains wedded to the study of crime, an engagement with the law and legal ontology is necessary.

Hillyard and Tombs (2004, pp.10) take as the springboard for their critique the growing empiricist orientation which they argue has begun to wrestle criminology back into an applied science. Citing Muncie (1998, pp.4), who argues that the critiques of crime and criminology

advanced in the 1970s and 1980s have been left largely unfinished and foreclosed by a growing realist hegemony, the authors contend that a reexamination of the prospects of criminology is in order and that it would be a fruitful exercise to reassess some of the criticisms advanced by critical scholars. The most fundamental of these criticisms, and the one which is of particular concern here, is the assertion that the category of crime has no ontological reality. The authors correctly note a host of writers (see Box, 1983; Christie, 1986; Hulsman, 1986; Mathiesen, 1990, 1997) have presented work which argues that there is “nothing intrinsic to any particular event or incident which permits it to be defined as crime” (Hillyard and Tombs, 2004, pp.11). Not only is there a “heterogeneity of problems that are dealt with under the heading of ‘crime’,” but “people who are involved in ‘criminal’ events do not appear in themselves to be a special category of people” (Hillyard and Tombs, 2004, pp.11). In effect, no event, incident, or individual(s) can *a priori* be identified as crime or criminal. Thus in order for the category of crime to be intelligible, it must be accompanied by a story which binds the category with the event, incident, or individual(s). Crime is therefore no more than “a ‘myth’ of everyday life” (Hillyard and Tombs, 2004, pp.11) as it lacks an immediate empirical reality.

The accompanying story required in the identification of a crime or criminal denotes an act of construction which is accomplished through intricate sets of interrelated processes. These include social, economic, political, and, most importantly for the current work, legal processes. Specifically, Hillyard and Tombs (2004, pp.14-15) cite the criminal law’s use of tests, such as *mens rea*, which are used to distinguish between events and determine whether or not a crime has indeed been committed. For the authors, these legal tests are artifices and clearly exemplify the creative forces of the law over the categories of crime and criminal. This fact exemplifies the deficiency of using crime as a conceptual category around which to organize a discipline.

Echoing Hillyard and Tombs' critique, Garland (2011, pp.303) states that "...criminology addresses a pre-given object (crimes and criminals) which it derives from a non-scientific social practice - namely, the criminalization processes of the criminal justice state." Though Garland, and arguably Hillyard and Tombs, may rightly lament criminology's inherent inability to define its own object of enquiry, being bound by an outside definition of crime simply reasserts crime's typology as a social construction. This, on Lasslett's (2010) account, is not enough to argue that crime is not ontologically real. What, then, if any, is the connection between ontology and empirical reality? Does a lack of immediate empirical reality entail a lack of ontological reality?

Lasslett (2010) draws on György Lukács' Marxist philosophy of being and claims that ontological reality can be distilled into an issue of concreteness; here, concreteness is the one shared characteristic between all three stages of being - the inorganic, the organic, and the social (Lasslett, 2010, pp.3). Concreteness is not simply the immediate empirical reality, the likes of which Hillyard and Tombs (2004) appear to subscribe to; rather it is "a category which encapsulates the mediated, interdependent character of all qualitative forms of matter" (Lasslett, 2010, pp.3). Thus, when an object or phenomenon is said to be real, what is really meant is that the object or phenomenon has concreteness. This meaning "...captures the important fact that phenomena never exists *in itself*, independent of other 'things'... it is always part of a larger totality of relations and processes, which inscribe it with definite characteristics" [Emphasis in the original] (Lasslett, 2010, pp.3). What differentiates social being, the category of being under which crime assuredly falls, "...is that the historically forged relations and corresponding ideal structure which gives it *concreteness*, have been authored by *humans* through collectively modifying their metabolic exchange with nature and each other" [Emphasis in the original] (Lasslett, 2010, pp.3). Although there is nothing intrinsic to an act which makes it criminal, acts

acquire this characteristic through various social, economic, political, and legal processes, giving them concrete reality as 'crime'. It is the fact that crime is creatively constructed through these processes which gives the phenomenon its concreteness as social being and its ontological status as 'real'. Quite simply, crime's status as a social construction does not preclude its status as ontologically real.

For our purposes, it should now be clear that, whether we embrace Hillyard and Tombs' (2004) claim or Lasslett's (2010), the law and legal processes are present in shaping the content and context of the category of crime. Moreover, insofar as criminology engages the concept of crime and/or its control, understandings of the law and legal theory have an inherent bearing upon how criminologists engage with, construct, and understand crime. Therefore, examining the (re)productive character of legal knowledge to investigate how and why particular criminological constructions of crime take the shape they do is a viable and constructive criminological endeavour. With this in mind, we will now turn our attention to the law. As mentioned earlier, there have been reflexive criminological projects which have sought to bring philosophy into criminology and, in order for this project to further our understanding of the (re)productive character of legal knowledge within criminology, we will do the same. For this reason, the Hart-Fuller debate serves as a useful starting point. It deals with two influential and prominent paradigms within legal philosophy. It involves refutations and reformulations of previous theories within these paradigms. It deals specifically with the ontology of the law in a philosophical fashion. And it is relatively unknown within criminology.

Given the relative lack of knowledge about either Hart or Fuller's legal theory within criminology, Chapter 1 will detail both theories and serve as a prelude to the main argument. Chapter 2 will explore the dynamics of Hart and Fuller's debate by engaging their readings of the

grudge informer case, bringing to the fore their separation on the character of legal knowledge. Chapter 3 will undertake a dialectic (re)reading of Hart and Fuller, arguing that their separation on the character of legal knowledge is ideological, not empirical. Their methods of knowledge production are typified by an historicist, logos-centric theoretical framework which (re)produces and is (re)produced by this separation. This (re)reading uncovers a (dis)unity between the authors' rhetoric and their analyses. This (dis)unity narrows intellectual enquiry by (re)producing the same historicist, logos-centric constructions of law *ad infinitum*. By examining Robert Agnew's (2011) representation of criminology, Chapter 4 will argue that this (dis)unification can be observed within representations of criminology. As criminology and legal philosophy (re)produce knowledge within each other, so too is this historicist, logos-centric state of affairs (re)produced within each discipline. Criminology's crisis is an example of how this state of affairs directly impacts the discipline. Ultimately, this picture of legal philosophical and criminological knowledge production raises doubts about the truthfulness of knowledge produced in this way. Dialecticism has the capacity to subvert this method's narrow gaze through a (re)newed holistic form of being and knowing; a form which engages the logos and the anti-logos, the self and the other, history and the future, space and time, materials and *matériels* (see Lefebvre, 1991[1974], pp.105). The final section will provide a summation of the project's overall argument.

## Chapter 1: Hart, Fuller, and Legal Validity

Legal validity refers to the conditions required for the existence of valid, enforceable law. It identifies the rules/threats/obligations/etc. which have the status of law and is an inescapable part of any enquiry into the nature of law. For this reason, legal validity serves as both a useful starting and end point for our enquiry into Hart and Fuller's substantive theories.

Within the tradition of natural law, legal validity is the result of moral legitimacy, where rules are legally valid insofar as they are morally legitimate (Beyleveld and Brownsword, 1985, pp.4). For Fuller, the law is based upon the principles of legality which are underpinned by morality. Therefore, insofar as system of law realizes the principles of legality, that system can be said to be legally valid. Hence, as Priel notes, the principles of legality do not merely constitute the principles of law's ideals; they are "...also its grounds" (2013, pp.404). That is to say, the principles of legality denote both the existence of law and the existence of *good* law (see Fuller, 1969, pp.39). Consequently, an examination of the relationship between law and morality, between the principles of legality as an expression of legal validity and the norms we use (e.g. justice, rights, etc.) to evaluate a system of rules (see Waldron, 2008, pp.1137), is indispensable to an understanding of law.

Within the tradition of legal positivism, legal validity is a statement of fact which, for Hart, provides little to no insight into the nature of law. Although he clearly accepts that in order for the law to function "...the rules must satisfy certain conditions [i.e. the principles of legality]," <sup>11</sup> he rejects these conditions as integral to an understanding of the nature of law

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<sup>11</sup> As Waldron's reading of Hart suggests, Hart seems to believe that a study of the principles of legality "...is not part of the philosophical discipline that tries to tell us what law essentially is" (2008, pp.1138). For more on Hart's specific acknowledgement of these principles see Hart, 1983, pp.114-115 and Waldron, 2008, pp.1144-1146. The

because they exist as internal evaluative criteria incapable of describing the general structure out of which they spring (2012, pp.207). That is to say, legal validity only confirms whether or not particular laws conform to these conditions. This understanding of legal validity reflects how legal positivism investigates the nature of law. For these theorists, it is an empirical endeavour. The end is to *describe* the law as it *is*, rather than *normatively* assess how the law *ought to be* (see Waldron, 2008, pp.1137; Priel, 2013, pp.402-403). Toward this end, Hart deconstructs the features of the municipal legal system. This type of legal system operates at the local level and is the system of law that is typically associated with the term ‘law’. It can be understood as the standard case because it has all of most common elements of law. Other systems such as certain forms of primitive law or international law lack a legislature or cannot bring states to court without their prior consent (Hart, 2012, pp.3-4). By engaging this standard form of law, Hart is able to describe the general, consistent, universalizable structure of the law. This chapter provides a brief summary of the intellectual tradition from which each author proceeds, followed by a detailed presentation of their resultant approaches and a more nuanced engagement with their handling of legal validity.

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rest of Waldron’s (2008) piece examines the vacillating which accompanies Hart’s weak engagement with the principles of legality, the full implications of which have yet to be brought upon Hart’s treatment of legal validity.

*Legal Positivism and H.L.A. Hart's Legal Theory*

...in the combination of these two types of rule [primary and secondary] there lies...‘the key to the science of jurisprudence’.

H.L.A. Hart, *The Concept of Law*, 2012, pp.81

In the social sciences ‘positivism’ is a philosophy of science which categorizes valid truths as originating from the derivations of sense experience and the workings of logical and mathematical proofs. Legal positivism, being within the domain of legal philosophy, does *not* follow from the positivist traditions within the social sciences. Rather, legal positivism refers to the study of law as it *is*, as opposed to how it *ought* to be (Austin, 1832, pp.278; Hart, 1958, pp.594-600; see also Fuller, 1969, pp.145-151). This assertion stems from the thesis most notably formulated by David Hume in *A Treatise of Human Nature* (1896, pp.49-61). In the text, Hume describes what we now understand as the problem of induction, which calls into question the viability of action predicated upon knowledge claims grounded in empirical observation. Briefly stated, Hume argues that the observation of past objects and events does not logically justify knowledge claims which seek to either generalize about the properties of certain classes of objects or predict the sequence of future events. This is the case because there is always space to conceive of a different sequence of events or a new property of an object which has yet to be discovered. Therefore, Hume claims, it is logically inconsistent to infer a particular course of action from the mere description of an object or phenomenon as it is.

The problem of induction illuminates a distinction between description and interpretation, between describing the world as it is and concluding upon a particular course of action. Hence John Austin’s claim in *The Province of Jurisprudence Determined* (1832, pp.278):

The *existence* of a law is one thing; its *merits* or *demerits* are another thing.  
Whether a law *be* is one inquiry: whether it *ought* to be, or whether it agree with

a given or assumed test, is another and a distinct inquiry... [Emphasis in the Original]

The interests of intellectual clarity, for legal positivism, are best served by attending to the methodological separation of empirical description from normative value judgements. A description of the law is one enquiry, the ideal structure of the law is a separate enquiry.

However much Hart disagrees with Austin's command theory of law (see below), the two share this methodological aim common to all legal positivism (see Green, 2012, pp.xlviii; Hart, 1958, pp.593-594; Hart, 2012, pp.239-240; Lacey, 2008, pp.1062). It follows that the primary claim associated with legal positivism is that "...[i]n any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits" (Gardner, 2012, pp.19). It is this assertion that underscores the legal positivist tradition. This is substantiated by Hart, as we will see, in a new way.

*The Concept of Law* is Hart's seminal text. It begins with a lengthy critique of the command theory of law, which is commonly associated with John Austin. Command theory is best exemplified by the gunman situation wherein a gunman says to a bank clerk "hand over the money or I will shoot". In this situation, the gunman secures the compliance of the bank clerk by threatening harmful or unpleasant action toward her/him, making it substantially less attractive for the clerk to keep the money than to give in to the demands of the gunman. Put simply, the gunman uses an *order* backed by a *threat* to get the desired result. Command theory holds that the law operates in this way: that wherever there is a legal system there must be "...some persons or body of persons issuing general orders backed by threats which are generally obeyed, and it must be generally believed that these threats are likely to be implemented in the event of disobedience" (Hart, 2012, pp.25).

Hart takes issue with this theory in two general ways. First, the model of sovereign orders backed by threats only accounts for a limited variety of law (primarily in the class of penal statutes). It fails to account for laws conferring legal powers upon individuals and/or institutions to adjudicate or legislate or for laws which create and/or change legal relations (Hart, 2012, pp.27-42). It fails to depict legal rules which do not originate as explicit prescriptions (i.e. laws which originate in custom as opposed to any conscious law-creating act) (Hart, 2012, pp.44-49). And, finally, it fails to account for the continuity with which modern legal systems maintain legislative authority because the sovereign person or persons cannot be identified within the electorate or legislature of the modern state (Hart, 2012, pp.50-78).

Second, the ideas which form the basis of the command theory (orders, obedience, habits, threats) cannot approximate the idea of a rule without which even the most elementary forms of law remain obscured (Hart, 2012, pp.80). The idea of a rule makes clear the case that deviation from a particular law is "...not merely grounds for a *prediction* that hostile reactions will follow or that a court will apply sanctions...but [it is] also a *reason* or justification for such reaction and for applying the sanctions" [Emphasis added] (Hart, 2012, pp.84). This is because a rule attends to both the internal and external character of obligatory standards whereas the command theory only accounts for the external character (Hart, 2012, pp.88-91). To make this clear, Hart turns to the contrast between *being obliged* (an external statement) and *having an obligation* (an internal statement). These two states of affairs are different sides to the same coin and speak to something intrinsic within law. Returning to the gunman situation, the command theory tells us that when the gunman orders the bank clerk to "hand over the money or be shot" the notion of obligation or duty is present because it can be said that if the bank clerk obeys the gunman, then s/he was 'obliged' to hand over the money (Hart, 2012, pp.82). From the perspective of an

external observer, this statement is true and it would remain true whether the bank clerk was following a rule or, as s/he is here, following an order backed by threats (see Hart, 2012, pp.90). However, it would be misleading to say that the bank clerk ‘had an obligation’ to hand over the money because s/he has no general social duty to do so. Though the gunman situation has within it the external notion of ‘being obliged’, it is missing an internal account of the imposition of duty (2012, pp.82, 85).

By reframing the law within the notion of a rule, both the external and internal character of obligation is accounted for. For Hart, the law is composed of a particular type of rule, social rules. Social rules involve “...a combination of regular conduct with a distinctive attitude to that conduct as a standard” (2012, pp.85). These rules are accompanied by normative vocabulary such as ‘ought’, ‘must’, and ‘should’. This vocabulary is used to identify deviations and formulate demands, criticisms, and acknowledgements of the rule itself. In so doing, it creates the external sense of obligation seen in the gunman situation. It also generates social pressure which pushes an individual to acknowledge the existence of the rule and to conform her/his behaviours to this rule. This pressure is reflective of the *seriousness* of the rules and manifest as physical threats or diffuse hostile or critical reaction. By seriousness Hart means that social rules are typically believed to be necessary for the maintenance of social life and require individuals to sacrifice their self-interests to conform to the duties of the rules (2012, pp.87). Because social rules are accompanied by serious social pressures, deviation from such a rule “...is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility,” [Emphasis in the original] (Hart, 2012, pp.90).

Embracing social rules as the basic building block of law, Hart argues that legal rules are of two kinds: primary and secondary. Law exists in the marriage of these two kinds of rules.

Primary rules govern particular standards of conduct, placing restrictions on such acts as "...the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other" (Hart, 2012, pp.91). They dictate what human beings are required to do and to abstain from doing, whether they wish to or not (Hart, 2012, pp.81).

That said, a society can only survive on a system composed solely of primary rules if they remain small, closely knit by ties of kinship, common in sentiment and belief, and exist in a stable environment (Hart, 2012, pp.92). In any other instance, such a system will resemble more closely the rules of etiquette than the rules of a legal system and, for that reason, fail to control social behaviour (Hart, 2012, pp.92). Such a failure occurs in three ways and can be rectified with the introduction of three secondary rules. Secondary rules create law's structure. They do not govern behaviour directly. Rather, they "...specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined" (Hart, 2012, pp.94). Many of the familiar elements which make up a legal system come from these rules. With these rules we can, on Hart's account, claim to have identified law.

The first failure is uncertainty. In situations where there is doubt as to what the rules are or as to the precise scope of the rules, a system of primary rules has no formal procedure; it lacks an authoritative text or person whose official declaration can settle the matter. Uncertainty can be resolved with the inclusion of a rule of recognition which specifies that "...some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it [i.e. the group] exerts" (Hart, 2012, pp.94). That is to say, a rule of recognition might stipulate, for example, that only actions

detailed within a particular text or decreed by a particular person or persons are to be properly supported by the social pressure which the law exerts. Consequently, rules of this type can take a range of forms, from a simple authoritative list of rules written in a text to the more complex form typical today whereby primary rules are identified by reference to some generally possessed characteristic(s) such as their enactment by a particular body, their long customary practice, or their relation to judicial decisions (Hart, 2012, pp.94-95). By identifying rules in this way there is within the rule of recognition the basis of legal validity as well as a relation to society and the normative values therein.

The second failure is the static character of primary rules. For a system of primary rules, the only method of change is "...the slow process of growth" whereby conduct once thought optional gradually becomes habitual and then obligatory or, conversely, conduct once thought deviant becomes tolerated and then unnoticed (Hart, 2012, pp.92). Within a system of primary rules there is no way for rules to be adapted to changing circumstances; old rules cannot be directly eliminated and new rules cannot be directly installed. To correct this failure the rules of change are enacted (see Hart, 2012, pp.95-96). These rules empower individuals or bodies of people to introduce new primary rules and eliminate old primary rules. They are most identifiable in modern legal systems as laws which confer power, such as rules which specify persons who are to legislate or rules which define the procedure to be followed in legislation (Hart, 2012, pp.96). Rules of change are closely tied to rules of recognition because where the rules of change exist the rules of recognition will necessarily incorporate a reference to them as an identifying feature of legally valid rules (Hart, 2012, pp.96).

The third failure is the inefficiency of social pressure as a means of maintaining the rules (see Hart, 2012, pp.93-94, 96-98). Primary rules alone cannot authoritatively determine whether

a primary rule has been broken. A system of primary rules relies on the seriousness of social pressure to judge, punish, and maintain the rules, which can be inconsistent and ineffective. As disputes over the violation of a rule are inevitable and as small societies grow into nation-states, maintenance of the rules requires a person or agency specially empowered to assess and authoritatively settle disputes. As such, the rules of adjudication provide particular individuals with the power to adjudicate disputes as well as define the procedure to be followed (Hart, 2012, pp.97). With these secondary rules come many key elements of the modern legal system such as the judge, the court, jurisdiction, and the concept of judgement. Like the rules of change, the rules of adjudication are tied to the rules of recognition in that "...if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are" (Hart, 2012, pp.97).

Ultimately, without secondary rules a system of primary rules is incapable of being more than a system of customs. Secondary rules provide formal structure to the primary rules which authoritatively promulgates the primary rules and reinforces their collective acceptance, adherence, and social pressure. By applying this consistent standard of validation they give law an immediacy and social weight that is lacking in a system of primary rules. In this way, secondary rules *generate* legal validity whereas primary rules are the *subjects* of legal validity. Primary rules owe their status as law to the secondary rule of recognition which is itself reciprocally informed by the secondary rules of change and adjudication (Hart, 2012, pp.100-107). The rule of recognition thus exists, as we have seen, as the ultimate rule of a system of law as it grants legal validity to all other rules, including the secondary rules (Hart, 2012, pp.107). Because of this the rule of recognition cannot be assessed by the criteria of legal validity. Its

existence does not follow from the authority of a higher rule; rather it exists only in its practice through the active efforts of the courts, officials, and private persons:

[W]hereas a subordinate [primary] rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact. [Emphasis in the original] (Hart, 2012, pp.110)

Although something akin to the principles of legality<sup>12</sup> might exist within the criteria of legal validity (see Hart, 2012, pp. 206-207), such principles would only exist *within* the practiced existence of the rule of recognition and would still fail to describe the existence of the rule itself. On Hart's account legal validity therefore offers no more insight into the nature of law than the simple statement that a particular law is "valid given the system's criteria of validity" (Hart, 2012, pp.110). In this case, the criteria of validity is simply a rule's acknowledgement by the rule of recognition.

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<sup>12</sup> More on this central aspect of Fuller's (1969) theory below.

*Natural Law and Lon L. Fuller's Legal Theory*

Law... [is] the enterprise of subjecting human conduct to the governance of rules.

Lon L. Fuller, *The Morality of Law*, 1969, pp.74

Natural law theory has a lengthy intellectual tradition which originates at the intersection of moral and political philosophy. It dates from Plato and Aristotle through to Thomas Aquinas, Thomas Hobbes, John Locke, and, more recently, the likes of Lon L. Fuller, Ronald Dworkin, and John Finnis (see Bix, 1999, pp.1613; Bix, 2004, pp.62; George, 1999, pp.1625; Kaye, 1987, pp.306-307; Soper, 2007, pp.205-206). The tradition's formulations within early Greek and Christian moral and political philosophy means that unlike legal positivism, which is a dedicated legal theory, natural law has a broader purview. It is "...about the connections between the cosmic order, morality, and law" (Bix, 2004, pp.61). Consequently, natural law has been drawn upon for its insight into ethical and moral theory, epistemology and meta-moral theory, political philosophy, theology, and legal theory (Bix, 2004, pp.61-62).

While it generally claims that "...moral truths are to be derived from truths about human nature" (Bix, 1999, pp.1615), as a tradition within legal theory natural law has become distinct from its incarnation as a moral and political theory (Bix, 2004, pp.63; Soper, 2007, pp.203-204; see also Bix, 1999, pp.1613). In its moral and political form, it attempts to better understand the character of moral action in the context of a citizen or state official and the limits of legitimate governmental action by determining an objective moral structure (Bix, 2004, pp.63). In legal theory, however, natural law has made little headway past its initial assertion that there exists a necessary connection between law and morality. Primarily, natural law theorists have been caught up in stymieing criticisms levelled against this assertion (Bix, 2004, pp.70-73; Soper, 2007, pp.201, 204-206). Legal positivism has forwarded the bulk of this critique, arguing that,

practically speaking, whether the law is just or unjust is irrelevant because legal sanctions exist despite their moral status and are thus law regardless of their moral legitimacy (see Soper, 2007, pp.201). Natural law can thus be characterized in two ways: first, as a moral/political theory which seeks to ask the question, ‘is there an objectively determinable moral law’; second, as a legal theory which asserts that there is a necessary connection between law and morality. For the purposes of this project natural law will hereafter refer to its tradition within legal theory.

Early Thomistic natural law can be summed up in the brief remark: unjust law is no law at all (see Bix, 2004, pp.71; Kaye, 1987, pp.310; Soper, 2007, pp.201, 205-207). On this account, the relationship between the law and morality is one of substance, where legal validity is determined by checking that a rule or directive is consistent with the requirements of justice as determined by some moral theory (Soper, 2007, pp.205; see also Fuller, 1969, pp.98). Legal validity is central to the natural law perspective and it is upon this point where modern natural law theory deviates from its early Thomistic manifestations. Modern natural law holds that moral considerations are imbricated in the identification of law from the very beginning (Soper, 2007, pp.206). Here Lon L. Fuller serves as a notable advancement as he clearly moves from a substantive to a procedural natural law approach:

What I have called the internal morality of law is in this sense a procedural version of natural law...The term “procedural” is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be [i.e. law]. [Emphasis in the original] (Fuller, 1969, pp.96-97)

Morality, for Fuller, does more than judge legal content. It is the basis for law’s very existence; it is the basis for law’s structure and administration. Legal validity is therefore incumbent upon the

law's form, more so than its content. To fully unpack what this means we will turn to *The Morality of Law* (1969) in which Fuller presents his most detailed analysis of law's essence.

In *The Morality of Law* (1969) Fuller addresses a dual dissatisfaction about how legal thought has developed in its engagement with and understanding of morality. The first concern is the general dismissal which the category of morality garners within legal theory given that it is the chief comparative category against which law is commonly analyzed. The second concern is that legal theory neglects the morality which makes law possible. The concern here is about acknowledging the conceptual foundation upon which the law is built (e.g. justice, rights, duties, etc.). This foundation is typically strewn aside with a few words about legal justice (i.e. the formal requirement that like cases be treated alike); yet such remarks are rarely acknowledged for their limitations. They only address a small aspect of a much larger issue, "...that of clarifying the directions of human effort essential to maintain any system of law" (Fuller, 1969, pp.4). Fuller attempts to redress these concerns in two ways: first by outlining two types of morality – the morality of aspiration and the morality of duty<sup>13</sup>; second by explicating the way these moralities are imbricated within the conceptual foundation of law – that is, within the directions of human effort essential to the maintenance of a system of law.

The morality of aspiration represents the human capacity to strive for excellence; that is, to achieve the "...fullest realization of the human powers" (Fuller, 1969, pp.5). It is perhaps best illustrated in ancient Greek philosophies wherein the good life is achieved through the concept of 'proper fitting conduct' (i.e. of conduct fitting of a human functioning at her/his best). It is

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<sup>13</sup> Although Fuller describes these frameworks using the term 'morality', they do not represent any single moral theory (e.g. Utilitarian philosophy has elements of Fuller's morality of duty and of his morality of aspiration) and may be better understood as moral attitudes.

possible for one to fall short of the fullest realization of one's capabilities, in which case one is judged not for negligence toward one's incumbent duties, but rather for failing to achieve one's fullest realization. Criticism stems from "...shortcoming, not wrongdoing" (Fuller, 1969, pp.5).

Philosophies of this kind are joined by the concept of virtue which presents individuals with a standard of excellence toward which they must strive. The virtues encompass the attitude of power, efficacy, skill, and courage which is paramount to the aspirational perspective (Fuller, 1969, pp.14-15):

When we seek to comprehend some new form of artistic expression, our effort...will direct itself at once to the purpose pursued by the artist. We ask ourselves, "What is he trying to do? What does he seek to convey?" When we have answered these questions, we may like or dislike the work in question. But no distinct step intervenes between our understanding and our approval or disapproval. If we disapprove, but remain distrustful of our judgement, we do not ask ourselves whether we have applied the wrong standard of approval, but whether we have after all truly understood what the artist was trying to do. [Emphasis in the original] (Fuller, 1969, pp.14)

While the morality of aspiration is more akin to aesthetics than it is to law - in the sense that law cannot compel an individual "...to live up to the excellence to which he is capable" - it is by no means irrelevant to law (Fuller, 1969, pp.9). Rather, law fosters an environment of reason which directly serves the morality of aspiration by providing man with an end and means toward which s/he may rationally strive. The legal system represents a complex of rules designed to wrestle man from the "...blind play of chance and to put him safely on the road to purposeful and creative activity" (Fuller, 1969, pp.9). Contract law, for instance, "...declares void agreements entered under a mutual misapprehension of the relevant facts" (Fuller, 1969, pp.9). This principle was not recognized in the early stages of law, but the fact that it is accepted today represents the struggle to reduce the role of the irrational in human affairs. Although the law cannot compel an individual to lead a rational life, it can, in this way, create the conditions essential for a rational human existence (Fuller, 1969, pp.9).

The morality of duty begins at the bottom of human achievement. It takes as its task the definition of the minimum rules without which “...an ordered society directed toward certain specific goals must fail of its mark” (Fuller, 1969, pp.5-6). This is perhaps best represented by theistic philosophies wherein behaviour is restricted through prescriptive language (e.g. ‘thou shalt’ and ‘thou shalt not’) (Fuller, 1969, pp.6). Language such as this defines the boundaries within which acceptable behaviour operates. Thus when an individual crosses one or more boundary lines, s/he has failed to “...respect the basic requirements of social living...” and can be justly criticized for neglect (Fuller, 1969, pp.6). This morality aligns neatly with the imperative mood of legal statutes, giving the morality of duty direct relation with the law.

Fuller invites us to think about these moralities as extremes on a linear scale where the bottom represents the basic demands of social living (duty) and the top represents the highest reaches of human capacity (aspiration) (see 1969, pp.9-13). The point where the scale is divided between duty and aspiration has been the subject of debate between moralists for centuries. Those who are more morally demanding are forever locating the point higher up, expanding the area of duty rather than extending an invitation for us to join in the realization of human potential (Fuller, 1969, pp.10). However, it can here be argued that any delineation of one’s duty presupposes a conception of the good life (i.e. the heights of aspiration). Since the morality of duty must incorporate borrowed standards from the morality of aspiration, there is no reason to delineate between the two because the morality of aspiration is the foundation of all morality. But for Fuller this does not follow from the facts of human experience:

In no field of human endeavour is it true that our judgements as to what is undesirable must be secretly directed by some half-perceived utopia. In the field of linguistics, for example, none of us pretends to know what a perfect language would be like. This does not prevent us from struggling against certain corruptions of usage which plainly tend to destroy useful distinctions. (Fuller, 1969, pp.11)

It is thus possible to know the bad based upon imperfect notions of the good and, consequently, for a distinction to be maintained between the moralities of duty and of aspiration. Here Fuller makes a passing remark which preliminarily directs us toward the relation between morality and law:

If a working companion asks me for a hammer, or the nearest thing to it available to me, I know at once, without knowing precisely what operation he is undertaking, that many tools will be useless to him. I do not pass him a screwdriver or a length of rope...So I believe it is with *social rules and institutions*. We can, for example, know what is plainly unjust without committing ourselves to declare with finality what perfect justice would be like. [Emphasis added] (Fuller, 1969, pp.12)

Poor social rules and institutions, just like a screwdriver used for the task of a hammer, are discernible without first fully comprehending or committing to any one conception of the perfectly good. Insofar as it is possible to classify law within the realm of social rules and institutions, it is possible to identify law through imperfect understandings of good law. It is here, with the use of an imperfect sense of good law (and even with the identification of what cannot rightly be called law) where morality joins with the law.

There is one final and important distinction which Fuller makes regarding the moralities of aspiration and duty which makes it clear that his moral scale impacts legal form and structure; that is, that it is not merely a mode of substantive evaluation like Thomistic natural law. The morality of aspiration is about directing human effort toward the higher reaches of human capability. This necessarily implies some conception of the highest good of man (Fuller, 1969, pp.17). It suggests that there exists some higher aim that guides our pursuit and achievement of our fullest realization; that is, that we are working toward a particular goal, beyond achieving our fullest realization, when we act in accordance with the morality of aspiration. But the morality of aspiration fails to describe what this higher purpose of life is or should be (Fuller, 1969, pp.18).

In effect, when one acts according to the morality of aspiration, s/he resorts “...to the notion of balance – not too much, not too little” (Fuller, 1969, pp.18). Aristotle expressed this balance in his conception of the just mean (sometimes referred to as the golden mean or the golden rule), which places demands upon one’s insight and intelligence to properly manage her/his pursuit of the virtues (see Kenny, 1992). Even outside of the moral domain the notion of balance exists as a guide for everyday human behaviour: “It is a characteristic of normal human beings that they pursue a plurality of ends; an obsessive concern for some single end can in fact be taken as a symptom of mental disease” (Fuller, 1969, pp.18). Accordingly, the notion of balance is crucial to the practice of the morality of aspiration and is a general characteristic of the navigation of human life.

Whereas the morality of aspiration has to do with balance, the morality of duty has to do with exchange. This can be explicit (such as the exchange of a promise for a present or future act) or implicit (one can assert that a citizen has a moral duty to vote without implying that there is a bargain between the citizen and their government) (Fuller, 1969, pp.19). Wherever a duty exists, there exists an appeal to a sort of exchange whose character “...depends upon the fulfillment of certain expectations concerning the actions of others” (Fuller, 1969, pp.21). In other words, the relation between duty and exchange is mediated by a third concept – reciprocity. Reciprocity, as it is understood here, is an expression of a social bond between individuals: one is compelled to act insofar as s/he can depend upon others to carry out anticipated actions.

One can imagine a social bond which is not incumbent upon the duty-reciprocity-exchange dynamic, such as the love of an intimate partner. A bond of this sort knows nothing of measuring contributions because the proper organizing principle is not exchange, but “...one for all and all for one” (Fuller, 1969, pp.22):

But so soon as contributions are designated and measured – which means so soon as there are duties – there must be some standard...by which the kind and extent of the expected contribution is determined. This standard must be derived from the pattern of a social fabric that unites strands of individual action [i.e. from exchange] (Fuller, 1969, pp.22)

To make this point clear, Fuller outlines three conditions for the optimal efficacy of the notion of duty. First, the relationship of reciprocity which births the duty must be voluntarily agreed upon by the parties affected (Fuller, 1969, pp.23). Second, there must be equivalence of value in the reciprocal actions performed by each party (Fuller, 1969, pp.23). Third, the relationship of duty must be reversible in theory and practice (i.e. the same duty which you owe me today, I may owe you tomorrow) (Fuller, 1969, pp.23). These conditions make the notion of duty most palatable to the man who is obligated to it. But in what sort of society are these conditions most likely to be met? Interestingly, the answer is in a society of economic traders (i.e. through capitalism). Not only do such societies, by definition, enter into voluntary relationships of exchange, but it is only in a free market that a general equivalence between goods of disparate value can be achieved. Moreover, economic traders frequently change roles from buying to selling, thus the duties which are born out of their exchanges are reversible in theory and practice. It is therefore “...only under capitalism that the notion of the moral and legal duty can reach its full development” (Fuller, 1969, pp.24). Hence it follows that legal and political institutions of such a society be permeated with notions stemming from exchange (Fuller, 1969, pp.25). Examples of just such an occurrence can be found in criminal law where “...we find a table of crimes with a schedule of appropriate punishments or expiations – a kind of price list for misbehaviour.” It is also seen in private law where the legal subject is one who “...owes duties, possesses rights, and is granted the legal power to settle his disputes with others by agreement” (Fuller, 1969, pp.25). Conversely, within a communist society, economic

exchange would be abolished, along with the legal and political concepts which stem from it such as legal rights and duties (Fuller, 1969, pp.25).

Fuller's discussion of morality outlines the framework within which one can understand law's nature. These different moral outlooks constitute human life in the ways detailed above. The morality of aspiration pushes man to realize her/his potential, to move forward in a constructive and reflexive manner. The morality of duty imposes upon man a minimum standard of behaviour from which s/he can reliably and collectively organize social life. These attitudes are the foundation upon which all social institutions are built. They are integral to all of human life and they can be found in not only the content of our social institutions, but the form as well. As Fuller notes, "[a] pervasive problem of social design is therefore that of maintaining a balance between supporting structure and adaptive fluidity. This problem is shared by morals, law, economics, aesthetics, and...also by science" (1969, pp.29). This is to say, the problem of social design is one of striking a balance between the morality of duty and the morality of aspiration. Importantly, this problem directs us not to a concern over being free versus being secure (as has often been the focus of debate within morals, law, politics, etc.), but to a concern over "...attaining a harmony and balance among the processes... of society as a whole" (Fuller, 1969, pp.29). This is the problem which man is faced with when s/he raises the question: what is law? Or what is law's nature? The law, like all social institutions, finds a way to solve this problem. It finds a way to balance these two attitudes. It is this solution that is the answer to man's question. Crucially, it is an answer that is not merely reflected in the law's content, but in its form and structure as well.

With this in mind Fuller turns his attention toward the law and its solution to the problem of social design (or as he calls it: the morality that makes law possible). On his view, the law is

the enterprise of subjecting human conduct to the governance of rules. Similar to Hart's contention that the rule of recognition exists by way of the actions of the courts, officials, and private persons, Fuller contends that the law exists in its pursuit of the principles of legality; hence its characterization as an 'enterprise' (1969, pp.39). This active depiction of law, like any other active human endeavour, means that it has the potential to fail. Recall that Fuller asserted that it is possible to know the bad through imperfect notions of the good and that this can be applied to social institutions and rules. Beginning from just such imperfect notions, Fuller deduces, by way of a lengthy allegory about an inept ruler named Rex, eight ways for a system of law to fail (see 1969, pp.33-41, 46-91).

- 1) Failure to achieve rules (i.e. every issue is dealt with on an *ad hoc* basis).
- 2) Failure to make available to the affected party the rules to which s/he is expected to observe.
- 3) Abuse of retroactive legislation.
- 4) Failure to make rules understandable.
- 5) Enactment of contradictory rules.
- 6) Enactment of rules requiring conduct outside of the ability of the affected party.
- 7) High frequency of change (i.e. rules change too frequently for the subject to adequately orient their actions by them).
- 8) Incongruence between the rules as they are announced and their administration.

These eight pitfalls of legal achievement represent the principles of legality and comprise the inner morality of law (Fuller, 1969, pp.41-44). Each principle can be understood as containing corresponding high (aspirational) and low (duty-bound) desiderata which serve to judge the relative legality of a legal system. Successful law is achieved in the simple fulfilment of the minimum demands of the principle. In essence, if a system of rules successfully fulfills the

minimum requirements of the principles of legality it is rightly a legal system and law can be said to exist, though it may not necessarily be a very good system with very good laws. One might assume that an excellent legal system, then, ought to be achieved by perfectly realizing each of these principles. This, however, is not the case. As we saw earlier in regards to the morality of aspiration, excellence is not synonymous with perfection, but rather with balance. As well, principles may conflict and, at times, a middle ground might have to be found. True legal excellence is thus to be found in the relative harmony of a system's realization of the principles (Fuller, 1969, pp.45-46). The inner morality of law is therefore a highly affirmative and creative endeavour; it demands more than simple imperatives such as 'do not kill' or 'do not steal' (Fuller, 1969, pp.42). It requires that the law be known or coherent and clear - accomplishments which necessitate the focus of human energies upon particular kinds of achievement rather than upon restricted sets of behaviour: "It is easy to assert that the legislator has a moral duty to make his laws clear and understandable. But this remains at best an exhortation ... The notion of subjecting clarity to quantitative measure presents obvious difficulties" (Fuller, 1969, pp.43). Although it encapsulates both, the inner morality of law lends itself more to the morality of aspiration than to the morality of duty.

The principles of legality are also the progenitors and guides of social organization. Notice that each principle is characteristically active. Each requires that actions be taken by legal actors in order to create and maintain law; rules will guide a citizen's behaviour, who in turn is expected to act according to them as laid out by the legislature:

This reciprocal dependence permeates in less immediately obvious ways the whole legal order. No single concentration of intelligence, insight, and good will, however strategically located, can insure the success of the enterprise of subjecting human conduct to the governance of rules. (Fuller, 1969, pp.91)

These principles thus work to (re)produce and maintain the bond of reciprocity between the citizen and lawgiver such that “[w]hen this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen’s duty to observe the rules” (Fuller, 1969, pp.40). In effect, “[a] total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all...” (Fuller, 1969, pp.39). The allegory of Rex illustrates this. As non-law pervades under Rex’s rule, citizens are less bound to follow the rules. Rex breaks the bond of reciprocity, thereby threatening collective social organization. This rupture is possible because implied in this bond is a view of man as a responsible agent who is “...capable of understanding and following rules, and answerable for his defaults... Every departure from the principles of the law’s inner morality is an affront to man’s dignity as a responsible agent” (Fuller, 1969, pp.162). In instances where laws are inadequately promulgated, for example, a citizen cannot rightly be answerable for her/his defaults because s/he was never given a sufficient chance to understand and follow the rules. It is through the implicit view of man that any one failure to achieve the principles of legality results in the destruction of the bond of reciprocity and a failure to achieve law at all. This view of man also pushes the law to strive for excellence. It urges a systematic structuration such that individuals are provided with the environment in which they can realize their own lives in their own ways while simultaneously maintaining their fidelity to the law and to collective social organization. The inner morality of law therefore embraces man as a capable and responsible agent while also protecting her/him from the constraints upon individual agency imposed by overwhelming and unjust duty. Ultimately, the inner morality of law creates and evaluates the category of ‘law’. It accomplishes this by (re)producing the conceptual foundations

(i.e. the moralities of aspiration and duty) upon which human life, collective social organization, and social institutions are built.

The imbrication of legal validity in the nature of law and existence of law should now be clear. In essence, Fuller's analysis simply holds that law cannot exist without first being valid as law. Contrary to Hart, there is no higher rule which exists above the concept of legal validity expressed in the principles of legality. As Fuller has shown, the nature of law as a social institution is such that the moniker 'law' is only afforded to rules which are derived from a morally legitimate procedure attuned to the conceptual foundations of social organization. The statement that 'law exists only where there is valid law' may sound tautological, but within Fuller's framework this is not the case.

## Chapter 2: Morality, Law, and the Separation of Description and Interpretation

With the substantive positions of Hart and Fuller aside, we can turn to the issue at the centre of their conversation – the relation between law and morals. Until now, we have used *The Concept of Law* (Hart, 2012) and *The Morality of Law* (Fuller, 1969) as touchstones for examining the authors’ theories in isolation from each other. However, these theories were not birthed in a vacuum, they came out of scholarly debate. This chapter will explore the authors’ engagements on the question of morality. So doing will illustrate that, as Fuller asserted in his *A Reply to Critics* (included in the revised edition of *The Morality of Law* (1969)), their dispute does “... indeed depend on ‘starting points’ – not on what the disputants said, but on what they considered it unnecessary to say, not on articulated principles but on tacit assumptions” (1969, pp.189). That is, their differentiation rests on ideologically – not empirically – substantiated assumptions.

Hart holds the view that morality has no deeper relation to the law than to inform the legal content of primary rules. Conversely, Fuller holds the view that law, to exist at all, must stem from and be structured by society’s balance of the moralities of aspiration and duty. While the authors’ positions can be quickly summarized in this way with a modicum of accuracy, their departure on this issue alludes to a deeper distinction nested in their ontological and epistemological assumptions about the law. To make this clear, this chapter will examine the authors’ engagement with the grudge informer case. Through this it will become clear that the question of law’s relation to morality turns upon the question: what is the character of legal knowledge? Hart holds the view that the law can be known in and of itself whereas Fuller holds the view that the law can be known in relation to morality. This distinction dichotomizes legal knowledge such that legal knowledge is thought to exist *exclusively* in either of two modalities:

knowledge of the law as it is (descriptive) or knowledge of the law as it ought to be (interpretive). This separation runs throughout Hart and Fuller's conversation and, as argued later, is maintained ideologically, not empirically. It is this isolated, antagonistic characterization of legal knowledge which has marginalized Fuller as a confused theorist while championing Hart as the beacon of reason throughout contemporary legal theory. This chapter will be concerned with detailing the conflict between descriptive and interpretive legal knowledge which arises through the *grudge informer* case. The method of producing this dichotomous characterization of legal knowledge will be the focus of Chapter 3 where the descriptive and interpretive divide will be dissolved through a (re)reading of Hart and Fuller's debate, revealing a nexus of (re)production that turns upon the ideological maintenance of the descriptive-interpretive separation.

*Postwar Germany, Law, and Morals*

Writing little more than a decade after the end of the Second World War, both authors, being legal practitioners, were confronted with the fallout of Nazi law, its attempted remedies within a newly established German government, and the theoretical and methodological ramifications of these endeavours. Notably, attempts to rectify the atrocities of Nazi law were coupled with criticisms of the separation between law and morals. Specifically, Gustav Radbruch, a German legal scholar who shared the positivist legal perspective prior to Nazi rule, observed that

... the Nazi regime had exploited subservience to mere law – or expressed, as he thought, in the “positivist” slogan “law as law” (*Gesetz als Gesetz*) – and from the failure of the German legal profession to protest against the enormities which they were required to perpetuate in the name of the law, that “positivism” (meaning here the insistence on the separation of law as it is from law as it ought to be) had powerfully contributed to the horrors. [Emphasis in the original] (Quoted in Hart, 1958, pp.617)

Radbruch’s observation directs us toward the heart of Hart and Fuller’s dissension, the opposition between the law as it is and the law as it ought to be. On the one hand, morality, for Hart, is not wholly absent in the law. It exists, but only insofar as it manifests in the content of primary rules. Morality does not extend into the structure of the law but, rather, only into the secondary rules of recognition, change, and adjudication. It is thus possible to have morally dubious laws which are at the same time valid in form and structure. In this way, Hart argues that Nazi law does not signify a refutation of legal positivism as Radbruch saw it so much as it exemplifies what “...was most important in the eyes of the Utilitarians [i.e. legal positivists]; for they were concerned with the problem posed by the existence of morally evil laws” (1958, pp.616). Hart takes great lengths to make it clear that to assert that law *is* law does not pass final judgement on the moral quality of the law. Rather, it is precisely in the ability to separate law

and morals that it is clear that “[l]aw is not morality...” (1958, pp.618). Simply because a rule can be said to be a valid rule of law does not mean that the rule ought to be obeyed (Hart, 1958, pp.618). There is thus a distinction to be made between the evaluation of legal rules (which occurs on moral grounds) and the description of the law.

On the other hand, for Fuller, morality is embodied in the ends of human life and the social order. For law to make sense it must facilitate and spring from the pursuit of this morality. Without this moral direction imbricated within the basic structure of the law, obedience to the law becomes untethered from human experience and fidelity to the law becomes unintelligible (Fuller, 1958, pp.656). For Fuller, Radbruch’s observation about the exploitation of the Nazi regime points to a more fundamental manipulation of the rule of law under Nazi authority. Not only did the Nazi regime routinely resort to retroactive legislation to provide legal grounding for previously illegal acts, but “...the Nazi-dominated courts were always ready to disregard any statute, even those enacted by the Nazis themselves, if this suited their convenience or if they feared that a lawyer-like interpretation might incur displeasure from ‘above’” [Emphasis in the original] (Fuller, 1958, pp.652). Consequently, during this time law was not truly in place because the Nazi regime demonstrated continued affronts to the inner morality of law. For Fuller these are important factors in evaluating the actions of the postwar German courts and they are emblematic of the extent to which the existence of law relies upon conceptions of what the law ought to be.

This discussion need not be confined to the abstract. Radbruch conceived of the law as harbouring in it the fundamental moral principle of humanitarianism which became illustrated in the practice of the German courts through its judgement of local war criminals, spies, and informers who operated under the Nazi regime during World War II (Hart, 1958, pp.618). These

cases are important because they provide concrete examples of retroactive legal judgement justified on moral grounds. Persons accused claimed that their actions were not illegal under the laws of the regime in power, yet their pleas were met with a reply by the courts that the laws upon which they relied were invalid because they contradicted the fundamental principles of morality (Hart, 1958, pp.618). One case in particular<sup>14</sup>, known as the grudge informer case, is used by Hart and Fuller to express their dissenting views on the relation between morality and the law. The events unfolded as follows:

In 1944 a German soldier paid a short visit to his wife while under travel orders on a reassignment. During the single day he was home, he conveyed privately to his wife something of his opinion of the Hitler government. He expressed disapproval of...Hitler and other leading personalities of the Nazi party. He also said it was too bad Hitler had not met his end in the assassination attempt that had occurred on July 20<sup>th</sup> of that year. Shortly after his departure, his wife, who during his long absence on military duty "had turned to other men" and who wished to get rid of him, reported his remarks to the local leader of the Nazi party, observing that "a man who would say a thing like that does not deserve to live." The result was a trial of the husband by a military tribunal and a sentence of death. After a short period of imprisonment, instead of being executed, he was sent to the front again. After the collapse of the Nazi regime, the wife was brought to trial for having procured the imprisonment of her husband. Her defense rested on the ground that her husband's statements to her about Hitler and the Nazis constituted a crime under the laws then in force. Accordingly, when she informed on her husband she was simply bringing a criminal to justice. [Emphasis in the original] (Fuller, 1958, pp.653)

Ultimately, the court of appeal ruled that:

...the wife was guilty of procuring the deprivation of her husband's liberty by denouncing him to the German courts, even though he had been sentenced by a court for having violated a statute, since, to quote the words of the court, the statute "was contrary to the sound conscience and sense of justice of all decent human beings." [Emphasis in the original] (Hart, 1958, pp.619)

Hart's issue with this judgement has to do with how the court justified punishing the accused. Although this might first appear to be a semantic criticism, it is not. The court justified

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<sup>14</sup> Judgement of July 27, 1949, Oberlandesgericht, Bamberg, 5 Süddeutsche Juristen-Zeitung 207 (Germany 1950), 64 Harv. L. Rev. 1005 (1951).

its action on moral grounds. It argued that the accused's actions were punishable because they betrayed some deep principles of morality held by all human beings. This directly ties legal decision-making with moral decision-making. It conflates legal obligation with moral obligation, thereby reducing fidelity to the law to fidelity to morality. This is problematic for Hart because it overrides legal obligation by amalgamating the law (which consists plainly of rules) with morality (which consists of disputable propositions). "[W]hen we have ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy" (1958, pp.621). Instead, Hart argues that the court ought to have introduced a new statute and retroactively punished the accused according to this. Although he acknowledges that this solution is a blatant compromise of legal form, it is effective because it administers proper justice (i.e. it secures the accused's punishment) while maintaining the integrity of the law as distinct from morality. Fundamentally, then, Hart is concerned with the maintenance of legal obligation as separate from moral obligation.

As we saw in the previous chapter, for both Hart and Fuller legal obligation is central to an understanding of the nature of law. For Hart, the rule-based structure of the law comes to light through the kind of obligation which arises from social rules. For Fuller, the genesis of obligation exists in the alignment of legal structures and demands with the plurality of human ends and the social order. Hart's concern is therefore not merely semantic; it is directed at the very core of law's nature. However, tied up in this criticism is the presumption that the nature of law can be grasped through a description of the law's forms and structure, without the need for an external referent<sup>15</sup>. As we will see shortly, Fuller's depiction of the grudge informer case

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<sup>15</sup> While Hart's claim does not preclude the possibility that legal knowledge is possible via some other metric, his proceeding works in the debate with Fuller retain a staunch focus on describing law through its forms and structures

leads to the opposite presupposition; that the law is interpretively discernible through external referents, namely morality. However, before we examine Fuller's position, we must ask why these ontological claims about the nature of law are tied to epistemological claims about the character of legal knowledge? The answer lies in the fundamental character of knowledge.

Epistemological and ontological claims reflect a basic metaphysical reality about the nature of human knowledge: for knowledge of an object/phenomenon or about a particular characteristic of an object/phenomenon to exist, that object/phenomenon or characteristic must first exist (be that in an organic, inorganic, or social state) and, second, humans must have the capacity to know about it. Existence (i.e. knowing *of* something) and meaning (i.e. knowing *about* something) are distinct yet related modalities which implicate epistemology and ontology in the production of knowledge through their mutual existence and interplay. We have already seen this relationship at play within our introductory discussion of law and crime. Hillyard and Tombs (2004) are concerned that the current description of crime is incorrect and, in effect, creates a meaning (i.e. the myth of crime's existence) that fails to capture reality which, for the authors, is more aptly described by the concept of social harm. Lasslett (2010), however, reframes how crime is described and, in effect, places new limits on what meanings are associated with it<sup>16</sup>. To prioritize existence over meaning or meaning over existence is to abandon holistic knowledge for a false, disguised approximation. So, if Hart claims that law's nature can be gleaned from a description of the form and structure of the law, then this

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while marginalizing law's normative dimensions. *The Concept of Law*, for example, is explicitly stated to be an analysis of municipal legal systems (Hart, 2012, pp.17) and in the postscript Hart refers to and defends his work as a general and descriptive account of law because "...in spite of many variations in different cultures and in different times, [the law] has taken the same general form and structure..." (2012, pp.240). It is thus fair to attribute to Hart the position that legal knowledge needs only reference legal form and structure to be meaningful.

<sup>16</sup> Another example is Lefebvre's (1991[1974], pp.14) dismissal of Cartesian spatiality as empty. Ostensibly, the entirety of *The Production of Space* (1991[1974]) provides a new description of space that associates the description a new meaning.

description must be meaningful in some way. That is to say, his description must reveal some fundamental truth about why the nature of law is structured in such a way. This requirement contradicts the legal positivist principle that separates the description of the law as it is from normative assessments of the law as it ought to be. However, it will be argued in Chapter 4 that in *The Concept of Law* (2012) Hart does this. He gives his description a certain normative meaning that unintentionally, but necessarily, contradicts his legal positivist position.

Fuller's criticism of the Grudge Informer case is based on an analysis of the Nazi statutes which the accused cites in her defense. The first was passed in 1938 which legislated against any individual who "...publicly solicits or incites a refusal to fulfill the obligations of service in the armed forces...or who otherwise publicly seeks to injure or destroy the will of the German people or an allied people to assert themselves stalwartly against their enemies" (Fuller, 1958, pp.653). It is clear where the woman's defense lies in relation to this statute. Her husband's denunciations of the then German leader and other prominent figures within the Nazi regime and his lamenting of the failed assassination attempt can be construed both as a solicitation/incitation to refuse service and as an attempt to injure the will of the German people. However, as Fuller notes, the statute clearly sanctions against *public* actions; yet, the accused, who was at the time barred from military service due to her sex, was engaged in a *private* conversation with her husband (1958, pp.653-654). It is widely recognized that judicial interpretation under Nazi governance generally extended sanctions to all utterances, be they public or private. But is the legal meaning of this statute to be found in this form of judicial interpretation? Is it to be found in a principle which sees the letter of the law blatantly at odds with judicial application? If a post-war German court were to punish the woman through retroactive legislation, it would be tacitly asserting that the previous actions of the court were in fact valid as law, but that they will

henceforth not be recognized as such. If Hart is prepared to justify a post-war German court's decision through retroactive legislation, then, according to Fuller, he must be prepared to hold that "...the legal meaning of this statute is determined in light of this apparently uniform principle of judicial interpretation [i.e. that public utterances encompass both public and private utterances]" (1958, pp.654).

Fuller extends this same criticism to the second statute which the accused cited in her defense. The statute, passed in 1934, details similar sanctions against the public utterances of political disapproval directed at the governing National Socialist German Workers' Party. Again, judicial interpretation of this statute eroded the existence of private utterances by subsuming all utterances of disapproval under this statute. Is it more fitting, Fuller asks, to validate this judicial interpretation and retroactively legislate against these statutes than it is for the post-war German courts to declare these statutes not law (1958, pp.655)? From here Fuller's position is quite clear. Judicial interpretation and administration under Nazi governance demonstrated incongruence between the rules as they were announced and the rules as they were administered, betraying the inner morality of the law. The German courts were therefore correct in arguing that the statutes comprising the accused's defense were not law because they betrayed the sound conscience and sense of justice of decent human beings.

In this we find Fuller's basic position that the law is, at its core, incumbent upon morality and if we apply our above analysis of the necessary components of knowledge, Fuller clearly claims that fidelity to the law requires an underlying moral structure. This means that the nature of law can be grasped through a process of enjoining law and morals. Knowledge about the law is therefore relative. That is to say, the law is knowable relative to moral sources, thereby requiring a process of interpretation that engages normative values and concepts to create a

picture of law. *The Morality of Law* (Fuller, 1969) does just this. It grapples with the basic organization of social life to interpretively construct the phenomenon of law.

In the end, we are left with two different assessments of the grudge informer case and with two different propositions as to the relation between law and morals. Crucially, however, as Fuller asserted in his *A Reply to Critics*, as already cited, their dispute does "... indeed depend on 'starting points' – not on what the disputants said, but on what they considered it unnecessary to say, not on articulated principles but on tacit assumptions" (1969, pp.189). One of these assumptions is the differing perspectives on the character of legal knowledge. Hart stresses a descriptive endeavour, attempting to meaningfully engage the question of law's nature through an investigation of its form and structure. In *The Concept of Law* (2012) Hart investigates the modern municipal legal system and goes to great lengths to isolate this system from the political and social contexts that comprise its content. His position on the irrelevance of legal validity to the nature of law and on the isolation of morality in the realm legal content emphasize his assumption as to the descriptive, conceptual character of legal knowledge. Fuller stresses an interpretive endeavour, attempting to engage the question of law's nature through its relation to morality. In *The Morality of Law* (1969) Fuller begins his investigation with a lengthy description of morality and makes relevant to the nature of law such concepts as the social order, duty, aspiration, and the nature of man, reflecting his interpretive stance on the character of legal knowledge. However, as it was mentioned previously, there may be cause to question whether the authors' separation between descriptive and interpretive legal knowledge is reflected in their works.

### Chapter 3: Maintaining Conflict

The space engendered by time is always actual and synchronic, and it always presents itself as of a piece; its component parts are bound together by internal links and connections themselves produced by time.

Henri Lefebvre, *The Production of Space*, 1991 [1974], pp.110

In the previous chapter it was implied that the view of legal knowledge as either descriptive or interpretive was an ideological distinction, not an empirical one. This chapter will substantiate this claim by showing how Hart and Fuller's analyses actually contradict this neat separation. In effect, there exists a (dis)unity between the authors' rhetoric which separates description and interpretation and their analyses which dissolve this separation. To do this the authors will be (re)read through a dialectic lens. In so doing, it will become apparent that the authors' rhetoric (re)produces and is (re)produced by a latent historicist, logos-centric method of knowledge production. This method is problematic because it fails to acknowledge the (dis)unity of the authors' rhetoric and analyses and (re)produces conceptions of the law which are exclusively understood, constructed, and disseminated through the interpretive context of time. The method prioritizes the logos to the extent that it dismisses the possibility of producing valid knowledge through other methods, thereby limiting the realm of possible enquiries. Importantly, this historicist, logos-centric method resides within the substance of the authors' work *and* the larger legal theoretical consciousness. Being located within theory and within the theoretical consciousness illuminates how this method implicates theories and disciplines outside of legal philosophy. Chapter 4 will explicate how this method is implicated in the criminological theoretical consciousness and, thus, in the (re)production of criminological knowledge.

Before we move forward, a concrete definition of historicism is in order. As it will be understood here, historicism is a practice of marginalization. Specifically, I will borrow from

Edward Soja's definition which states that historicism is "...an overdeveloped historical conceptualization of social life and social theory that actively submerges and peripheralizes the geographical or spatial imagination" (1989, pp.15). In other words, historicism refers to a particular structure of thought that emphasizes history and time as the conceptual windows through which social life and social theory are conceptualized. This theoretical practice encompasses the acts of understanding, construction, dissemination, and criticism. Although Soja was particularly concerned with the effects of historicism on the concept of space, and while our definition of dialecticism stems in part from critical spatial theory, the concept of space will not be attended to here. Rather, historicism will be observed for its marginalizing effects on dialectic knowledge production in legal philosophical theory<sup>17</sup>. This chapter will begin by deconstructing two crucial arguments which ground Hart's theory as a conceptual and descriptive account of law in order to uncover Hart's normative elements.

In his discussion of the internal perspective, Hart states that external social pressure is the driving force behind obligation to social rules: "...importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations" [Emphasis in the original] (2012, pp.87). In this way, normativity (i.e. social pressure) instigates fidelity to the law (i.e. obligation). In *The Concept of Law* (2012) fidelity to the law is said to derive both from legal form and structure (externally perceived dimensions which provide particular powers to particular rules and practices) *and* from external social pressures (internally perceived dimensions which are crucial in generating social obligation to legal rules and practices). The internal perspective is not only the basis for Hart's differentiation from Austinian legal positivism; it is a crucial component of Hart's establishment of the law as a

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<sup>17</sup> Chapter 4 will observe this marginalizing effect on dialectic knowledge production within criminological theory.

system of rules. So, if the internal perspective (i.e. obligation) is central to Hart's construction of the law and normative structures and practices are central to the internal perspective, there is a fundamental connection between normativity and the law. The core of Hart's argument therefore rests on imbuing the nature of law with meaning through sources outside of the law (normative structures and practices). Though rhetorically Hart downplays and at times denies this connection, a (re)reading of his work illustrates that there is a normative, and therefore a moral basis (in the sense of Fuller's definition), for the law outside of legal content.

In his *Postscript* (2012, pp.238-276) Hart acknowledges a similar critique put forward by Ronald Dworkin. Dworkin argues that useful theories of law are interpretive. That is to say, they explicitly reflect one moment or stage in the developing practice of law (Dworkin in Hart, 2012, pp.242). Hart offhandedly dismisses this criticism by restating that morally inert description is possible and that an objective observer can, and ought to, describe the internal aspect of obligation without "...himself shar[ing] the participants' acceptance of the law in these ways..." (2012, pp.242). This argument, however, misses the point. Dworkin's issue is not whether Hart himself can or cannot be an objective observer. Instead, the problem is whether what Hart is describing is the categorical form which the law takes. If fidelity to the law has both conceptual and normative dimensions, then it is possible to question whether Hart's description is indeed universal or whether, as Dworkin wrote, he is "...interpret[ing]...a particular stage of a historically developing practice..." (Dworkin in Hart, 2012, pp.242).

Hart's reluctance to acknowledge the interdiction of normativity in the formation of legal structure and the implication which this has on his purely 'conceptual' account of the law reflects a dogmatic desire to keep interpretation at arm's length and maintain a theoretical separation between description and interpretation. This has generated a sense of uneasiness within

surrounding discussions which has led to drawing lines – first between hard and soft legal positivism, second between legal positivism and natural law. Hard positivism, such as that advocated by Gardner (2012), strips legal positivism bare, arguing that it is a single thesis on legal validity and not a whole theory of law. This position reconciles the interpretive-descriptive conflict by simply ignoring the implications which larger interpretive questions bear upon the determination of legal validity. That is to say, it flatly dismisses criticisms that legal validity is, at least in part, discursively produced through social processes both internal and external to a system of law. Soft legal positivism, such as *The Concept of Law* (2012), acknowledges normativity, but quarantines it within the realm of legal content to ensure that the interpretative aspect does not taint the purity of a wholly descriptive account of law<sup>18</sup>. However, as we have seen, it is not necessarily possible to limit the implications of normativity to legal content. It implicates legal form and structure as well. If neither of these options suffices, natural law offers a solution that abandons the descriptive modality and embraces a wholly interpretive account of the law. The existence and perennial antagonism of these perspectives shows that a central concern of legal theory is to separate concept and norm and, as well, description and interpretation, because they are generally understood to be contradictory terms. This understanding has persisted such that any mention of their mutual existence within a single theory is thought to reflect irrationality, disorganization, and conflict - all issues a successful theory is supposed to resolve.

Dworkin's criticism of Hart offers some insight into why these modalities are thought to be contradictory. Dworkin actively temporalizes legal theoretical practice. He pairs utility with

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<sup>18</sup> There is considerably more nuance to these positions. However, for our purposes these characterizations accurately typify the overall separation between hard and soft legal positivism.

causality (i.e. useful legal theories with stages of a historically developing practice) and reflects a general understanding of theorizing as linearly and causally organized – both crucial elements of the logos. This has the effect of typifying description as temporally neutral (it remains constant over time) and interpretation as temporally contingent (it changes over time). If theories are to be reasonably and logically constructed, then a theory can only be attuned to either descriptive or interpretive knowledge because an object or phenomenon cannot both remain constant and change over time. Such an historicist conceptualization of legal theorizing reifies the mutual exclusivity of description and interpretation and (re)produces elements of the logos within the very fabric of legal theoretical practice. This state of affairs is not unidirectional. Rather, historicist legal theory (re)produces historicist legal theorizing while historicist legal theorizing (re)produces historicist legal theory. The maintenance of such a state of affairs actively marginalizes dialectic knowledge production within the legal field, allowing the logos to remain dominant over the anti-logos within the legal theoretical consciousness. This is particularly problematic because it (re)produces historicist, logos-centric constructions of the law and *a priori* dismisses anti-logos constructions of the law. This limits the ways enquiry of the legal object can be performed thereby limiting the breadth of understanding. We see this effect clearly in the way that Hart downplayed and ignored the foundational role of normativity in his theory and dismissed criticisms that highlight this oversight.

Hart's reluctance to embrace conflict and contradiction within his theory does his analysis a disservice. He has struck a poignant point in his account of legal obligation that is passed over in the race toward descriptive purity. His depiction of fidelity to the law as simultaneously constituted by legal form and structure (the external perspective) and by normative structures and practices (the internal perspective) speaks to a truth about mid-20<sup>th</sup>

century life within a western democratic capitalist society. That is, social obligation to a system or a rule is not exclusively causally related to the structure of said system or to the internal normative value systems and practices of those within or under the system. Rather, social obligation exists in dialectic relation to institutional form and internal and external norms. In the specific case of law, Hart shows us that social obligation simultaneously references and is referenced by objective legal form and structure on one axis and normative structures and practices on another. The relationship is such that neither can exist without the other, they are reciprocally necessary to law. We do not obey the law out of coercion alone nor are we coerced into obeying the law. By the same token, we do not obey the law out of social pressure alone nor does social pressure incite obedience to the law. It is a continued, simultaneous exchange between the two that generates the phenomenon we call fidelity to the law. The product(s) and the precedent(s) are mutually constitutive and simultaneously produced. While more cannot be said here, it should be evident that opening Hart's theory up to the anti-logos and embracing contradiction and conflict provides space for a more nuanced understanding of the relation between the internal perspective, the external perspective, and fidelity to the law without sacrificing logical coherence.

The second point where Hart melds description and interpretation is in his depiction of the transition from a pre-legal to a legal state. According to Hart, this shift occurs because a system of primary rules can only accommodate "...a small community closely knit by ties of kinship, common sentiment, and belief..." (2012, pp.92). However, if we ask why such a shift might occur in the first place our answer, and the subsequent *raison d'être* of secondary rules, contradicts Hart's general rhetorical position on the universality of law. Our expansion to larger social states has not originated *because* of the law or *out* of the law. Rather, and by Hart's own

admission, modern legal systems are a *response* to changes in the social landscape (2012, pp.92). The secondary rules of recognition, change, and adjudication exist for this sole purpose – to respond to the deficiencies of a pre-legal system of rules adorned only with primary rules of conduct. They exist out of the necessity for a system of social control to adapt to changing human circumstance. Hence Priel’s conclusion that “...Hart did not describe a universal truth about what makes something into law; at best what he did was articulate the idea of law as understood in a particular place and time, and especially for a particular group committed to certain political values” (2013, pp.408).

In the deficiencies of a system of primary rules and the responses proffered by the secondary rules we find the shifting values of particular groups. We find the values of fairness, liberty, and autonomy. We find a belief in progress, in the rationality of an ever-accumulating past capable of accounting for the present and guiding the future. In short, we find the echoes of a particular social stratum, structuring the law by defining the boundaries of effective and necessary social control. It is thus quite clear that the essence of law as Hart recounts is deliberately a product of social construction. In fact, the descriptive nature of this account actively masks the past, present, and future expressions of domination reflected in the very act of social construction. It reifies a western democratic liberal way of knowing and being and the system of law thereby constructed.

Taking these dynamics into account, Hart’s method of knowledge production changes in regard to his analysis. He moves from the descriptive to the interpretive modality, while rhetorically construing normative dimensions as conceptual. This (dis)unity between rhetoric and analysis is once again indicative of the pressures of historicism and the domination of the logos. By attempting to remain consistent with the historicist, logos-centric method, he (dis)unifies his

work and portrays a normative process as universal. The supposed origin of law is purported to be a universal shift in the methods of social control which takes the same structure and form regardless of spatio-temporal context. If Hart rhetorically embraced social construction as the process by which secondary rules are forged, then he would either be forced to concede to interpretive accounts of law or embrace both accounts and fall into contradiction. Here, we once again see the diffuse (re)productive pressures of the logos. The historicist character of the legal theoretical consciousness pushes Hart into (dis)unity, (re)producing the separation between description and interpretation. At the same time, the existence and form of Hart's theory functions to (re)produce the historicist, logos-centric structuration of the legal theoretical consciousness. Without observing this (dis)unity, this way of knowing and being becomes hegemonic and further reifies the domination of the logos over the anti-logos. In this way, enquiry into the nature of law is limited, pushing legal theory to narrowly (re)construct particular forms of law.

An attempt to embrace both sides of the descriptive-interpretive separation within legal theory has occurred before. In fact, in *The Law in Quest of Itself* (1940, pp.5-12) written prior to his debate with Hart, Fuller argued that the separation is illusory. "In the field of purposive human activity...value and being are not two different things, but two aspects of an integral reality" (1940, pp.11). Here, Fuller presents an injunction not to "separate the inseparable" (Fuller, 1940, pp.12). Yet only a few lines later he insists on a problem of choice arising for all whose "...activities touch the law" (Fuller, 1940, pp.12). The problem is between striving for what we already have and striving for something better. Should one operate within the descriptive framework of being and strive for the status quo or operate within the interpretive framework of value and strive for something better? Although Fuller acknowledges the

inseparability of value and being (description and interpretation) he submits to historicism by overriding their inseparability with a problem of practice. This reversion makes sense within the framework of historicism because Fuller's enjoinder of value and being is contradictory to an historicist, logos-centric legal theoretical consciousness. He explicitly joins two opposite poles. So, in order to retain some semblance of rational causality, he quickly separates the poles on a practical plane by temporally reevaluating the everyday functions of value and being. However, through a dialectic lens the (in)separability of these concepts is emblematic of the throes into which man is placed within everyday life, where it is possible to conceptualize the being of an object or phenomenon and its perceived value as mutually constitutive. As Lefebvre showed regarding space, the value with which it is ascribed and its being are always extant within the practice of everyday life. Fuller's issue does not represent a problem of choice so much as it represents an inability to reach past the prioritization of the logos. In this way, historicism within legal theory can be maintained even when it is acknowledged to be deficient.

Understanding Fuller's previous attempts at dialecticism gives greater context to his shift into the descriptive modality within *The Morality of Law* (1969). While it is quite easy to read Fuller's account through a dialectic lens, particularly given his above stated comments, his rhetoric and continued discussion with Hart conveys a reliance upon historicist, logos-centric knowledge production and, like Hart, results in a (dis)unity between his rhetoric and analysis. His analysis describes a disguised causal relationship by categorically relating normativity to the form and structure of the law. This is evident in the development of the inner morality of the law. Determining this morality, regardless of social context, is always done in the same way. That is to say, it is possible to unearth the inner moral structure of any social institution if one can observe the human ends of a given society along with its particular social order. This general

method causally relates the law to normative structures and practices in such a way that the nature of law is universalized as an oscillating normative construct. While the inner morality of law may change depending on the social context, the law itself, as a normatively constituted social enterprise, remains static across space and time. Morality only matters to law in the formation of its inner morality. In this sense Fuller's account is conceptual. Morality is subsumed as a component of law and thereby ceases to exist externally to it. The nature of law is therefore imbued with meaning by reference to the law's own structure and form, not by reference to an external object. In this way, Fuller shifts from the interpretive to the descriptive modality.

It should be clear that, for Fuller, the law is a social product. While the ends of human life and social order directly constitute the inner morality of law, the effects of law upon society (i.e. the normative structures and practices which constitute the inner morality of law) is not acknowledged. By failing to reflect on the implications which the law has on society, Fuller makes the relationship between law and society unidirectional. This reversion to generality is necessary within an historicist, logos-centric framework because if the law is constituted by social practices, then those same practices cannot be simultaneously constituted by law. If that were the case, then law and its progenitor would have had to exist at the same moment. This can be the case for a dialectic understanding of law, however, for an historicist, logos-centric understanding this cannot be. The cause must precede the effect<sup>19</sup>. Historicism and the logos teach us that this type of mutuality betrays reason because causality, a concept derived from the empirical observation of time, operates linearly. Hart demonstrates this 'impossible' simultaneity through the internal-external relationship. "[D]eviations from them [i.e. legal rules] are not

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<sup>19</sup> What we see here is a predicament similar to the bootstrap paradox wherein an object or piece of information loses a discernable point of origin. In this case, the object or information can thus be said to be "uncaused" or "self-caused".

merely grounds for a prediction that hostile reactions will follow [i.e. the external perspective] ...but [they] are also a reason or justification for such reaction and for applying the sanctions [i.e. the internal perspective]” (Hart, 2012, pp.84). This relationship acknowledges that the law is a product of social relations that function to limit acceptable action inasmuch as the law is a justification for the existence of those very limitations in the first place. Fuller’s account lacks this nuance, he simply describes the causal shift from social structure and legal practice. That said, it is not clear that even Hart recognizes that he demonstrated the dialectic relationship between law and society because, as we saw, he clearly stated that the legal state arrived out of response to the deficiencies of a pre-legal system of primary rules.

On the surface, Hart and Fuller forward dichotomous characterizations of the law. But upon closer inspection, their analyses converge and the authors actually trade places. Hart’s analysis takes up Fuller’s interpretive position while his rhetoric remains descriptive. Fuller’s analysis takes up Hart’s descriptive position while his rhetoric remains interpretive. In the face of evidence as to the (dis)organized and (dis)united space occupied by law, Hart and Fuller’s historicist dogmatism is both confusing and unsurprising. Looking outside of the theories themselves, as we saw briefly regarding Dworkin’s criticism of Hart, we are confronted with a wider scholarly discourse typified by a logos-centric historicism. The investigations and conversations which have built up around the Hart-Fuller debate have remained driven by the separation between description and interpretation, a state of affairs which is reciprocally (re)produced by the authors, their works, and the surrounding discourse. On the one hand, Green, in his introduction to *The Concept of Law*, emphatically states that “[l]aw is a social construction. It is an historically contingent feature of certain societies, one whose emergence is signalled by the rise of a systemic form of social control administered by institutions” (in Hart,

2012, pp.xv; see as well generally Green, 1999; Green, 2008). This same position can be read in McCormick (1981), Raz (2011), and Gardner (2012) who have explicitly worked to further a conceptual, descriptive legal positivist project. On the other hand, Waldron (2008, pp.1137) and others (see Priel, 2012; Priel, 2013, pp.412; Soper, 2007, pp.202-203) have criticized Hart and his proponents not only for misinterpreting Fuller and natural law criticisms, but for treating a normative fact as a conceptual question. Consequently, by actively taking sides, all of these works divisively uphold the separation between the descriptive and interpretative modalities. They (re)produce and are (re)produced by historicism and the domination of the logos. They further entrench the investigatory lens of reason, causality, and time into the legal theoretical consciousness, thereby narrowing the scope of legal knowledge and (re)producing conceptions of the law which fit within this historicist, logos-centric framework. That is not to say that dialectic thinking has been wholly absent. Manderson (2010) attempts to read Hart and Fuller side-by-side and Finnis presents a collection of essays which express the mutuality of description and interpretation within the milieu of sociality wherein he states that "...no one ever can rationally treat a *fact* alone as giving reason for anything... [t]here must always be some 'evaluative argument' for treating any fact or combination of facts as a 'basis' for identifying a proposition as obligation-imposing or...normative" [Emphasis in the original] (2011, pp.4). And, as we have seen, Fuller came close to practicing a dialectic method in *The Law in Quest of Itself* (1940). Crucially, however, there remains a prioritization of historicism and the logos that actively marginalizes and frequently dismisses dialectic, anti-logos knowledge. As a result, this state of affairs is (re)produced and legal philosophical knowledge is limited to (re)producing particular constructions of the law. This populates legal philosophy with a (dis)unified type of knowledge that is not acknowledged as such. It is this failure to acknowledge (dis)unified knowledge that is

truly problematic because it raises questions about the truthfulness of legal philosophical knowledge.

## Chapter 4: The Concept of Crime

This chapter will explore the relationship between legal philosophy and criminology's method of knowledge production. First, definitions of crime will be extrapolated from the conventional understandings of Hart and Fuller's theories<sup>20</sup> - putting aside for the moment the criticisms of these understandings levelled in the previous chapter. It will be argued that these definitions mirror definitions within Robert Agnew's (2011) representation of criminology. This similarity emphasises the closeness of the legal philosophical and criminological fields and demonstrates how these disciplinary representations (re)enforce concepts, rhetoric, analyses, and, most importantly, methods of knowledge production within the other. As we will see, Agnew's criminology maintains the ideological distinction between description and interpretation through the same historicist, logos-centric (re)productive process. Applying our refashioned dialectic method, it will be argued that, similar to Hart and Fuller, mainstream and critical criminological analyses harbour elements of both the descriptive and interpretive modalities while their rhetoric maintains the historicist, logos-centric method. This method prioritizes particular constructions of law and crime and, in criminology in particular, (re)produces and is (re)produced by criminology's crisis.

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<sup>20</sup> By 'conventional understandings' I do not mean to reference one specific reading, but rather the rhetorical position that the authors take in their works.

*Hart and Fuller on Crime*

As it is now clear, for Hart, the law is embodied in the union of primary and secondary rules. Regarding the concept of crime<sup>21</sup>, there are some important differences between these two sets of rules. Primary rules, as we know, dictate what human beings are required to do and abstain from doing, whether they wish to or not (Hart, 2012, pp.81). They directly express crime as the violation of legal rules. These rules also vary, as we have seen, depending on the social context. However, Hart notes that there are particular truisms about human nature which always exist within the primary rules given that man lives with others:

[T]he [primary] rules must contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other. Such rules are in fact always found in the primitive societies of which we have knowledge... (Hart, 2012, pp.91)

So, in conjunction with rules that vary depending on social context, there are also more general primary rules that exist within all systems of law. Importantly, neither of these types of primary rules has an intrinsic quality which *a priori* defines them as criminal. All primary rules come to be and maintain their authority through obligation. The legal validity of primary rules is generated; it is not innate. However, breaches of the rules, whatever their content may be, are justifiably punished through the pressures of obligation. The very nature of law as a system of rules is to punish deviations from the rules, meaning that crime is no more than the violation of legal rules.

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<sup>21</sup> It should be noted that Hart does elaborate on the concept of crime in his work on punishment (2008; see also Lacey, 1994; Wesley, 1992). In the interest of confining our discussion to the terms of Hart and Fuller's conversation I will piece together a Hartian definition of crime which does not deviate from his position in *The Concept of Law* (2012) and his earlier writing on legal positivism (1958).

Secondary rules, though legal rules as well, do not belong within a concept of crime. They cannot be punished in the same way as primary rules because deviation from them occurs at the structural level, not the individual level. That is to say, secondary rules define the form and structure of the law. Specifically, secondary rules perform two interrelated functions. First, they create institutions and institutional practices which administer and govern the law. Second, they ensure that these institutions and institutional practices are malleable. That is to say, these institutions and institutional practices consider social context. With these two functions, secondary rules construct the law's form and structure and ensure that this form and structure reflects the social context. These rules are *about* law whereas primary rules *are* law. In effect, secondary rules do not determine individual culpability. Conflict, for secondary rules, manifests between content and form (i.e. between legal rules and legal structures and practices). It is a structural issue and, for this reason, citizens and legal actors cannot be held accountable for deviations from these rules. Consequently, resolutions to structural issues result in the application of *ex post facto* law.

To give colour to this, let us return to Hart's engagement with the grudge informer case detailed in Chapter 2. Hart argued that although the final verdict was indeed correct, judicial reasoning ought not to have been predicated upon moral condemnation of the accused's actions, but upon the creation of legislation which retroactively secured the accused's punishment and condemned the previous judicial interpretation. Importantly, this solution demonstrates that judicial interpretation under the Nazi regime was seen to be inconsistent with judicial interpretation within post-war Germany and, in order to realign the current realities of the law with its past proceedings, previous interpretations of the law must be negated. However, this negation cannot be secured on the grounds of criminality (i.e. that past rulings of judges

somehow violated a particular legal rule and are therefore justifiably punishable), just as it cannot be secured on the grounds of moral condemnation<sup>22</sup>. Rather, it must be secured by retroactively nullifying the previous ruling and judging the current case according to new legislation. This is because to negate previous law on the grounds of criminality would throw into question the very notion of judicial discretion. It would criminalize the process of judicial interpretation, by punishing judges for passing incorrect interpretations. This would take away the judges' freedom to apply their interpretation of the law and make the adjudication process an act of applying the law as it is written. Furthermore, the appeals process and the existence of higher and lower courts would become irrelevant as judges would, through threat of punishment, do no more than level the same judgment as the original court. Ultimately, to condemn a ruling based upon its criminality and punish judges would throw the secondary rule of adjudication into contradiction with itself. It would confer upon judge's the power to adjudicate via judicial discretion while simultaneously stripping that power away. As such, it is not possible to violate secondary rules in the same way as primary rules without making the very structure of the law inconsistent with itself. Consequently, secondary rules must be able to be compromised without incurring the label of crime because they are not concerned with individuals, but with ensuring the internal consistency of a system. It is thus fair to argue that a Hartian definition of crime is simply the violation of primary rules and can be grasped by observing the law in isolation.

Fuller implies, as it should be expected, a definition of crime that looks past the law. As we know, for Fuller the law is characteristically active, it is the enterprise of subjecting human conduct to the governance of rules. It can therefore be said to exist through the actions of people.

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<sup>22</sup> Hart's position on the deficiencies of morality as a basis to sufficiently negate previous law was detailed in Chapter 2.

Be they judges, lawyers, politicians, academics, policy-makers, the media, or the general public, the law must be acted out to exist. However, individuals do not act out the law for its own sake. Rather, the actions of people impart on law their various ends and society's social order. This process imbues the law with different values as the actions of different actors embed within the law different ends and forms of social organization. Thus, as Fuller demonstrated through the allegory of Rex (1969, pp.33-39) and in reference to the changes in legal form under communist and capitalist systems (1969, pp.24-26), the law is fundamentally reflective of a struggle over dominant ways of being. Certain values are prioritized over others as the form and content of the law are contingent to domineering values. In this way, the law is a relative, not unanimous, enterprise. Crime inherits these characteristics. It is defined by the struggle of particular groups to have their values realized within law. As particular ends and particular ways of organizing society are prioritized over others, different ends and organizations are marginalized as less dominant groups have less power over the creation of law. The Indigenous populations in Canada are but one example of how a marginalized way of being, largely unrepresented within the law, can result in increased confrontation with the law. In this Fullerian sense, crime cannot be fully grasped by observing the law in isolation. It, just as law, varies over time and space and is fundamentally determined by the ways that particular values are acted out in the government of human conduct. It is tethered to the general moral standards (i.e. the ends of human life and the social order) of particular societies.

This definition is further substantiated in Fuller's determination of a 'good' system of law. The legal enterprise is expressed through the inner morality of law which is constituted by the principles of legality. The administration of these principles is itself governed by morality where a 'good' system of law finds a balance between all eight principles. As the notion of

balance implies, a 'good' system of law ought not to obtain perfect alignment with all of the principles because perfection both imposes an overwhelming burden of duty upon individuals and would be impossible to uphold given the inevitability of certain principles which would conflict with one another (Fuller, 1969, pp.45). It follows, then, that a 'good' system of law is not without deficiencies. It would, at times, stifle the achievement of some human ends and fail to protect the social order. It would not be perfectly moral and, in this way, could be judged as deviant, failing to be law at all. Insofar as the law deviates from morality it can be said to be criminal. Crime, as a concept, is therefore capable of regulating and judging the law. In this way, a definition of crime necessarily incorporates elements other than the law.

For both Hart and Fuller crime is socially produced. Be it via social pressure or via morality, crime is a social product. Hart defines crime narrowly as the violation of primary rules, prioritizing a factual and descriptive account. Fuller defines crime broadly through its relation to shifting moral standards, prioritizing a value-driven and interpretative account. That said, these definitions of crime, like the authors' substantive legal theories, dissolve the separation between description and interpretation. Hart relies on normative behaviour to explain how deviation from primary rules is justifiably punished and, therefore, how they are imbued with their criminal character. Fuller universalizes the human struggle to structure society and the law, thereby generalizing crime as a universally normative construct. Thus within the realm of crime, as within the realm of law, the authors maintain a (dis)unity between their rhetoric and analyses; that is to say, between their historicist, logos-centric method of knowledge production and their analyses which amalgamate description and interpretation. Here, we catch the first glimpse of the projection of this historicist, logos-centric state of affairs in(to) criminology.

*Connecting Hart, Fuller, and Agnew's Criminology*

According to Agnew (2011, pp.2-5) criminology can be broadly separated into two approaches: mainstream criminology and critical criminology. Each conceptualizes crime in different ways. They bring with them different assumptions, methodologies, and foci and take for granted different claims regarding the nature of reality, people, society, and agency. Though all these factors interrelate to constitute these perspectives, the following section will speak to how mainstream and critical criminology define crime and, in so doing, align with Hartian and Fullarian treatments of crime and law.

“Mainstream criminologists define crime as acts that violate criminal law, and they focus their research on what are sometimes called ‘street crimes,’ which include individual acts of violence, theft, and drug use” (Agnew, 2011, pp.13). This focus on individual street crimes causally relates crime to the deviant actions of individuals. These actions are constituted by an individual’s history, including her/his physiological experiences and social/physical environments. This focus stems from the severity of the individual and community harms which street crimes entail as well as the increased attention they garner from politicians, government officials, the media, and the general public (Agnew, 2011, pp.15). Implied in this definition of crime is a general consensus on what constitutes criminal behaviour. That is to say, it is implied that the harmfulness of particular acts and widespread attention of the general public expresses a social agreement regarding what is and what is not a crime. This view is so fundamental to mainstream criminology that, even though it significantly narrows what is and is not defined as crime (i.e. it ignores significant sections of law, such as contract law), many mainstream researchers do not present or defend this definition (Agnew, 2011, pp.14). For this reason, the mainstream definition of crime lacks an authoritative source which one can refer back to. Rather,

it is inferred from the researcher that hold the general positions outlined above. That said, mainstream criminology constitutes an important portion of the criminological core and is frequently relied upon to inform, among other things, public policy and legislation.

Mainstream criminology has been criticized for a number of reasons. Most notably by critical criminology which has argued that the legal definition of crime ignores the power differentials of different social groups in constituting legal rules (Agnew, 2011, pp.16-18). Social acceptance is not unanimous and as dominant groups are able to exert more power over the legislative process than less dominant groups, behaviours which threaten the interests and values of the dominant groups are more likely to be criminalized, regardless of the actual harmfulness of the behaviour in question. By failing to acknowledge this struggle mainstream criminology takes for granted the social acceptance of legal rules, universalizing the values of dominant groups and perpetuating the marginalization of others (Agnew, 2011, pp.17). This criticism has been challenged by mainstream criminologists on the basis that many legally defined crimes threaten the interests of the powerful and powerless alike. Furthermore, because the law is based on social consensus (Agnew, 2011, pp.19), embracing the legal definition of crime reflects the public's views about what should and should not be defined as criminal. Behaviours which cause bodily harm, property damage, and property loss have been shown to align with public sentiment in a number of different societies. As such, the legal definition of crime remains sufficiently objective as it aligns with general public views (Agnew, 2011, pp.17). However, others have argued that there is significant difference in public opinion involving supposedly 'victimless' crimes such as homosexuality, low level drug use, and gambling and that this observation throws into question the consensual nature of the law. Regardless, the mainstream definition of crime is widely used within criminology and is quite clear in its propositions. It takes crime to be the

violation of criminal law rules where the content of these rules is born out of social agreement. In this way, researchers who utilize the mainstream definition avoid the imposition of personal value when investigating the causes of crime. They describe crime as it is, avoiding the use of normative value judgements.

It should be clear how mainstream criminology and Hart align on crime and law. Both situate crime within the scope of individual actions and both contextualize their objective/descriptive position within the framework of law's social formation, be it through social consensus or social pressure. Unsurprisingly, mainstream criminology is subject to a similar (dis)unity between rhetoric and analysis as it contends that the legal definition of crime is objective, yet constituted by a process of social consensus which imbues its foundation with normative behaviours. Furthermore, observing mainstream criminology's methodologies, these researchers rely primarily on quantitative modes of enquiry such as survey data to causally explain crime. While Agnew (2011, pp.3) has observed that mainstream criminology has been influenced by critical criminology as it has begun to supplement quantitative data sets with qualitative data such as subject interviews, it has kept these methods at arm's length and maintained their subordination to quantitative methods. Mainstream criminology has also begun to more directly confront normative concepts such as race, ethnicity, gender, and class, but has done so by causally relating them to crime. In effect, mainstream criminology masks the dissolution of the descriptive-interpretive separation through a rhetoric of historicism and logos domination that (re)produces this separation within the criminological theoretical consciousness. This structuration of thought is reinforced by the alignment of mainstream criminology with Hartian legal philosophical concerns.

Critical criminology holds a number of competing views on how best to define crime. Due to the limitations of this project, only one will be engaged. This definition begins from the premise that crime is a social construction, that it cannot be objectively defined because it is constituted through a social process whereby normative behaviours, in their temporal and spatial contingency, are inscribed into law through competition: "...[G]roups compete with one another to get their views translated into law, with the more powerful groups winning out" (Agnew, 2011, pp.27). Crime is a reflection of this struggle to create law and is therefore defined using the legal definition as it is employed within particular societies at particular points in time (Agnew, 2011, pp.27). Importantly, by accounting for variance in *use*, changing social dynamics and values are accounted for while crime remains a distinctly legal concept. This dualism ensures that crime is not conflated with normative values and dynamics.

It should be clear how critical criminology and Fuller align on crime and law. Both situate crime as behaviours which betray a particular normative standard, determined through a process of competition whereby the law becomes inscribed with the values (i.e. ends of human life and social organization) of particular groups. Implicitly, critical criminology puts forward a similar argument to Fuller's regarding the process of determining the inner morality of law. Fuller held that by observing the ends of human life and the social organization of a given society it was possible to uncover the inner moral principles which structure law. This, he claimed, illustrated that law is a singular and unified institution built upon shifting socio-political landscapes. For critical criminology, the process of determining crime is such that, given the social values of dominant and marginalized groups within a particular society at a particular point in time, one can socially contextualize the law and thereby uncover the meaning of crime within that time and place. Like Fuller, critical criminology generalizes crime through an

objective process of identification, meaning that in the same breath crime is characteristically variable and invariable. It is a universalizable concept which is constituted by normative processes and behaviours. In this sense, critical criminology presents an objective account of crime and utilizes the descriptive modality. Furthermore, by characterizing crime as an expression of the values of dominant groups, critical criminology causally relates crime to shifting normative contexts in a unidirectional fashion: normative behaviours dictate the content of the concept. This fails to recognize the effects that conceptualizations of crime have on normative behaviours. In effect, critical criminology masks the dissolution of the descriptive-interpretive separation through a rhetoric of historicism and logos domination that (re)produces this separation within the criminological theoretical consciousness<sup>23</sup>. This structuration of thought is reinforced by the alignment of critical criminology with Fullerian legal philosophical concerns and simultaneously (re)produces constructions of crime and law within this limited historicist, descriptive-interpretive worldview.

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<sup>23</sup> There are a host of other factors such as the links between particular types of research endeavours and institutional grant funding as well as the gender, race, and class make-up of legal and criminological scholars which contribute to the (re)production of historicism, logos domination, and the descriptive-interpretive divide within criminological and legal theorizing. Due to the constraints of this project they cannot be fully engaged here; however, their existence and contribution to the (re)production of criminological knowledge cannot be dismissed.

*Coming Back to Crisis: what it means to learn from legal philosophy*

We can now turn back to the argument regarding criminology's crisis laid out in the introduction. It was argued that criminology was of two minds. On the one hand, with all of the facets of human life coming to a head within the realm of crime (and law), criminology is poised to engage any and all aspects of thought and being. Biology, psychology, language, culture, space, politics, economy, poetry, music, all of these and more are vastly relevant to how and why humans do and think in particular ways and therefore how and why humans regulate their behaviours. This intellectual fluidity gives the discipline an inherent eclecticism. On the other hand, these seemingly endless intersections have produced disciplinary divisions which, when coupled with the general inability of criminologists to constructively synthesize knowledge across these borders, have given rise to a sense of intellectual disorganization that risks ultimately manifesting in widespread disciplinary fragmentation. Ad hoc solutions to this fragmentation have taken the form of small, self-referential sects within criminology which have begun to forgo engaging outside their tight-knit intellectual circles. Unsurprisingly, the tension between eclecticism and fragmentation has led criminologists to doubt what criminology is and what it ought to be. Some embrace eclecticism and, according to their detractors, allow the discipline to slowly lose relevance as it becomes hyper-fragmented. Others have attempted to constructively synthesize disparate knowledges under a single, self-referential criminological banner which has led to a tightening of criminological boundaries and an altogether dismissal of the criminological project (see Hillyard and Tombs, 2004 for an argument for a social harm approach).

It was hypothesized that, through our dialectic method, criminology could reflexively (re)engage itself and others, understanding this supposed crisis as an historicist, logos-centric

reaction to criminology's chaotic character. That rather than submit to this false choice, criminology can investigate crime in an eclectic manner while retaining a sense of disciplinary unity that does not require a closed self-referential attitude to pervade and abstract the discipline from the multiplicity of human existence. It should now be clear how this project has sought to subvert criminology's crisis. By embracing a dialectic method of knowledge production, itself founded upon philosophical reflexivity in the form of simultaneous criticism of the self and the other, criminology can constructively learn from and integrate the other (in our case learning how legal philosophy, its construction of crime, and its structuration of legal theorizing bear on substantive criminological knowledge claims as well as the practice of criminological theorizing); it can do this while simultaneously reflecting upon and operating from the self (in our case by questioning how mainstream and critical criminology (re)produce their own knowledge claims). Collecting these insights, criminology's crisis does not appear to be the dire situation as has been claimed. It is possible to learn from both the sum and the parts, albeit in a messy fashion. Criminologists can both shed and embrace differences in basic assumptions. They can embrace conflict and contradiction in a way that distances ideas, concepts, and practices from one another while simultaneously bringing them together. In this way, it is possible to acquire a new depth of understanding for the meanings, practices, and interconnections which (re)produce knowledge and characterize human thought and being. In this way, criminology's crisis is not an existential bubble waiting to burst. It is not a conflict requiring a resolution. Rather, it is a reflection of the very character of human knowledge, of the struggle which man faces in everyday life between the Apolline pull to reason and the Dionysiac push to unreason.

## Final Remarks

We have seen that there are significant lessons to be learned from legal philosophy if criminologists are willing (re)engage the discipline, both in terms of substantive theoretical positions and understanding the (re)production of legal and criminological knowledge. Through a renewed engagement with legal philosophy, this project has sought to show how criminology can learn about itself – about the ways by which it, and other disciplines, (re)produce knowledge within its own borders and within the borders of others. I began by embracing a unique dialectic method that seeks knowledge of the whole through, and in opposition to, its parts. This methodology has allowed us to investigate polemics at a number of levels at the same time – criminology contra legal philosophy, Hart contra Fuller, mainstream criminology contra critical criminology, interpretation contra description, and law contra crime. Fundamental to this method is a reflexive attitude premised upon open criticism and conflict. It is fitting that the concepts of the logos and the anti-logos are the bases of this method because, as we know, they originated in Friedrich Nietzsche's *The Birth of Tragedy* - this work was originally lambasted and Nietzsche would write a scathing review entitled *An Attempt at Self-Criticism* which would preface later editions (2003, pp.3-12). Lefebvre, in *The Production of Space* (1991[1974]), extended Nietzsche's teachings into the realm of space, leaving geography and social theory forever changed. By identifying the Apolline and Dionysiac forces within the concept of space, Lefebvre sought to reframe space using the logos *and* the anti-logos. He sought to validate the use of the anti-logos by illuminating the (dis)unification of the concept of space; that is to say by depicting space not as a distilled sum, but as a messy whole.

By engaging criminological and legal theorizing in a similar fashion we have been able to make some sense of the ways by which preconceived ways of knowing and being within the

practice of both legal and criminological theorizing (re)produce understandings of law and crime. This method of knowledge production permeates both disciplines. It separates description and interpretation and prioritizes historicism and the logos. It (re)produces and is (re)produced in the practices of these disciplines and it obfuscates the (dis)unity which arises between ideologically maintained rhetoric and empirically grounded analyses. It was shown that Hart and Fuller both exhibit this (dis)unity. Hart was found to normatively ground his theory while arguing for the maintenance of objective description while Fuller universalized a normative process.

Concepts of crime were then extrapolated from Hart and Fuller's legal theories. These were found to mirror Agnew's representations of crime within mainstream and critical criminology, making it clear that representations of criminology exhibit a similar (dis)unity. Hart and mainstream criminology conceive of a legal definition of crime and align with the objective thrust of Hart's legal theory. Fuller and critical criminology conceive of a socially contingent definition of crime and align with the normative thrust of Fuller's legal theory which attempts to embrace the necessary interpretive dimensions of the law. These alignments demonstrate how the rhetorical framework achieves unification through opposition. It (pre)dictates legal and criminological knowledge while embedding itself within the theoretical consciousness of the disciplines. Ultimately, the (dis)unity between legal and criminological rhetoric and analyses is disguised as this rhetoric and the (re)production of the descriptive-interpretive relationship appear to resolve conflicts and contradictions by unifying and organizing legal and criminological knowledge. These parallels make it explicitly apparent how knowledge about law and crime is (re)produced within and across criminology and legal philosophy.

Finally, by unmasking these practices, worries over criminology's crisis begin to fall away as it is uncovered to be a mere repercussion of this pervading structuration of knowledge. As we saw criminology can be at once eclectic and autonomous. It can stem from and reflect back on its own knowledges while simultaneously embracing the knowledge of other disciplines. It can, in the same breath, be heralded for its integration of psychology, economics, biology, sociology, political science, and philosophy while actively erecting barriers between these knowledges and the larger whole. Criminology's crisis has revolved around reconciling these supposedly mutually exclusive practices by presenting criminologists with a choice: maintain the status quo or change. Keep our borders open and remain eclectic, but fragmented or close ourselves off to more fully develop a self-referential discipline. But this choice between within and without, between the self and the other is, as it should now be clear, false. These are not opposed states of being that must be chosen between, but rather a single multi-faceted image, itself representative of a small portion of the larger portrait of human life. As the distinction between existence and meaning folds in on itself within legal philosophical and criminological perspectives, so too does it dissolve when we begin to contemplate criminology's existential crisis. Chaos and messiness are the way of things, as are order and organization. They are two sides to the same coin; we cannot prioritize one because the other appears illegible, rubbed out by the passage of time. We cannot compartmentalize and organize ourselves to the point where life and the world fit with preconceived notions of how things are or ought to be. Rather, we must become equally comfortable with the messiness that knowledge entails as we are with the reason which it gifts. Let us heed the warning that Nietzsche (2003, pp.54) laid when he called to out to Euripides:

...though you greedily plundered all the gardens of music, all you could manage was a counterfeit, masked music. And because you abandoned Dionysus, Apollo

in his turn abandoned you; though you rouse all the passions from their beds and bewitch them into your circle, though you whet and hone a sophistical dialectic for the speeches of your heroes, they too will have only counterfeit, masked passions, and speak only counterfeit, masked speeches.

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