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We Need to Talk....About Institutional Integrity

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Preface

The Hale Ethics Series is a set of occasional publications on various aspects of ethics. Its scope is as broad as the scope of ethics, and that is broad indeed.

Ethical issues permeate our lives. If I jump the line to buy tickets, I am making an ethical judgment that I deserve service before those already in line. Just consider how indignant we get when someone barges in front of us. In deciding to flip a coin to settle a dispute, I am making an ethical decision. I am deciding that what is in dispute does not by right belong to either party to the dispute or if it does, the resolution of the dispute is more important than any right either party has. Even the simplest and most mundane acts are suffused with ethical value. Life without ethical risk is impossible.

So one aim is that the pieces in the Series allow us to see more clearly than we might otherwise how ethics affects us. Another is that the works will take us out of ourselves, as it were, to begin to see the ethical world as others may see it.

Just as our particular way of walking seems so natural that it is difficult to imagine how we could move through the world with any other gait, so the moral judgments we make may seem so natural, so obvious to us, that we find it incomprehensible how anyone could think differently. The first step in moral maturity comes from realizing that what seems obvious to us may not be correct. The ways in which we are reared can blind us to ethical issues that we can come to understand only by seeing ourselves as others see us.

The more ways we look at ethical issues, the more likely it is that we shall come to understand them. So the pieces to be published will cover a full range of topics from the history of ethics to knotty ethical problems to ethical theory—anything of philosophical substance that can raise our level of ethical understanding. Some of these pieces will be drawn from lectures sponsored by the Ezra A. Hale Chair in Applied Ethics as part of the Hale Ethics Series, but no matter what their provenance, the aim is to increase our knowledge of ethics and our understanding of the complexities of ethical issues. We will make no progress in understanding how ethical problems can arise and how we may resolve them ethically if we do not examine and discuss them, no matter how contentious they may be.

The pieces published are chosen on their merit, their philosophical acumen and their clarity of style and argument, without regard to any other consideration.

The Ezra A. Hale Chair in Applied Ethics was funded through the generosity of Pat and Bill Hale, in honor of Ezra A. Hale of Rochester, New York. I thank them for their generosity and concern that the world become a better place.

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Abstract

It seems a reasonable hypothesis that institutional health depends upon institutional integrity and institutional integrity depends upon individual integrity. If that's right, "disease" may be manifest at two levels—at the level of institutional or individual integrity.

I begin with the first part of the hypothesis above, that institutional integrity is a condition of institutional health. The legal theorist Lon Fuller articulated this idea in a less generalized form when he spoke of a morality internal to law that makes law possible. I will explain and illustrate this idea and indicate how it applies to institutions of various sorts, includ-ing professions such as engineering, architecture, or medicine. Then I will turn to the second part of the hypothesis, that there is a dependency relation between institutional integrity and individual integrity. However, instead of exploring the conse-quences of lapses of integrity by individuals within an organization, I will approach this part of the hypothesis in terms of its suggestion that institutional integrity nourishes or promotes individual integrity. This suggestion presupposes a formative relation between institutions and persons; that in some meas-ure our practices dictate both what we should do and what we should be. Todd May makes a powerful case for this thesis in his book *Our Practices, Ourselves*, and a recent book on privacy by Anita Allen has a similar thrust. I draw on their work to cash out what is little more than a suggestion in Fuller's legal philosophy. I do this with an eye to achieving some clarity about what's at stake if, as was suggested earlier, "disease" can manifest itself at the level of institutional integrity as well as individual integrity. And that, in turn, adds to the strength of the case for saying, with Fuller, that the principles internal to an enterprise constitute a morality and the responsibilities of the persons within an institution are moral responsibilities.

"The forms and restraints which make our living together possible are created by us, but they in turn help to make us what we are and to define what we should be toward one another."

Lon Fuller
"The Philosophy of Codes of Ethics"
Electrical Engineering, *October 1955 (917)*

We need to talk....
about Institutional Integrity

Daniel E. Wueste, Ph.D.

I will begin with some observations that few, if any, will find dubious or objectionable. Institutions can be healthy, or not. When they are healthy, they perform well and thus are positioned to achieve their purpose or mission. When an institution is healthy, both the integrity of those who work within it and the integrity of the institution itself enjoy some measure of protection. In an unhealthy institution both individual and institutional integrity are at risk. And, of course, the health of an institution may be jeopardized when individuals within it conduct themselves in ways that exhibit a lack of integrity.

The relationship between institutional and individual integrity is complex. When attention is directed to the link between the health of institutions and their integrity and the contribution individual integrity makes to both it is apparent that there is considerable complexity here as well.

Our lack of deep understanding in this area—a theoretical lack—contributes to and in fact is fed by a lack of activity on this front in practice. The pronounced tendency, in business or government, for example, to think that the cause of a scandal is a bad apple rather than a bad barrel, confirms the point. It is not that theory encourages the hunt for bad apples; rather, what theory contributes to our lack of understanding comes mostly by way of its failure to discourage the hunt.

In the recent past ethical theory has taken a back seat to applied ethics, which takes many of its cues from practice. The heavy reliance on case studies in applied ethics is perhaps the best evidence of this trend. When cases involve the hunt for bad apples, as they tend to when legal questions loom large, the prompts we get from them direct attention to individual agency and wrongdoing by individuals. We need to bracket the explicit prompts and encourage inquiry that digs beneath the surface. It may be helpful to think of the explicit prompts as symptoms that challenge us to discover the disease that causes them.

That brings us back to the health metaphor with which we began.

It seems a reasonable hypothesis that institutional health depends upon institutional integrity and institutional integrity depends upon individual integrity.[1] If that is right, "disease" may be manifest at two levels—at the level of institutional or individual integrity.

I will begin with the first part of the hypothesis above, that institutional integrity is a condition of institutional health. The legal theorist Lon Fuller articulated this idea in a less generalized form when he spoke of the implicit laws of lawmaking or, more famously, the morality internal to law. I will explain and illustrate this idea and, after a bit of a detour, I will indicate how it applies to institutions of various sorts, including professions such as engineering, architecture, or medicine. Then I will turn to the second part of the hypothesis, that there is a dependency relation between institutional integrity and individual integrity. However, instead of exploring the consequences of lapses of integrity by individuals within an organization, I will approach this part of the hypothesis in terms of its suggestion that institutional integrity nourishes or promotes individual integrity. This suggestion presupposes a formative relation between institutions and persons; that in some measure our practices dictate both what we should do and what we should be. Todd May makes a powerful case for this thesis in his book *Our Practices, Ourselves*, and a recent book on privacy by Anita Allen has a similar thrust. I draw on their work to cash out what is little more than a suggestion in Fuller's legal philosophy. I do this with an eye to achieving some clarity about what's at stake if, as was suggested earlier, "disease" can manifest itself at the level of institutional integrity as well as individual integrity. And that, in turn, adds to the strength of the case for saying, with Fuller, that the principles internal to an enterprise constitute a morality and the responsibilities of the persons within an institution are moral responsibilities.[2]

1 One might be tempted to frame the hypothesis another way: institutional integrity is a necessary condition of institutional health and the integrity of agents within an institution is a necessary condition of institutional integrity. This formulation is, however, unsatisfactory because, among other things, a lack of integrity on the part of an agent within an institution may, but will not necessarily, undermine the integrity of the institution.

2 Fuller's claim met with great resistance as well as derision. In part this was the result of his association with secular natural law theory, which invited

Built Environments for Purposive Human Interaction

Institutions or organizations are environments for purposive human interaction. They are, of course, built environments; they are not found in nature. They are human creations. In this respect, they are like the built environment we occupy at this moment—a building on the campus of the Rochester Institute of Technology, or the one I slept in last night, the hotel here on the edge of campus. Sometimes institutions are consciously created; sometimes they arise in the manner of customary law, which we'll discuss, albeit briefly, in a later section of this paper.

Let us think for a moment about institutions of the first sort, that is, those that are consciously created. Examples are not far to seek. A think tank such as the Brookings Institution was consciously created; so too, the Rochester Institute of Technology, the Republican Party, the Catholic Church, the NCAA, Auschwitz, and the United States of America. In each case what was instituted, that is, created or set up, came into existence—indeed, we can specify the date— and, with one exception in the list I provided, still exists, though each has changed somewhat over time. Each of these institutions has (or had) a purpose (or set of related

if it did not guarantee misunderstanding of his central claim. For instance, H.L.A. Hart dismissed Fuller's claim that the principles internal to the lawmaking enterprise constitute a *morality* saying that Fuller's morality designation rests on and is likely to perpetuate a "confusion of principles guiding any form of purposive activity with morality." As if the principles internal to the carpenter's craft, or worse, the role of a concentration camp commandant, constitute a *morality*. H.L.A. Hart, review of *The Morality of Law*, by Lon L. Fuller, *Harvard Law Review* 78 (1965): 1285-87. I cannot mount a defense of Fuller's idea here. I have done so elsewhere, however. See, Daniel E. Wueste, "Fuller's Processual Philosophy of Law," review of *Lon L. Fuller*, by Robert S. Summers, *Cornell Law Review* 71 (1986): 1214-1217; Wueste, "Morality and the Legal Enterprise—A Reply to Professor Summers," ibid., 1252-1263 (discussing Hart's criticism, Summers's interpretation of Fuller's claim, and the question whether—as I argue, contra Hart and Summers—the principles Fuller identified as the internal morality of law constitute a role morality). The basic issue arises outside of jurisprudence. For example, it looms large in my critique of David Luban's position respecting what he calls "institutional excuses." See my "Role Moralities and the Problem of Conflicting Obligations," in *Professional Ethics and Social Responsibility*, ed. Daniel E. Wueste (Lanham, MD: Rowman and Littlefield, 1994.)

purposes) and each is (or was) an arena for human interaction in pursuit of that purpose. In the case of the institution that ceased, what is most remarkable is the gross iniquity of its purpose. While the evil character of its purpose did not guarantee its demise, it did guarantee human misery and debasement.

Some purposes that we choose to pursue require a special kind of place, a space that has the things that we need to accomplish our aims. For example, on many college campuses you will find a large space used only occasionally, for example, on select Saturday afternoons or evenings in the fall, as is the case at Clemson University. The space was created—it is a built environment—for a complex set of human interactions involving a rather large number of people. At Clemson this space is called Death Valley (its official name is Frank Howard Memorial Field) and what goes on there is a truly complex set of human interactions focused on and including the activities of specially outfitted young men who kick, carry and throw an oddly shaped ball for a specified period of time to, among other things, engage and gratify roughly 85,000 spectators seated in the stands.

Clemson's Memorial Stadium is a straightforward example of a built environment. It was built using bricks and mortar, girders and glass, i.e., familiar, tangible, materials. It was built for a purpose and purposive activities take place within it. Some of these purposive activities take place on the field; some take place in the stands and boxes. In some cases, it is apparent that the environment was designed to accommodate the activity. In other cases, it just happens that the environment is suitable for the pursuit of the purpose. In such a case one takes advantage of what is there to accomplish something the architect did not have in mind and for which no specific provision was made. One good example is when a man proposes marriage by arranging to have his proposal appear on the scoreboard screen at halftime. In our time one can easily imagine another example, on the dark side to be sure, in which a terrorist hacks into the computer controlled scoreboard screen and announces that there is a bomb in the stadium knowing that, although there is no bomb, his purpose will be served, since all will be terrorized and many may indeed perish in the panic.

I want to draw your attention to three things that I have said about this environment, built of bricks and mortar, girders and glass, that are true of institutions or organizations qua environments for purposive interaction.

- The environment was built for a purpose and purposive activities take place within in it.
- The environment was specifically designed for some of these activities.
- Some activities that take place in this built environment were not foreseen or planned for by its architect; in other words, although the participants in these activities find what they need for their purpose in this environment, this is, for them, a happy coincidence. The consequences in such cases are not necessarily happy ones, however. The environment and much else may be damaged.

You may recall some of my examples of consciously created institutions. I mentioned the Rochester Institute of Technology, the Republican Party, the Catholic Church, the NCAA, Auschwitz, and the United States of America. To be sure, structures made of bricks and mortar are associated with these institutions; however, what we have in mind when we speak of them as *institutions* is certainly something more, something other than buildings such as the White House or St. Peters in Rome. One way of cashing this out is to say that the institutions are housed in such structures. This is not terribly precise, however, since, among other things, the activities of an institution such as the federal government, the Catholic Church or the NCAA are not confined to a specific building or, indeed, any building at all. With this observation, which is surely a commonplace rather than a discovery, we are in a position to grasp the sense in which an institution is a special sort of environment built for human interaction.

As we have seen, some purposes that we choose to pursue require a special kind of place, a space where the conditions for the realization of our aims are met. In the case we have been considering—football in Death Valley—the conditions are satisfied by physical

structures. Let us consider another case where the conditions for the realization of our purposes neither are nor can be satisfied in this way.

Institutions, Normative Structures and Purposes

Imagine a group of shipwrecked men, not sailors whose relations would be organized by the hierarchy that governed them on board ship, but civilians. Suppose, as seems reasonable, that disputes arise among them and that they want to resolve them peacefully. There are, in fact, several ways to settle disputes peacefully. Tossing dice and flipping a coin, for example, are means for dispute resolution. However, not all disputes can be resolved by such means. For instance, it seems clear that flipping a coin is an inappropriate way to settle a dispute that involves conflicting claims of right or an accusation of guilt. A genuine claim of right is a demand that is supported by a principle, and an accusation of guilt presupposes a standard in terms of which conduct constitutes delict. So, for example, with conflicting claims of right there is a quite reasonable and settled expectation that resolving the dispute will require consideration of the relevant principles.

Suppose that the dispute that creates the challenge for our shipwrecked men involves competing rights claims. One of the men has a mirror. He (that is, the owner) claims that since it is his property, it is he and he alone who should use the mirror. He agrees, we may suppose, that the mirror should be used for signaling, but he claims that he should do the signaling. The other party to the dispute, a young Navy veteran who served in the signal corps, claims that he should do the signaling because he is best qualified to do it. One disputant has a claim of right based on a principle respecting ownership; the other has a claim of right based on a principle that asserts that custody and use of such items should be based on one's ability to use them in beneficial ways. Certainly, this dispute is less amenable to resolution by chance (flipping a coin, for example) than a dispute over who has the first watch. While we don't need a judge in the latter case—a coin will do quite nicely—a judge appears to be precisely what we need in the case of the dispute over the mirror.[3] Here, then, the

3 With this example I am following Fuller, who uses a hypothetical involving shipwrecked sailors in "Reason and Fiat in Case Law," 59 *Harvard Law Review* 376 (1946) to get at the elements of the judicial process.

purpose the men have set for themselves, namely, peaceful resolution of a dispute involving conflicting rights claims, determines the means of its realization. For the shipwrecked men, the "space" where the conditions for the realization of their purpose are met is normative space; their aim will be met within a normative structure, in particular, it will be met within the normatively governed practice or institution of adjudication.

The adjudicative structure is normative both in its product—authoritative resolution of disputes—and its process. The link between pro-cess and product here is constitutive; the normativity (validity/authority) of the product is the upshot of the satisfaction of normative conditions *within* the process/practice that are specified by principles internal to the enter-prise itself. This idea, that there are principles internal to an enterprise that, in fact, make that enterprise possible, in the sense of creating the capacity to achieve its purpose, is the idea that Lon Fuller struggled to articulate in his books *The Morality of Law* and *The Anatomy of Law.* In the first case, he spoke of law's internal morality; in the second, perhaps because such talk turned out to be an obstacle to understanding (as well as a target of sustained criticism), he spoke instead of the implicit laws of lawmaking.

I will return to Fuller in a moment. First, however, I want to clarify the basic idea that is now on the table by continuing with the hypothetical case of the shipwrecked men. Earlier we identified two methods of dispute resolution, tossing a coin and adjudication. Both are dual aspect normative structures. That is, each is a normatively governed practice that creates a product that has a normative function, for example, an authoritative decision respecting liability for negligence. One is more complex than the other, of course. Yet, the crucial point emerges from the same inquiry: what explains the sense of rightness that attaches to the products of these practices?

If the dispute were resolved by flipping a coin, the only reason that could be offered for one party's being the rightful user of the mirror is the pre-toss agreement to abide by the result of the coin toss. The situation would be importantly different if the dispute were resolved by adjudicative means. For in that case, a reason beyond the agreement to abide by the decision of the judge (the upshot of an adjudicative process) could be given.

That such a *reason* is forthcoming is a settled expectation within the practice of adjudication. In fact, this expectation is inextricably bound up with the practice of adjudication. Moreover, this expectation, qua normative condition, is the key element in an explanation of the sense of rightness that attaches to the judge's decision, in particular, it explains the fact that this sense of rightness seems to be richer and firmer than the sense of rightness that attaches to the "decision" made by flipping a coin.

In both cases there are conditions that must be satisfied if a sense of rightness is going to attach to the decision. For example, in the first case, the coin must be a fair coin, and the number of times the coin will be tossed must be established before the coin is tossed (is it two out of three, or will the coin be tossed only once?). What of the second case? Well, here too we find conditions respecting the decision maker qua decision maker and conditions with respect to the operation of the decision-making process. For instance, the judge must not have been bribed or be hopelessly prejudiced; opportunities must be provided for the parties to present and defend the principles that support their competing rights claims; the judge has to attend to the arguments she hears in making her judgment.

Conditions for Decision-maker

Coin toss: The coin must be a fair coin.

Adjudication: The judge has not been bribed and is not hopelessly prejudiced.

Conditions for the Operation of the Decision-making Process

Coin toss: The number of times the coin will be tossed has to be settled before the coin is tossed.

Adjudication: Opportunities must be provided for the parties to present arguments in which, for example, they articulate and defend the principles that support the competing claims of right; the judge must attend to these arguments.

The complexity of adjudication that we noted earlier is apparent here; it is explained in large part by the fact that the role of decision maker within this process is assumed by a conscious being that has interests and can willfully comply or refuse to comply with the processual constraints of that role. One consequence of this is that in practice it is easier to distinguish the two sorts of conditions in the coin toss case than with adjudication.

These practices are normative both in their products (decisions that resolve disputes) and their processes. The normativity (validity) of their products is the upshot of the satisfaction of normative conditions specified by governing principles internal to the enterprise itself. As noted earlier, this idea, that there are principles internal to an enterprise that, in fact, make that enterprise possible, in the sense of creating the capacity to achieve its purpose, is central to Lon Fuller's jurisprudence. It is time to make good on the promise I made to return to Fuller.

Lon Fuller's Eunomical Jurisprudence

The most rewarding reading of Fuller begins with an appreciation of the eunomical orientation of his jurisprudence. As Ken Winston explains in his Introduction to *The Principles of Social Order*, a collection of Fuller's essays and addresses that he edited, Fuller coined the term "eunomics" in 1954 in a review of Edwin Patterson's book *Jurisprudence: Men and Ideas of the Law.* Fuller uses the term eunomics, which he defined as "the science, theory, or study of good and workable social arrangements,"[4] in inviting others to join in the project of discovering and studying the principles contained in the forms or processes of social order by which human interaction is organized and facilitated, for example, legislation, adjudication and contract. Fuller began working on this project as early as 1949 in chapter 6 of *The Problems of Jurisprudence*. In fact, as Winston points out, "Fuller's principal concern is…the discovery of natural laws of social order, that is, the compulsions and opportunities necessarily contained in particular

4 Lon Fuller, "American Legal Philosophy at Mid-Century," 6 *Journal of Legal Education* 457 (1954) 477.

domains of objective social reality, in certain ways of organizing men's relations with one another."[5] Winston's point squares with Fuller's description of his project as a sort of "social architecture"[6] focusing on problems of institutional design. Here is Fuller, writing about codes of ethics in the journal *Electrical Engineering*:

> We must ask of [social institutions] what purposes they serve in society and then reason out what restraints must be observed if those purposes are to be achieved. When a creative responsibility toward social institutions is assumed, we are no more free to follow our whims and impulses of the moment than is an electrical engineer who undertakes to design a circuit for a specified purpose.[7]

Fuller is best known, perhaps, for his claim that law has its own internal morality. The idea emerges in a story he tells about a hapless King Rex who fails as a lawmaker in eight distinguishable ways. The lesson we learn, according to Fuller, is that lawmakers must comply with eight principles internal to the legal enterprise lest they fail to make law. Laws must be 1) general, 2) promulgated, 3) typically prospective, not retroactive, 4) clear—that is, readily intelligible. Laws must also be such that the acts they require are 5) neither incompatible nor 6) impossible to perform. Moreover, 7) laws must not be changed too frequently, and finally, 8) there must be a congruence between the rules as declared and the rules as administered. As Fuller has it, these eight principles constitute the morality that "makes law possible." In other words, what we have here answers the question of how what emerges from the legislative process can make behaviors *normatively* non-optional, in a word, obligatory.

5 Kenneth I. Winston, "Introduction," *The Principles of Social Order,* ed. Kenneth I. Winston (Durham, NC.: Duke University Press, 1981) (hereafter *PSO*) 12.

6 Lon Fuller, "Means and Ends," *PSO* 50-52.

7 Lon Fuller, "The Philosophy of Codes of Ethics," 74 *Electrical Engineering* 916 (1955) 917.

I will let Fuller speak for himself:

> Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted. As the sociologist Simmel has observed, there is a kind of reciprocity between government and the citizen with respect to the observance of rules.[8]

The "principle of reciprocity" is key in Fuller's account of law's capacity to obligate. Indeed, as Fuller has it, "the notion of reciprocity [is] implicit in the very notion of duty—at least in the case of every duty that runs toward society or toward another responsible human being."[9] Thus, a complete rupture of the "bond of reciprocity" between government and citizen leaves nothing "on which to ground the citizen's duty to observe the rules."[10] There is nothing mysterious here, no "brooding omnipresence in the sky," just a principle that "has roots…in our professions [and] in our practices"[11] and is "visible, as it were, in varying degrees. At times it is obvious to those affected by it; at others it traces a more subtle and obscure course through the institutions and practices of society."[12] In any case, as Fuller has it, although the principle is "given" and is in that sense natural, "we do not know it instinctively." We "discern and understand" it by using "our minds and our powers of observation."[13]

8 Lon Fuller, *The Morality of Law* revised edition (New Haven and London: Yale University Press, 1969) (hereafter *MOL*) 39.

9 Fuller, *MOL* 21.

10 Fuller, *MOL* 39-40.

11 Fuller, *MOL* 21.

12 Fuller, *MOL* 22.

13 Fuller, "The Philosophy of Codes of Ethics," 74 *Electrical Engineering* 916 (1955) 916.

Reciprocity is central to Fuller's description of customary law which, he says, "[consists] of the reciprocal expectations that arise out of human interaction."[14] This is important for several reasons, but I mention it now because in fleshing this out Fuller makes a key point, namely, that in addition to prescribing or proscribing certain acts, customary law also specifies roles and functions and holds those responsible for discharging them to account. If that is right, and I for one think that it is, stable interactional expectations are a source of roles and functions as well as certain prescriptions or proscriptions; as Fuller puts it, they create both "a vocabulary of deeds and a basic grammar."[15]

Consider the practice of casting ballots, an election. This practice rests on an assumption, a stable expectation about the activity, namely, that a vote cast for candidate A will be counted as a vote for candidate A. "This is true," Fuller explains, "even though the possibility that my ballot will be tossed in the wastebasket, or counted for the wrong man, may never enter my mind as an object of conscious attention."[16] The expectation that votes cast will be faithfully counted is intrinsic to the practice of voting or elections; if this expectation is thwarted, "the participation of the voter [would lose] its meaning altogether"[17] and the institution would "[cease] to function in any significant sense at all."[18]

The Fullerian idea is that human beings build environments for purposive interaction, for example, selecting representatives (elections), resolving conflicting rights claims (adjudication), or "subjecting human conduct to the governance of rules"[19] (legislation). The environments they build are spaces where the conditions for the realization of their purposes are met. Fuller focused attention on what I called normative space where human aims are achieved within a normative structure, that is, within a normatively governed practice or institution. According to Fuller, each of these institutions has an internal morality, which consists of principles that articulate the stable interactional expectations of those who

14 Fuller, "The Role of Contract in the Ordering Processes of Society Generally," *PSO* 176.
15 Fuller, "Human Interaction and the Law," *PSO* 243f.
16 Fuller, *MOL* 217.
17 Fuller, "The Forms and Limits of Adjudication," *PSO* 92.
18 Fuller, "The Forms and Limits of Adjudication," *PSO* 91.
19 Fuller, *MOL* 74.

(inter)act within it. Making these expectations explicit can be difficult, however. While they direct and inform our behavior toward others as well as our interpretations of their behavior toward us, in general we are not conscious of them. As Fuller says, in this respect they are like "rules of grammar that we observe in practice without having occasion to articulate them until they have been conspicuously violated."[20] Thus, in his work he makes extensive use of allegory, telling stories about shipwrecked men on a desert island in "Reason and Fiat in Case Law," trapped speluncers in "The Case of the Speluncean Explorers," and the hapless King Rex in *The Morality of Law*, where, as we have seen, he reveals the morality internal to "the enterprise of subjecting human conduct to the governance of rules," i.e., legislation. The analogy to grammar is easy to see in the last case, for in the story, as we noted earlier, the principles of the lawmaking enterprise emerge as Rex fails to make law. In each case, his failure is the upshot of a violation of a principle internal to the enterprise. Fuller's lesson can be stated simply: institutions such as legislation or elections "have an integrity of their own which must be respected if they are to be effective at all."[21] Rex's failures to respect the integrity of the legislative enterprise impaired the health of the institution and that, in turn, rendered it incapable of achieving its purpose.

Webs of Accountability Within Our Practices

In his book, *Our Practices, Ourselves*, Todd May focuses attention on the question of who we are. As he has it, this question is "about each of us individually and about us in our being together." Continuing, he explains that the question is "about we as in who each of us is, and who we are in our various groupings: who you are and who I am and who each of these other folks we share the planet with is." As you might have surmised from the title of his book, his answer is roughly "we are our practices."[22]

20 Fuller, "Human Interaction and the Law," *PSO* 218, 221.

21 Fuller, "The Role of Contract in the Ordering Processes of Society Generally," *PSO* 180.

22 Todd May, *Our Practices, Our Selves, or What it Means to be Human* (University Park, Pennsylvania: Pennsylvania State University Press, 2001). (hereafter *OPO*) 2.

As May uses the term 'practice' it refers to "a regularity (or regularities) of behavior" that is ordinarily "goal-directed." A third characteristic rounds out his notion of practices: practices are "socially and normatively governed."[23] Practices are social in the sense that they involve normatively governed positions, i.e., roles that can be occupied by a number of persons. The roles are defined by norms (not all of which can be formulated as rules) that, among other things, delineate stable interactional expectations. An example may be helpful. Baseball is a practice in this sense. There are regularities of behavior here that have an aim; the regularities of behavior are socially and normatively governed. The players have roles that interlock and complement each other and that can be cashed out largely in terms of stable interactional expectations. The idea is straightforward. One sees readily, for example, that friendship and familial life also constitute practices in this sense. This idea of a practice is a powerful device for making headway in answering the question of who we are.

What May calls practices reside, so to speak, "at the intersection of the individual and the social."[24] With this notion of practices May abandons two ideas that have dominated social and political thinking: on the one hand, he walks away from the idea of an individual as solitary, self-enclosed, distinct and severable from the social setting in which we find her, and on the other hand, he walks away from the idea that an individual, a self, is the product of vast social forces—the nation, capitalism, society, patriarchy. We are, then, positioned to jettison the idea that wisdom and justice in matters social and political begins with the distinction between public and private.

In a recent book, *Why Privacy Isn't Everything,* Anita Allen directs attention to and provides a very helpful name for the mechanisms May has in mind when he says that practices are governed socially and normatively. She calls them "webs of accountability," and very much like May she holds that "we live lives enmeshed in" them.[25] Moreover, again like May, as Allen has it, webs of accountability are ubiquitous, subject to

23 May, *OPO* 8.

24 May, *OPO* 12.

25 Anita Allen, *Why Privacy Isn't Everything* (Lanham, Maryland: Rowman and Littlefield, 2003) (hereafter *WPIE*) 2, 197-99.

change, and powerful influences on who we are. This name is, as I said, very helpful. It is certainly useful shorthand for a rich, powerful and rather Fullerian idea that comprises "actual and felt imperatives, including obligations, duties and responsibilities."[26]

Think again of baseball. The players have interlocking and complementary roles and they are accountable to one another (and others such as fans) in the sense that a reckoning may be required.[27] Each may be required to explain or justify an action—throwing the ball to first instead of trying for a double-play, for instance—or to provide information, to act reliably, or do their reckoning through the mechanism of sanctions that are meted out and endured. Their accountability is a matter of degree; its measure depends on the degree to which, for example, explaining or justifying one's actions to others is (or is felt to be) non-optional, that is, obligatory. There is a web of accountability here. It is an intrinsic element of the practice.

What I want to flag with this return to the baseball example is that webs of accountability are internal to practices; they are, as it were, structural elements. Actually, it would be more accurate to say that they are not only structural but *structuring* elements. This last is a point I want to explore further.

Very often, perhaps more often than not, talk of accountability, like talk of responsibility, brings to mind wrongs for which one is held to account in the sense of being liable to unwelcome treatment at the hands of another, for instance punishment. Further, there is a tendency to think that what occasions such accountability is a transgression, a trespass, the performance of an act that violates a rule. In the main, the rule that has been violated in such cases is a rule that forbids action. The rule was supposed to check, hold back, or prevent folks from taking a course of action. It said "No"; the agent ignored the voice of power and did it anyway. Of course, some rules don't restrain us *from* acting; rather, they constrain us *to* act. This dyad of doing is a province of power; for

26 Allen, *WPIE* 17.

27 Here I follow Allen, for whom accountability is a matter of reckoning with others, which we do by explaining and justifying our actions to others, by providing information, by acting reliably, and through the mechanism of sanctions that are meted out and endured.

example, one way in which governmental power over people manifests itself is in its demands that we do or not do certain things. The realm of power extends further, however. In addition to being able to get people to do or not do something, as May observes, "to have power over people is to be able to get them either to *be* or *not be* something." May goes on,

> Although traditional political philosophers have focused their energies on the not-doing and not-being part, we all recognize that what is at stake in power are doings and beings as well as not-doings and not-beings.[28]

The neglect of doings and beings is explained by the fact that social and political philosophy direct attention to forces such as society or government that have a wide or general scope and limit liberty (largely, though not exclusively) by in effect saying no. Sometimes these forces say no with an eye to preventing harm, as Mill argued they may, or to prevent sin, or offense, or indeed, for the good of the people whose liberty will be limited, all of which Mill argued they may not do. The theories of traditional social and political philosophy emerge from inquiries about what makes a society or government just. The philosopher is looking for the principle (or principles) that justifies limiting liberty or, if you will, exercising the power of no. In the liberal tradition this leads to a distinction between public and private and a two-part claim about these large forces, namely (1) that they have no right to say no to conduct that is private and (2) their power to say no is legitimately exercised only under certain circumstances, for example, to prevent harm to others.

May directs attention elsewhere, to the "question of what makes us do and be certain things." He argues against the assumption that power is a matter of restraint; he locates "the power that does not simply restrain us but also creates us…at the level of practices." He is working at a different level, which he calls "local,"[29] where power not only *restrains* people *from* acting, by saying no, but also *constrains* them *to* do or be something. I believe that what May has in mind here is a creative power that works by

28 May, *OPO* 176. Emphasis added.
29 May, *OPO* 176.

channeling. I find this metaphor apt because, as May has it, practices make us who we are in the sense that "what we do, what we believe, and what we feel [are] created and sustained" by the practices we engage in.[30]

Our practices tell us what to do and what to be; they enumerate our responsibilities and articulate aspirations. I will not press the baseball example any further, instead I invite you to think of the practice of a profession—lawyering, or medicine, engineering, or the professorate, for example. Membership in any of these professions entails responsibilities and aspirations. Indeed, the linkage between who one is and one's profession can scarcely be denied. After all, prominent among the questions one asks in choosing a profession is whether *that* is what one wants to *be.* Professional practices have the power to form selves and sustain them once created.

I believe that a large part of this formative and sustaining power resides in what Anita Allen calls webs of accountability. Consider for a moment the web of accountability within a professional practice, that is, a professional ethic. Such a web of accountability constitutes a role morality the norms of which are either "created, applied and enforced by some organization," or "generally accepted, followed and sanctioned informally within some community."[31] These norms are standards for action and reaction: they apply to a role agent who is deciding what action to take; they also apply to the reactions of others (within and outside of a profession) who observe or otherwise become aware of deviation from (or conformity with) them. What we have here is a web of accountability internal to a practice. Recalling the point made earlier about what's at stake in the choice of a profession—is that what I want to *be*? —it should be clear that doings and not-doings, beings and not-beings are within its scope.

So, again, I think a large part of the power of practices to form and sustain selves—to make us who we are—is found in what Allen calls webs of accountability. It is clear that she is aware of this facet of accountability, for she notes how it "chills, deters, punishes, prompts, pressures, and exposes" and yet "protects, dignifies, and advantages."[32]

30 May, *OPO* 175.

31 Carl Wellman, *A Theory of Rights*, Totowa, New Jersey: Rowman and Littlefield, 1985) 118.

32 Allen, *WPIE* 195.

She observes that official accountability to the state and unofficial accountabilities constrain in similar ways and she recognizes that accountability is a "device of group identity and solidarity" within families and religious groups, for example.[33] Moreover, it is clear that she sees the creative power of webs of accountability within practices at what May would call the local level. As it happens, in the place where this recognition is clearest, she is talking about the "dark side" of webs of accountability. Noting that they may have positive effects, her emphasis falls on the fact that "suffocating, harsh, nongovernmental accountability can make a person wretched."[34]

To my mind the singular importance of webs of accountability emerges at this juncture with an awareness of their creative and sustaining power. It is important to note that from the practice perspective we won't always be able to identify a person or institution that is using the practice to mold us or make us what we are. The reason for this is that practices do not require agency of either sort. In this respect, webs of accountability map onto a distinction familiar in the law; what I have in mind is the distinction between law "by position," for example, positive law created by a legislature, and customary law, which, as Fuller suggests, is an interactional phenomenon. The basic idea was articulated earlier when we spoke of institutions as built environments for purposive human interaction and noted that some of them are consciously created while others arise in the manner of customary law.

Revisiting Fuller: Institutional and Individual Integrity

Customary law arises out of interaction and serves to order and facilitate it. Fuller describes it in general terms as "reciprocal expectations that arise out of human interaction."[35] As we develop ways of interacting that allow us to achieve mutual or complementary aims these forms of interaction become regularized. Although they are not consciously created, these forms of interaction are human artifacts; they are built environments for purposive human interaction. Turning our conscious

33 Allen, *WPIE* 198-99.

34 Allen, *WPIE* 199.

35 Fuller, "The Role of Contract in the Ordering Processes of Society Generally," *PSO* 176.

attention to them we can discern and articulate the stable interactional expectations comprised by them, that is to say, we can articulate what Fuller calls their internal principles or the customary law of a form of interaction.

As we have seen, on Fuller's view customary law is not limited to the prescription or proscription of certain acts. It also designates roles and functions and, when the occasion arises, it "holds those discharging those roles and functions to an accounting for their performances." It constitutes both "a vocabulary of deeds and a basic grammar."[36] What Fuller has in mind "primarily [are] the tacit commitments that develop out of interaction"[37] and that, as it happens, is also what he has in mind when speaks of the implicit laws of lawmaking, a.k.a. the morality internal to law. So, we have returned to the internal morality idea that we visited earlier in talking about institutional integrity, though now, having taken seriously May's points about practices, we recognize a formative relation between institutions and persons in which "what we do, what we believe, and what we feel [are] created and sustained" by the practices we engage in.[38]

Fuller's point, you will recall, is that there are principles internal to an enterprise that underlie its capacity to achieve its purpose. We explored this idea in connection with the sense of rightness that attaches to the products of adjudication as well as the practice of resolving disputes by means of a coin toss. In the case of lawmaking, which has the purpose of making some conduct *normatively* non-optional, Fuller called the principles internal to the project the morality of law. In each case, what is at stake is the effective realization of an institutional purpose; in order to achieve the purpose, one has to comply with the normative constraints intrinsic to the enterprise, which is essentially the task of maintaining its integrity. Fuller's hapless King Rex, for example, failed to do this and for that reason he failed to make law.

36 Fuller, "Human Interaction and the Law," *PSO* 243f.

37 Fuller, *MOL* 234.

38 May, OPO 175. Earlier, in discussing institutions as environments for purposive human interaction, we noted that their architects did not foresee some of the things that take place within such built environments. I suspect that more often than not, the forming and sustaining of selves is one of those unforeseen activities; all the more when the institution is not consciously built but arises in the manner of customary law.

As Fuller hinted and May argues eloquently, in some measure our practices dictate both what we should do and what we should be; they "help to make us what we are."[39] Of course, this formative thrust of institutions can be positive or negative; it can work for good or ill. And thus it emerges that "disease" may be manifest at two levels—at the level of institutional or individual integrity. Bad apples can spoil a barrel and a bad barrel can create bad apples. Because this reciprocal relationship is creative and because what is being created or built are the forms of our living together *and* ourselves, it is hard to deny Fuller's claim that the principles internal to an institution—a normative structure or normatively governed enterprise—constitute a morality, and that the responsibilities of the persons within an institution are moral responsibilities. Thus, as I suggested at the start, Fuller's eunomical jurisprudence provides an excellent starting place for a serious and sustained conversation about institutional integrity.… And we do need to talk….about institutional integrity, in particular, we need to talk and then to act in ways that are informed by an appreciation of the capacity of healthy institutions to nourish or promote individual integrity.

39 Fuller, "The Philosophy of Codes of Ethics," 74 *Electrical Engineering* 916 (1955) 917.

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