

“The Rule of Law” Means Literally What it Says: The Rule of the Law’: Fuller and Raz on Formal Legality and the Concept of Law⁺

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‘The rule of law’ means literally what it says: the rule
of the law[.]¹

I. Introduction

What is the conceptual relationship, if any, between *the rule of law* and *law*? Clearly there is some kind of linguistic relationship: we are using the same word ‘law’ in both expressions.² However, in modern jurisprudential thought the rule of law (ROL)³ is most commonly associated with a political ideal about how governance by law might best proceed, rather than being simply the rule of ‘laws’, where ‘laws’ are those things that would fit within our concept of law. Many theorists of analytical jurisprudence would agree that one makes one inquiry to see whether a system falls within our concept of law, and another inquiry to see whether it accords with our ideal of the ROL.⁴ However, Simmonds observes that making such a distinction between one’s ideal of the ROL and one’s concept of law is

not an entirely comfortable one, for it aims to separate ideas that, in our ordinary understanding, are not clearly separate but closely linked and perhaps inseparable.

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¹ Joseph Raz, ‘The Rule of Law and its Virtue’ in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1983) (‘The Rule of Law and its Virtue’) 212.

² Richard Fallon makes the same point in Richard Fallon, ‘The Rule of Law as a Concept in Constitutional Discourse’ (1997) 97 *Columbia Law Review* 1, 10.

³ Hereafter I will generally use the acronym ‘ROL’ to refer indicate ‘rule of law’; where there is an exception it will be either stylistic or to make a linguistic point.

⁴ The prime example of this position is Raz, above n 1.

Taking words at face value, might we not reasonably assume that ‘the rule of law’ refers to a state of affairs where law rules? Is it really possible to think of law’s existence as one thing and its ‘ruling’ as another?⁵

This paper examines the significance of denying the separation of the concept of law from our ideal of the ROL. This raises as many questions about conceptualising law as it does about the ROL, cutting to the core of the jurisprudential endeavour. When we focus on the question itself, we find that the conceptual separation of the ROL and the concept of law has been both denied and supported by different legal theorists, often on the basis of their concept of law.⁶ Simmonds characterises legal positivists as generally presenting a dualist approach to this question, whereby the ROL is separated from the concept of law.⁷ However, this depends on the positivist: Matthew Kramer must be noted as one clear legal positivist exception.⁸ Thus, I will focus on the most prominent positivist dualist, Joseph Raz. I will contrast his view with Lon L Fuller’s idea that the formal legality account of the ROL should be regarded as part of our concept of law – a position I have termed ‘monism’. Thus, apart from a description of the competing positions, this paper will focus on analyzing the conceptual relationship between the ROL and law through examining a possible inconsistency in Joseph Raz’s legal theory.

The arguments surrounding the positivist ‘law as it is’ and the natural law ‘law as it should be’ have significant parallels with the dualist ‘law as it is’ and the monist ‘law as it should be’ debate.⁹ In particular, there is a parallel that, to some degree, our conceptual problem is linguistic or about the use of words, reducing down to the questions of ‘[h]ow shall we state the problem?’ and ‘[w]hat is the nature of the dilemma in which we are

⁵ Nigel Simmonds, ‘Law as a Moral Idea’ (2005) 55 *University of Toronto Law Journal* 61, 63.

⁶ Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] *Public Law* 467, 487. See also the similar argument at 477.

⁷ Simmonds, above n 5, 64–6, discussing the views of Raz and Kelsen. David Dyzenhaus has also made this observation of the positivist dualism: David Dyzenhaus, ‘Transnational Justice’ (2003) 1 *International Journal of Constitutional Law* 163, 174. See also John Gardner, ‘Legal Positivism: 5 ½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199, 207–11.

⁸ See Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (1999) 45–53; Matthew Kramer, ‘On the Moral Status of the Rule of Law’ (2004) *Cambridge Law Journal* 65, 65.

⁹ H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, especially part IV.

caught?’¹⁰ when we come across directives that violate formal legality. Both the dualists and monists would strictly scrutinise such directives, but the problem would be stated by the dualists as ‘this law violates the rule of law’, and by the monists as ‘this putative law is not law’. Fuller saw this ‘statement of the problem’ question as the difference between his views and Hart’s, with the fundamental difference of stating the problem leading onto questions about moral and legal obligation.¹¹ This connection between conceptual questions in jurisprudence and the ROL will be discussed in detail below.¹²

This paper is divided as follows. Part II distinguishes the particular conception of the ROL that is used in this paper – the ‘formal legality’ conception that is popular with jurisprudential theorists – from other conceptions. Part III outlines Lon L Fuller’s ROL monism, which fuses formal legality principles to his concept of law. Part IV outlines Joseph Raz’s ‘dualism’, which sees formal legality as a contingent aspect of law rather than a conceptual necessity. Part V comments on a possible inconsistency within Raz’ dualist position.

II. The Operative Conception of the ROL

The concept of ‘the ROL’ is the subject of such intense disagreement that one commentator has examined whether it may fall within W B Gallie’s vision of an ‘essentially contested concept’: a concept on which there is disagreement its very core, rather than just at its margins.¹³ Brian Tamanaha observes, ‘the rule of law ... stands in the peculiar state of being *the* pre-eminent legitimating political ideal in the world today, without agreement upon precisely what it means.’¹⁴ Indeed, the elusiveness of the ROL has generated its own literature,¹⁵ with different theorists pointing to conceptions that give primacy to the Aristotelian rule of reason,¹⁶

¹⁰ Lon L Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 630, 656. In this paper, ‘Positivism’ will refer to this article.

¹¹ *Ibid* 656–7.

¹² See especially below Section V.

¹³ Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 *Law and Philosophy* 137 148–53 (on essential contestability).

¹⁴ Brian Tamanaha, *On The Rule of Law: History, Politics, Theory* (2004) 4.

¹⁵ For discussion of the various approaches to the rule of law, see Margaret Jane Radin, ‘Reconsidering the Rule of Law’ (1989) 69 *Boston University Law Review* 781; Waldron, above n 13; Fallon, above n 2; Craig, above n 6.

¹⁶ Lawrence B Solum, ‘Equity and the Rule of Law’ in Ian Shapiro (ed), *The Rule of Law: Nomos XXXVI* (1994); and Judith N Shklar, ‘Political Theory and the Rule of Law’ in Allan C Hutchinson and Patrick Monahan (eds),

limitations on governmental power,¹⁷ the rule of rules,¹⁸ the formal features of those rules,¹⁹ Anglo-American constitutionalism,²⁰ equality before the law,²¹ formal justice in adjudication,²² and the rule of rights.²³ This disagreement has also played out in the courts, with both majority and dissenting judges often claiming to be upholding the rule of law.²⁴

This paper does not attempt to resolve the question of conceptualising the ROL; it seeks to solve a particular problem in conceptualising law, namely whether and to what extent one particular conception of the ROL – namely the criteria of formal legality that most legal theorists take as constituting the ROL in a jurisprudential context²⁵ – is part of our concept of law.

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- The Rule of Law: Ideal or Ideology* (1987).
- ¹⁷ See Shklar's discussion of Montesquieu's archetype of the ROL: Shklar, above n 16.
- ¹⁸ Antonin Scalia, 'The Rule of Law as the Rule of Rules' (1989) 56 *University of Chicago Law Review* 1175.
- ¹⁹ Lon L Fuller, *The Morality of Law* (revised ed, 1969) ('*The Morality of Law*'); Raz, above n 1.
- ²⁰ See Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988); T R S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993); T R S Allan, *Constitutional Justice: A Liberal Theory Of The Rule Of Law* (2003).
- ²¹ A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959).
- ²² John Rawls, *A Theory of Justice* (revised ed, 1999) 206–13.
- ²³ This list of conceptions was found in Jeremy Waldron, 'The Rule of Law as a Theatre of Debate' in Justine Burley (ed), *Dworkin and His Critics* (2004) 319–20.
- ²⁴ See *Planned Parenthood v Casey*, 505 US 833 (1992), as discussed in Fallon, above n 2, 5; and *Bush v Gore*, 531 US 98 (2000), as discussed in Waldron, above n 13, 137–8, 144–8.
- ²⁵ The most recent examples of this usage is Simmonds, above n 5, 87; Kramer, *In Defense of Legal Positivism*, above n 8, 48–53. See also Raz, above n 1; Fallon, above n 2, 8; John Finnis, *Natural Law and Natural Rights* (1980) 270–3. Waldron notes the familiarity that students of Anglo-American jurisprudence have with the formal legality 'laundry list' – Waldron, above n 13, 154–5. For a full elaboration of the 'laundry list' see Fuller, above n 19, 46–91.

Tamanaha clearly shows where ‘formal legality’ fits within various ROL approaches, as tabulated below. Tamanaha divides the two categories resulting from

Alternative ROL Formulations²⁶

Thinner -----> to -----> thicker			
Formal Versions	Rule-by-law	Formal Legality	Democracy + legality
	-law as instrument of government action (but not restriction)	- general, prospective, equal, clear, certain (legal liberty) eg Fuller, Raz, Hayek.	- consent determines content of law (political liberty) eg Rousseau, Kant, Habermas.
Substantive Versions	Individual Rights	Right of Dignity &/or Justice	Social Welfare
	- property, contract, privacy, autonomy (private liberty) eg Dworkin.	Eg T R S Allan.	- substantive equality, welfare, preservation of community eg 1959 International Commission of Jurists.

the basic distinction between formal and substantive conceptions²⁷ into further threefold typologies ranging from thinner to thicker conceptions.²⁸ Formal legality falls within the formal category because it does not place any limitations on the substance of law. In that category it sits between ‘rule-by-law’ and ‘democracy + legality’.²⁹ It is a thicker account – imposing more requirements – than the ‘rule-by-law’ account, which merely requires that governmental action be authorized by law, and thus gives little content to the ROL concept.³⁰ But it is thinner than the ‘democracy + legality’ account that requires democratic processes of enactment. ‘Formal legality’ is the account that most legal theorists have adopted,³¹ most often for reasons that Raz and Craig make clear: in order to isolate the ROL from other virtues (or vices) of legal systems.³² Conversely – and exemplifying Raz and Craig’s concerns – Tamanaha criticises formal

²⁶ This table is based on the table set out in Tamanaha, above n 14, 91.

²⁷ See Craig, above n 6, 467.

²⁸ Tamanaha, above n 14, 91. See also Radin, above n 15, 784–91.

²⁹ Tamanaha, above n 14, 91.

³⁰ Ibid 92–3; see also the criticism of the ‘government by law’ conception of Joseph Raz in Raz, above n 1, 212; Craig, above n 6, 469.

³¹ Tamanaha, above n 14, 92. See Fuller; Raz, above n 1; Fallon, above n 2.

³² Raz, above n 1, 211; Craig, above n 6, 468–9.

conceptions as empty, because they allow for injustices that substantive ROL accounts do not.³³

In this light, I make the disclaimer that this paper considers only formal legality as part of a monist concept of law. Other conceptions are thus regarded in the same way that dualists view formal legality: as aspects of a political ideal that indicates the specific excellence of the law. The possibility that human rights and democratic enactment are part of the concept of law rather than ROL values – corresponding with the views of Dworkin,³⁴ Allan³⁵ and Habermas³⁶ – is left to another time. It might be objected that my discussion says very little about the connection between the ROL and the concept of law, because it excludes common visions of the ROL in liberal democracies.³⁷ My response is twofold: first, I am discussing the common *jurisprudential* concept of the ROL in relation to the jurisprudential concept of law.³⁸ Second, it is the stress that Raz lays on insisting on a denial of this very connection between formal legality and the concept of law, and the tensions that this causes within his legal theory, that are the immediately interesting points about the dualism/monism debate.

With this disclaimer, we can move on to examining the conflicting approaches to the relationship between the 'formal legality' conception of the ROL and the concept of law, which I have labelled monism and dualism.

III. Monism

A. Fuller: Law as Formal Legality

In this paper 'monism' refers to the view that formal legality criteria are part of the concept of law, in contradistinction to 'dualism', which is the position that they are not. The most famous statement of the monist position is found among the ideas of Lon L Fuller.³⁹ It is no coincidence that a 'natural lawyer' should make a seminal analysis of the relationship between law and the ROL, as natural law legal theory has always held these ideals in

³³ Tamanaha, above n 14, 93–4, 120–2.

³⁴ Ronald Dworkin, *Law's Empire* (1986).

³⁵ Allan, *Law, Liberty, and Justice*, above n 20, 39.

³⁶ Jürgen Habermas, *Between Facts and Norms* (1996).

³⁷ See Tamanaha, above n 14, 111.

³⁸ Ibid 92. See Fuller; Raz, above n 1; Fallon, above n 2.

³⁹ For a discussion of Lon L Fuller's life and work see Robert S Summers, *Lon L Fuller* (1984).

high esteem,⁴⁰ and some theorists have collapsed the distinction between the two.⁴¹

Fuller's position on formal legality contains two points, one of which I want to set aside in this paper. The first point, integral to this paper, is that formal legality is part of the best concept of law, which eviscerates the boundary between the political ideal of 'the ROL' and the concept of 'law'. The second point, peripheral to this paper, is that formal legality criteria are somehow moral.⁴² Raz, Simmonds and Kramer agree that these two points are separable into: (a) the concept of law includes formal legality, and (b) formal legality is moral.⁴³ They exhibit agreement on (a), their argument focusing on (b). Recognising this separability, I will set aside (b) (noting that this is an alteration of Fuller's complete argument), and proceed to outline Fuller's argument for (a).

Throughout *The Morality of Law* one sees a commitment to a concept of law that Fuller thought richer than the positivist concept.⁴⁴ Chapter Two describes the eight 'formal legality' criteria constituting the internal morality of law (IML),⁴⁵ and the essential connection between formal legality and law is introduced, predominantly through Fuller's use of the term 'law'. The fable of King Rex shows us 'eight ways to fail to make law'.⁴⁶ Failing to heed formal legality, Rex 'never even succeeded in creating any law at all, good or bad.'⁴⁷ Clearly, the consequences of a failure to uphold the IML are not just a failure to fulfil the ROL:

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

⁴⁰ Robert George, 'Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition' (2001) 46 *American Journal of Jurisprudence* 249.

⁴¹ For examples see Dworkin, above n 34.

⁴² For Fuller's discussion of this point see Fuller, above n 19, Chapter V: A Reply to Critics, especially 200–24. See generally Summers, above n 39, 36–40. For Raz's rebuttal see Raz, above n 1; for Finnis' qualified support of Fuller see Finnis, above n 25, 273–4.

⁴³ Raz, above n 1; Simmonds, above n 5; Matthew Kramer, 'Scrupulousness Without Scruples: A Critique of Lon Fuller and His Defenders' (1998) 18 *Oxford Journal of Legal Studies* 235–63, reprinted in Kramer, *In Defense of Legal Positivism*, above n 8, 48–51; Nigel Simmonds, 'Straightforwardly False: The Collapse of Kramer's Positivism' (2004) 63 *Cambridge Law Journal* 98, 118–9.

⁴⁴ Fuller, above n 10, 646.

⁴⁵ Fuller, above n 19, chapter II.

⁴⁶ *Ibid* 33.

⁴⁷ *Ibid* 34.

all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.⁴⁸

Fuller had previously expressed the same sentiment – more vehemently given the context of discussing the Nazi ‘legal’ system – in ‘Positivism’.⁴⁹ Though it sometimes seems that Fuller might be weighing Nazi directives against unjust substantive morality, he insists that he is not.⁵⁰ Thus, Fuller consistently maintains that formal legality is part of the concept of law.

The reason for this is also relatively clear: Fuller regarded law as a purposive or functional concept.⁵¹ ‘Law’ is ‘the enterprise of subjecting human conduct to the governance of rules.’⁵² Of course, governance can be achieved without law: the ruled can be faithful to the ruler, and the ruler can achieve his or her objectives, without conforming to the IML and thus without law.⁵³ Furthermore, Fuller noted that there could be degrees of legality, corresponding to the degree of conformity with the IML.⁵⁴ Indeed, the IML may not be suited to some areas of governance in the modern administrative state.⁵⁵

This functional approach accords with his wider vision for a concept of law: law cannot be seen as an amoral datum to be described in the same way that one describes a stone; scientifically, pointing only to certain facts of texts, official behaviour, or state power.⁵⁶ Fuller’s purposive view of law ‘treats law as an activity and regards a legal system as the product of a sustained purposive effort’,⁵⁷ and it is such a concept of law that Fuller defends in Chapter Three.⁵⁸ The positivist view may be adequate for identifying valid rules of a system,⁵⁹ but not for conceptualising law –

⁴⁸ Ibid 39.

⁴⁹ Fuller, above n 10, 660.

⁵⁰ Ibid 660–1.

⁵¹ See generally Summers, above n 39, chapter 2.

⁵² Fuller, above n 19, 106.

⁵³ Ibid 41 (‘Rex’s subjects, for example, remained faithful to him as king throughout his long and inept reign. They were not faithful to his law, for he never made any’); Jeremy Waldron, ‘Why Law: Efficacy, Freedom, or Fidelity?’ (2004) 13 *Law and Philosophy* 259.

⁵⁴ Fuller, above n 19, 122, 131.

⁵⁵ See ibid 170–7. See also Edward L Rubin, ‘Law and Legislation in the Administrative State’ (1989) 89 *Columbia Law Review* 369.

⁵⁶ Summers, above n 39, 17.

⁵⁷ Fuller, above n 19, 106, 145.

⁵⁸ Ibid chapter III.

⁵⁹ Summers, above n 39, 17.

which in Fuller's view was prescriptive as well as descriptive.⁶⁰ If it is a function of law to govern conduct through rules, then formal legality sets both an ideal to which law can aspire and a level that systems of governance must meet before they counted as legal. Purposiveness does not relate to particular legal rules, but to the legal system as a whole.⁶¹ Although Tamanaha argues that Fuller is talking of legal validity,⁶² Fuller is more likely to have thought that morality is not a necessary condition of legal validity,⁶³ and therefore criticisms of Fuller based on his theory's utility to judges are misplaced.⁶⁴

B. Support for Monism

Fuller's view that formal legality is a conceptual necessity for law has gained support in recent jurisprudence. Finnis' definition of law refers to the traditional positivist concept of primary and secondary rules, efficacy, and institutionalisation, but additionally refers to formal legality: a legal system is

directed to reasonably resolving any of the community's co-ordination problems ... for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimisation of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.⁶⁵

Latterly, T R S Allan has based his constitutional theory on Fuller's monism,⁶⁶ and Simmonds and Kramer have agreed on monist concepts in their debate on law's morality.⁶⁷ That serious and rigorous jurisprudential

⁶⁰ Fuller, above n 10, 632.

⁶¹ See Summers, above n 39, 27–31, who makes the distinction between the purposiveness of law in terms of particular legal rules, and the purposiveness of legal systems as a whole.

⁶² Brian Tamanaha, *A General Jurisprudence of Law and Society* (2001) 18.

⁶³ Jules Coleman, *The Practice of Principle* (2001) 193; Brian Bix, 'Natural Law Theory' in Dennis Patterson (ed), *A Companion to the Philosophy of Law and Legal Theory* (1996) 231–4; Summers, above n 39, 17. See also Kenneth Einar Himma, 'Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory' (2002) 27 *Oklahoma City University Law Review* 41, 87–91, 108–11.

⁶⁴ See the criticism in Michael Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 127.

⁶⁵ Finnis, above n 25, 266 (emphasis added).

⁶⁶ Allan, *Constitutional Justice*, above n 20, 6.

⁶⁷ Simmonds, above n 5. See also the discussion of the debate on the morality

theorists support the monist view reflects the further point that many laypeople, judges and lawyers would also support monism, as Simmonds claims.⁶⁸ Thus, the monist position is still strong today, and many would agree with Kramer’s modern restatement, which corrects Hart’s reluctance to view Fuller’s formal legality principles

as conceptual or constitutive conditions for the existence of a legal regime. ... When the defining enterprise of law (the enterprise of subjecting human conduct to the governance of rules) is seen as involving the direct presentation of legal demands and prescriptions to citizens for their compliance, Fuller’s eight precepts are related to that enterprise not only instrumentally but integrally. Though various departures from each precept may not in themselves mark the demise of a legal system ... a thorough-going failure to satisfy one or more of the precepts will result not in an inefficient legal system but in the outright absence of such a system. If a mode of governance is based on general rules not at all or hardly at all, for example, then it is not governance by law. Much the same can be said in connection with the rest of Fuller’s principles.⁶⁹

Now that monism has been explicated, I will turn to the antithetical position: dualism.

IV. Dualism

A. Raz: Law ‘Without (Rule of Law) Trimmings’?

If a dualist were to examine the problem identified in Simmonds’ quotation above,⁷⁰ they would insist that there is no necessary connection between ‘the ROL’ and the concept of ‘law’, meaning that we can have law without having the ROL.⁷¹ This position seems consistent with legal positivism,⁷² which generally holds that the concept of ‘law’ should take identification and explanation of systems of legal norms as its focus, and eschews moral evaluation of those systems (leaving such evaluation to moral or political

of formal legality in Raz, above n 1, 225 and Jeremy Waldron, ‘All We Like Sheep’ (1999) 12 *Canadian Journal of Law and Jurisprudence* 169.

⁶⁸ Simmonds, above n 5, 62–3, 85.

⁶⁹ Kramer, *In Defense of Legal Positivism*, above n 8, 51.

⁷⁰ See above Section I, note 5.

⁷¹ Raz, above n 1.

⁷² Simmonds, above n 5, 65.

philosophy).⁷³ As Raz has conceded, there may be some question-begging here: one cannot argue that a good concept of law must exclude moral evaluation unless one can show that that the exclusion of moral evaluation is a part of the social practice one is conceptualising.⁷⁴ As indicated above, I leave to the side the question of whether formal legality is somehow moral.

The thesis considered here is Raz's dualist position that formal legality ROL criteria are not a necessary aspect of the concept of law. Without the moral overtones, positivists could and (like Kramer)⁷⁵ might well accept a monist concept of law. The question is whether those formal legality social facts – sufficient prospectivity, clarity, stability and so on – are necessary additions to the orthodox positivist social facts that make up the determination of whether a legal system exists.⁷⁶

Raz's dualism is most evident in his key discussion of the ROL, 'The Rule Of Law and its Virtue'.⁷⁷ Raz sees the ROL as a political ideal 'which a legal system may lack or may possess to a greater or lesser degree' and as 'just one of the virtues which a legal system may possess'.⁷⁸ Though he states that "[t]he rule of law" means literally what it says: the rule of the law',⁷⁹ he takes the view that if the content of the political ideal referred to is merely that government action is authorized by law then it is in fact not a political ideal but an empty tautology.⁸⁰ There must be more to the ROL ideal, or else the ideal does not evaluate or constrain law in any way. This is clearly dualism, because Raz's argument is premised on the idea that there is nothing in the concept of 'law' itself that could restrict government by law. If Raz were a monist there would be some restriction on government action (eg a requirement of formal legality), immanent in law, to describe.

To explain the linguistic problem identified in Simmonds' quotation (that it is incongruent to regard 'law' in 'the ROL' as something different from 'law' in 'the concept of law') Raz distinguishes between (a) the layman's idea of law, which includes both an understanding that we have rules that are law and the ROL ideal; and (b) the professional lawyer's idea of law, which refers only to law according to positivist conditions of

⁷³ H L A Hart, *The Concept of Law* (2nd ed, 1994); Hart, above n 9.

⁷⁴ Raz, 'Legal Positivism and the Sources of Law' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1983) 41–2.

⁷⁵ See above Section III:B.

⁷⁶ See Raz, above n 74, 42–4.

⁷⁷ Raz, above n 1.

⁷⁸ Ibid 211.

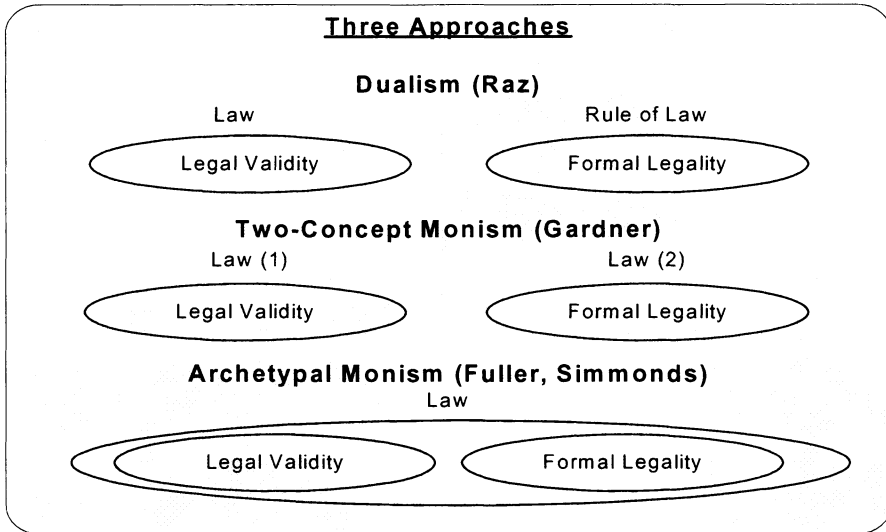
⁷⁹ Ibid 212.

⁸⁰ Ibid 212–3.

validity.⁸¹ This does not mean that they are not related: the ROL is ‘the specific excellence of the law.’⁸² Nevertheless, the analysis of the concept of law – in terms of whether law exists or not – is separate from the evaluation of a political order against the ROL.

B. Dualism, Two-Concept Monism, and Archetypal Monism

The difference between Fuller and Raz’s positions is shown in the diagram below. Raz’s dualism (top) contrasts with Fuller’s monism (bottom).



The intermediary position is occupied by the ‘two-concept’ approach. Two-concept monism recognises that theories and concepts usually have to be selective, commenting on particular features or functions that are essential or seem the most important in light of their purpose.⁸³ The two key purposes that analytical jurisprudence sets for concepts of law are to interrogate two questions: ‘what is law?’ and ‘what is a law?’. The first (more general) concept categorizes the systems of social norms and institutions in societies as ‘law’ or ‘not law’; the second (more particular) concept categorizes the standards that judges are obligated to apply or do apply into ‘law’ or ‘not law’.⁸⁴ Respectively, the concepts answer the questions ‘is this social phenomenon “law”?’ and ‘is this norm a “law” (legally valid) of this system?’. This two-concept distinction has been

⁸¹ Ibid 213.

⁸² Ibid 205.

⁸³ Brian Bix, *Jurisprudence: Theory and Context* (2nd ed, 1999) chapters 1, 24; Hart, above n 73, 79–88; Finnis, above n 25, 1–11.

⁸⁴ Bix, above n 83, 25–6.

identified and supported in some form by a variety of theorists, including Coleman,⁸⁵ Finnis,⁸⁶ Gardner,⁸⁷ Hart,⁸⁸ Raz,⁸⁹ Simmonds,⁹⁰ and Waldron.⁹¹

Against the two-concept approach, Simmonds argues that it is preferable to have a unified ‘archetypal’ concept of law. He observes that sometimes we see law as merely ‘mundane’ and instrumental, as a tool that can be used for good or bad depending on the will of the authorities. At other times we see law as ‘embodying an elevated aspiration’, so that ‘governance by law is seen as being, in itself, a virtue of a just political community.’⁹² One way to explain this would be to follow Raz and make the distinction between the ideal of the ROL and our concept of law.⁹³ However, Simmonds argues that it is not particularly satisfying to account for our use of ‘law’ in the phrase ‘the ROL’ either by distinguishing two concepts of law (two concept monism), or else a concept of law and a concept of the ROL (dualism).⁹⁴

An archetypal concept of law explains these elevated aspirations:

The essential hallmark of an archetypal concept is the fact that instantiations of the concept count as such by resemblance or approximation to the archetype, such resemblance or approximation being a property that can be exhibited to varying degrees.⁹⁵

Simmonds has noted the precursor to his approach – Finnis’ discussion of ‘focal’ instances of law, which bears a ‘strong resemblance’ to his understanding of an archetypal concept.⁹⁶ An archetypal concept dissolves the dualism because we can see how something counts as an

⁸⁵ Coleman, above n 63, 143–7, 180–2.

⁸⁶ See Finnis, above n 25.

⁸⁷ John Gardner, ‘The Legality of Law’ (2004) 17 *Ratio Juris* 168, 180–1.

⁸⁸ Gardner points to Hart’s discussion of the difference between the meanings of foreign words for ‘law’: *ibid.*

⁸⁹ Joseph Raz, ‘Two Views of the Nature of the Theory of Law: A Partial Comparison’ in Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (2001) 37.

⁹⁰ See Simmonds, above n 5, 63–9.

⁹¹ Jeremy Waldron, ‘Normative (or Ethical) Positivism’ in Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (2001) Part III – contrasting wholesale (‘what law, the institution, is’) and retail judgments (‘what the law on some particular subject is’) about law.

⁹² Simmonds, above n 5, 63.

⁹³ *Ibid.*

⁹⁴ *Ibid.* 64–6, citing Raz’s famous articulation of the ROL in Raz, above n 1.

⁹⁵ Simmonds, above n 5, 67.

⁹⁶ Simmonds, ‘Straightforwardly False’, above n 43, 121.

instance of law while falling short of full requirements of the archetypal concept,⁹⁷ rather than adhering to the dualist understanding of 'law' as it appears in 'the ROL' and 'law' as it is used elsewhere.⁹⁸

The usefulness of Simmonds' archetypal concept for the current analysis is double-edged. One edge focuses our minds on the incongruity of excluding formal legality from the concept of law, and it allows a remedy in positing formal legality within an archetypal concept of law. However, in this respect, I am not convinced that there is sufficient difference between Simmonds' and Gardner's approaches (see the diagram above); their conceptual differences are slight and do not differ significantly in relation to the evaluative criteria for concepts.

These comments must be tempered by acknowledging the other edge of his analysis – accounting for the intuition that law is a moral idea – which I have been at pains to exclude from this paper. Both Simmonds' archetypal and Gardner's two concept approaches provide defensible accounts of monism, which is the key point here; those who would like to consider the moral aspects of monism should consult Simmonds' article.⁹⁹

C. Complicating Raz's Dualism

The above discussion shows that Raz's dualism is not the only defensible way to account for the conceptual relationship between 'the rule of law' and 'law'. Indeed, as the following shows, Raz's own dualist separation of the ROL from the concept of law is complicated by two points derived from his article and his general theory of law. The first, discussed below, is Raz's acceptance of a functional aspect of law. The second, discussed in the next section, is the conceptual framework behind Raz's exclusive legal positivism. A third point causes Raz to recognise a minimal truth in Fuller's monist concept, while leaving his dualism intact; I will deal with this point first.

1. Minimal relationship

Raz concedes to monism that there is a minimal relationship between the ROL and the concept of law. ROL principles cannot be totally violated by a legal system.¹⁰⁰ However, this is not an acceptance of the monist position. It merely acknowledges that the dualist concept of law relies on some aspects of the ROL to be minimally present for a legal system to exist

⁹⁷ Simmonds, above n 5, 66.

⁹⁸ *Ibid.* Simmonds later reaffirms this point at 68.

⁹⁹ Simmonds, above n 5; Himma, above n 63, 108–11; Bix, above n 63, 232.

¹⁰⁰ Raz, above n 1, 223.

according to dualist/positivist criteria. Extreme violations of various aspects of the ROL ideal would mean that the positivist concept of law criteria would be breached: there have to be at least some prospective rules – in the form of Hart’s secondary and primary rules – for the concept of law to apply.¹⁰¹ Nevertheless, ‘the extent to which generality, clarity, prospectivity, etc, are essential to the law is minimal and is consistent with gross violations of the rule of law.’¹⁰² The ROL is only part of the concept of law insofar as some of its criteria must be fulfilled in order for positivist criteria to be fulfilled. Thus, Fuller’s monist argument is not vindicated, because many aspects of the ROL do not have this implication for the concept of law.

2. Law’s function

However, there is something more like a concession to Fuller’s view of the ROL as a necessary aspect of the concept of law in Raz’s discussion of law as a functional concept. While denying that the ROL is conceptually necessary for law to exist, Raz accepts that the law has a function or purpose: to guide human behaviour.¹⁰³ He states, ‘[t]he law to be law must be capable of guiding behaviour’.¹⁰⁴ The acknowledgement that law is a functional concept ‘establishes an essential connection between the law and the rule of law’.¹⁰⁵ Herein lies Raz’s inconsistency. If it is of the essence of law that it is constituted of rules that can guide human conduct, and if formal legality principles have to be followed for this to happen, then how can we say that ROL principles do not fall within any sensible concept of law? However, Raz is adamant in the rest of the essay that this is not the case.

V. Raz’s Monism?

This section argues that Raz is forced to accept ROL monism, because dualism is inconsistent with his arguments about authority and his exclusive legal positivist concept of law. This point is also applicable to the exclusive legal positivist analyses of Shapiro’s,¹⁰⁶ depending as it does on the fundamental point of difference between exclusive and inclusive positivism. In short, one of the key reasons for subscribing to an exclusivist positivist

¹⁰¹ Ibid.

¹⁰² Ibid 224.

¹⁰³ Ibid 225.

¹⁰⁴ Ibid 214. Allan sees this as a concession that there are formal limits to the ROL: Allan, *Law, Liberty, and Justice*, above n 20, 23.

¹⁰⁵ Raz, above n 1, 224.

¹⁰⁶ Scott Shapiro, ‘On Hart’s Way Out’ in Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (2001).

concept of law – that 'law must be capable of guiding human behaviour'¹⁰⁷ – is substantially equivalent to Fuller's reason for viewing formal legality as part of the concept of law, notwithstanding Raz's dualist argument. Before I argue that point, it is necessary to discuss how Raz ends up endorsing that functional reason for exclusivism, which requires brief exposition of the debates (perhaps the most lively of recent analytical jurisprudence)¹⁰⁸ within legal positivism, and some idea of Raz's theory of authority.

A. Raz's Theory of Authority

Raz' theory of authority¹⁰⁹ has been described in detail elsewhere.¹¹⁰ The relevant points for this paper are as follows. For Raz, a legal system must claim authority,¹¹¹ specifically by claiming to provide directives that have the *moral* property that the subject

is likely better to comply with reasons which apply to him ... if he accepts the directives of the alleged authority as authoritatively binding ... than if he tries to follow the reasons which apply to him directly.¹¹²

To claim authority, the legal system must be capable of having authority.¹¹³ The failure of authority usually stems from an inability to claim and have capability for authority, which relates to the above *moral* property, rather than the non-moral capability of having authority (that a rock or a person who could not communicate would lack).¹¹⁴ Therefore, for a concept of law to be consistent with the theory of authority, legal sources such as statutes and precedents must meet the non-moral criteria that they must be able to be identified without referring to the reasons on which they

¹⁰⁷ See Coleman, above n 63, chapters 7–10 for critical discussion of Raz's theory of authority and its relation to exclusive legal positivism, and pages 68, 124–5, 127 and 134–5 for particular statements of Raz's 'guidance' thesis.

¹⁰⁸ Brian Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence' (2003) 48 *American Journal of Jurisprudence* 17, 24.

¹⁰⁹ Joseph Raz, 'Authority, Law and Morality' in Joseph Raz, *Practical Reason and Norms* (1999); Joseph Raz, 'The Claims of Law' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1983) chapter 3.

¹¹⁰ See Coleman, above n 63; Kenneth Einar Himma, 'Law's Claim of Legitimate Authority' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001) 271–309.

¹¹¹ Raz, *Practical Reason*, above n 109, 199; Raz, 'The Claims of Law', above n 109, 30.

¹¹² Raz, *Practical Reason*, above n 109, 198. For a fuller discussion of law's claim of authority see Raz, 'The Claims of Law', above n 109, 28–33.

¹¹³ Raz, *Practical Reason*, above n 109, 199.

¹¹⁴ *Ibid* 202.

adjudicate.¹¹⁵ The legal theories of Dworkin and inclusive positivists violate these non-moral criteria by allowing morality as part of law,¹¹⁶ but Raz's exclusive positivism does not.

B. Exclusive Positivism

Naturally, Raz's concept of law must be consistent with his theory of authority. Legal positivism promises such consistency through its social thesis: what is law and what is not depends on matters of social fact.¹¹⁷ The social thesis is the foundation of a positivist concept of law because of the character of law as a social institution, as can be seen in the main tests for the existence and identity of a legal system: efficacy, institutional character and sources.¹¹⁸ Positivists clearly accept these tests, as do most natural lawyers.¹¹⁹ Raz argues, however, that positivists usually only build the first two factors into their concept of law, and are equivocal on the last aspect of the strong social thesis: the sources thesis.¹²⁰ The weak social thesis allows that sometimes legal validity is determined by moral considerations, 'since one has to resort to moral arguments to identify the law.'¹²¹

However, to support his theory of authority, positivism must embrace the strong social thesis (SST), whereby the system's

tests for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms and applied without resort to moral argument.¹²²

The SST insists that 'the existence and content of every law is fully determined by social sources'.¹²³ It is inconsistent with both inclusive positivism's acceptance of the (contingent) incorporation of morality into criteria for the validity of law, and the natural law conceptual necessity of moral evaluation.¹²⁴ Raz argues that we should accept the SST for two reasons. First, it helps us to better conceive of 'our understanding of a

¹¹⁵ Ibid 202, 205.

¹¹⁶ Ibid 206–14.

¹¹⁷ Raz, above n 74, 38.

¹¹⁸ Ibid 42–5.

¹¹⁹ Ibid 44–5.

¹²⁰ Ibid 45–6.

¹²¹ Ibid 46.

¹²² Ibid 39–40.

¹²³ Ibid 46.

¹²⁴ Ibid 47.

certain social institution' by explaining and systemising common distinctions.¹²⁵

The second reason appeals to the previously discussed argument that law necessarily claims authority, and thus is capable of authority insofar as it has the non-moral prerequisites of authority,¹²⁶ one of which was that law must pre-empt the practical reasoning of subjects with directives, and therefore it must be possible to identify the content of those directives without referring to the (dependent) reasons on which it adjudicates. The sources thesis acknowledges this:

Since it is of the very essence of the alleged authority that it issues rulings which are binding regardless of any other justification, it follows that it must be possible to identify those rulings without engaging in justificatory argument, ie as issuing from certain activities and interpreted in the light of publicly ascertainable standards not involving moral argument.¹²⁷

In this fashion, Raz justifies his exclusive legal positivism on the basis of his theory of authority.

C. Raz's Function of Law

There is no reason to delve any further into Raz's position and the inclusive/incorporationist rebuttal.¹²⁸ In this context, it is most important to note that his arguments depend on 'a fundamental insight into the function of law.'¹²⁹ Law's function is to 'mediate between persons and reasons',¹³⁰ to co-ordinate members of society into a stable social life, and to make clear which schemes of co-ordination are appropriate and binding given the pervasive disagreement on that question.¹³¹ It can only do this by 'providing publicly ascertainable ways of guiding behaviour and regulating aspects of

¹²⁵ Ibid 48–50.

¹²⁶ See above Section V:A.

¹²⁷ Raz, above n 74, 52.

¹²⁸ See Coleman, above n 63, chapters 6–9 for one comprehensive argument against Raz's exclusive positivism; Jules Coleman and Brian Leiter, 'Legal Positivism' in Dennis Patterson (ed), *A Companion to the Philosophy of Law and Legal Theory* (1996) gives a briefer discussion.

¹²⁹ Raz, above n 74, 50. See also Brian Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001).

¹³⁰ Coleman, above n 63, 127.

¹³¹ Raz, above n 74, 50–1; see also the views of MacIntyre in Tamanaha, above n 14, 103.

social life.’¹³² It is notable that another prominent exclusive positivist – Scott Shapiro – has taken up this functional account of law and affirmed that ‘the essence of law is the guidance of conduct’.¹³³ Indeed, Dyzenhaus sees the distinctive legal positivist position founded, by Hobbes and Bentham, on law’s ability to effectively guide citizens.¹³⁴

D. Exclusive Legal Positivism and Formal Legality

The inconsistency between Raz’s discussion of the ROL and his concept of law is plain. Raz’s discussion of the ROL is unmistakably dualist, but his exclusive positivist concept of law is deeply wedded to a ‘guidance of conduct’ functional account of law, which – as seen in the discussion of monism – supports a monist concept. Besides his argument that the sources thesis explains and systemises legal practice,¹³⁵ the only argument supporting Raz’s claims is the functional one identified in the previous paragraph. Raz’s edifice of exclusive legal positivism rests on convincing us that law must be capable of guiding human behaviour, because that is the function of law.¹³⁶

One will notice the symmetry between the exclusive positivist concept of law’s reliance on the essence of law being that it fulfils the function of guiding human conduct, and the reasoning behind Fuller’s monist concept of law (and Raz’s acceptance of that reasoning). Both approaches rely on a functional account of law as central to their projects. And both approaches identify ‘the guidance of human conduct’ as law’s essential function. What is striking is the lack of acknowledgement of this consistency between the two positions. Shapiro does not acknowledge it in his important essay.¹³⁷ The closest to a clear connection is made by David Dyzenhaus, who has argued that Fuller’s formal legality criteria assist in the operation of legal positivism’s essential effective guidance function,¹³⁸

¹³² Raz, above n 74, 51.

¹³³ See generally Shapiro, above n 106, 169–77 for Shapiro’s account of this essential function of law.

¹³⁴ David Dyzenhaus, ‘Positivism’s Stagnant Research Programme’ (2000) 20 *Oxford Journal of Legal Studies* 703, 708. Hart also saw law’s primary purpose as the guidance of human conduct: Hart, *The Concept of Law*, above n 73, 248–9.

¹³⁵ Raz, above n 74, 48–50.

¹³⁶ Scott Shapiro has made a similar argument emphasising law’s essential guidance function: Shapiro, above n 106. For a discussion see Kenneth Einar Himma, ‘Substance and Method in Conceptual Jurisprudence and Legal Theory’ (2002) 88 *Virginia Law Review* 1119, 1180–4.

¹³⁷ Shapiro, above n 106.

¹³⁸ Dyzenhaus, above n 134, 721. See also David Dyzenhaus, ‘Why Positivism is Authoritarian’ (1992) 37 *American Journal of Jurisprudence* 83, 108–9.

although Kramer notes that Fuller's function of law is compatible with legal positivism in general.¹³⁹

But is it the same function? Fuller's function of 'subjecting human conduct to the governance of rules' is very similar to Raz's 'guiding human behaviour'. Raz's 'guidance' *simpliciter* is of course wider than 'guidance by rules', but when we consider the requirements of the IML and his sensitivity to different forms of law,¹⁴⁰ Fuller surely uses the term 'rules' to indicate something wider than Dworkin's characterization of 'rules'.¹⁴¹ If one accepts this interpretation of Fuller's account of law's function – which perhaps Justice Scalia would not¹⁴² – then Raz's concept of law is analogous to Fuller's on two counts: (1) law should be seen as having a function; and (2) that function is the guidance of human behaviour. (Of course, the moral implications the theorists attach to this function differ greatly, but I have set this point aside in this paper.)

Though travelling on thoroughly divergent paths, Fuller and Raz have converged on the function of law. What are the implications of this insight? The obvious point is this: if (a) Fuller builds a monist concept because it is the function of law to guide human behaviour; and (b) Raz constructs a concept of law that looks rather counterintuitive to most people, in order to accommodate conceptual features in recognition that it is the function of law is to guide human behaviour; then (c) it seems that Raz should follow positivists such as Kramer in supporting Fuller's monist concept of law in terms of formal legality, because dualism undermines the coherence and force of his legal theory.

E. Raz's Way Around

Is the identification of Raz's tacit monism an insight or a truism? For Raz explicitly acknowledged that the functional approach to law requires formal legality.¹⁴³ Given this acknowledgement, the only incongruity that remains is his avowed dualism in that same paper. What are Raz's possible ways around this inconsistency?

It cannot be the dualist position, which, as seen above, contradicts Raz's explicit conceptual functionalism. However, Raz could take up

¹³⁹ Kramer, *In Defense of Legal Positivism*, above n 8, 44–53.

¹⁴⁰ Fuller, above n 19.

¹⁴¹ Ronald Dworkin, 'The Model of Rules I' in Ronald Dworkin, *Taking Rights Seriously* (1978).

¹⁴² Given that Justice Scalia is at pains to make legal directives more rule-like, see Scalia, above n 18.

¹⁴³ See above Section IV:B:2.

Gardner's two-concept approach and argue that the 'concept of law' labels only a working out of the criteria of legal validity and not an examination of other essential truths about law. This accords with Gardner's view that legal positivism is a position on legal validity, rather than excluding Fuller's formal legality criteria from our understanding of the nature of law.¹⁴⁴ On this view, the functional concept of law – in relation to 'what is law?' – is indeed monist, but there is a separate legal validity concept of law relating to 'what is the law?' that is dualist. This seems the only logical reading of 'The Rule of Law and its Virtue'. However such a reading fails, for two reasons. First, both Simmonds and Gardner emphasise that the 'concept of law' should be applied to examining things that we regard to be law, according to our settled understanding of what constitutes law as a social practice. And our settled understanding relates formal legality to our concept of law, not just our ideal of the rule of law.

Second, as shown below, Raz's exclusive positivism must be more than a mere answer to the legal validity question of 'what is law?'. Raz's theory, like other theories, derives its force from its conceptual coherence and its empirical link to our practice of 'law'. One might accept the authority and sources arguments as conceptually coherent, but argue that they are not linked to our validity criteria as they actually exist in legal systems. If they are not, then Raz's arguments are not primarily answers to the question 'what is the law?'. In that event, Raz's first justification for the sources thesis – that it explains and systemizes our legal practice – falls away, and all that is left is the second justification – that it is consistent with the function of law. Given that many (usually inclusive legal positivist) theorists have cast doubt on the first justification,¹⁴⁵ and, notwithstanding Raz's arguments otherwise,¹⁴⁶ the functional approach is a necessary aspect of Raz's concept of law. Raz cannot rely on Gardner's two-concept approach because his exclusivism is driven by the same concept that drives Fuller's concept: the functional 'what is law' argument, not the legal validity argument. Indeed, this seems to be Leiter's view.¹⁴⁷

However, in supporting a dualist concept of law in his ROL essay, Raz presents his acceptance of Fuller's functional approach as a mere foray

¹⁴⁴ Gardner, above n 7, 209–10.

¹⁴⁵ See Coleman, above n 63, chapters 8 and 9; Gerald Postema, 'Law's Autonomy and Public Practical Reason' in Robert George (ed), *The Autonomy of Law* (1999). See the discussion in Wilfred Waluchow, 'The Many Faces of Legal Positivism' (1998) 48 *University of Toronto Law Journal* 387, 430–2, and his point about constitutional moral criteria of validity at 440.

¹⁴⁶ See the description in Coleman, above n 63, 106–7, 109–10.

¹⁴⁷ Leiter, above n 129, 359.

into peripheral matters. The essay makes it clear that the concept of law is about fulfilling positivist criteria of the concept of law, and the functional analysis something else. Therefore, while in his other arguments the function of law is clearly in his mind, he has not acknowledged the inconsistency of (a) arguing for a dualist concept of law, while both (b) acknowledging that Fuller's monism makes sense from a functional perspective and (c) justifying the rest of his legal theory on a functionalist perspective.

If we take as a conceptual truth that law must be able to guide human conduct, as Raz argues in terms of his exclusivism, another part of his ROL analysis is put into question. Raz makes it clear that the ROL is only one of the virtues of law, and might sometimes be violated in a just society.¹⁴⁸ This (undoubtedly correct) point raises the following question in relation to Raz's concepts of law and the ROL: why is Raz willing to sacrifice the guidance capacity of law in terms of formal legality but not in terms of authority? Why does he construct a rather counterintuitive exclusivist explanation of moral predicates in law to ensure that guidance capacity is preserved and then argue that guidance capacity has to be balanced against other factors in terms of the ROL?

Two possible answers immediately spring to mind. (i) First, remember that Raz's concept of law relies on guidance capacity in terms of the argument from authority. It is clear that Raz takes strong positions on the purity of 'law' in terms of not involving the dependent moral reasons for which the law was supposed to pre-empt, as can be seen in his strong social thesis.¹⁴⁹ Thus, perhaps Raz takes a hard line on authority because it is central to his exclusivist concept of law, and he takes a softer line when the ideal of the ROL is at issue. (ii) Second, the related point is that Raz is more wedded to his theory of authority than to theorizing about the ROL and formal legality. His exclusive positivism flows from his account of morality. His discussion of formal legality and the ROL takes a more peripheral place in his academic project.

F. Other Points

Of course, Raz can always spring the trap the other way on anyone who acknowledges law's function as the guidance of human conduct. Does the Fullerian formal legality monist have to accept Raz's exclusive positivism in light of their functionalism? There are three answers. First, the Fullerian might take up Coleman's arguments against Raz and say that inclusivism

¹⁴⁸ Raz, above n 1, 228–9.

¹⁴⁹ Raz, above n 74, 39–40.

can still fulfil law's guidance function.¹⁵⁰ Second, the Fullerian might appeal to point (i) in the previous paragraph, and say that she is happy to acknowledge that there are degrees of legality, and that sometimes societies seek to govern some areas without law, or with law that has problematic formal legality features. Thus, they never were so deeply wedded to their functionalism that they could not accept deviations from formal legality, and whereas Raz takes a hard line on the sources thesis they could accept deviation in that respect as well.

This relates to the third point, which is that it is easier to see how Fuller's argument – that total failure in one ROL principle or derogation from a number of them in a legal system leads to a system that is clearly not guiding human behaviour by rules – has an intuitive merit. We can see how such a system fails to do what law must be capable of: guiding human behaviour. One must work much harder to accept Raz's argument about moral criteria for law. One must accept his theory of authority, but in practice it may be that the prevalence of moral criteria of legal validity in our legal systems overshadows Raz's theoretical insights. Further, notwithstanding moral validity criteria, we can guide our behaviour by such a law far easier than by one that is secret. For these three reasons, the exclusive legal positivist trap cannot be sprung on Fullerians.

VI. Conclusion

This paper has examined what I have termed the monist view that one conception of the ROL – formal legality – is not only a political ideal, but is part of the concept of law. My argument generally defends as plausible the approach that Lon L Fuller took to law, which has found support recently in the writings of Simmonds, Kramer, and Gardner. One can agree with Simmonds that our concept of law should account for both legal validity and law's function of guiding human behaviour. As Gardner's two-concept approach shows, such a concept does not need to be archetypal; but it does need to acknowledge formal legality as a matter of degree. Given those premises, Fuller's formal legality monism is a conceptual necessity for law, in that a substantial failure in formal legality leads to governance that is no longer law. Further, unless Coleman's objections fully satisfy us, we must accept that Raz has a point, and that the rule 'do what is moral' cannot fulfil law's function, or at least does so to a lesser degree than a rule that does not require moral reasoning.

Given that the monist view is well established and defended, this paper's key insight relates to the tensions that underlie Joseph Raz's dualist position. In his scholarly output, Raz's theory of authority led him to a

¹⁵⁰ See Coleman, above n 63.

concept of law that requires law to be capable of guiding human behaviour. Although Raz's prominent discussion of the ROL is overall a dualist one, this insight about law's ability to guide human conduct forces him to acknowledge the truth in Fuller's monism for a functional concept of law. Raz does not make clear whether the functional approach that Fuller promotes, and he to some extent affirms, sits at the margins or the centre of his concept of law, but I have argued that it is central. Ultimately, the answer to that question determines the truth of the monist project, and the degree of tension within his theoretical positions.