

The Natural Law Philosophy of Lon L. Fuller in contrast to *Roe v. Wade* and Its Progeny

Thomas W. Strahan

This article analyzes the legal theories of Lon L. Fuller (1902-1978) as contrasted with the legal framework adopted by the U.S. Supreme Court in *Roe v. Wade* and its progeny. Fuller was a professor of general jurisprudence at Harvard Law School for many years until his retirement in 1972. The scope of his writings on law included legal philosophy, contracts, mediation, comparative law, and legal procedure. As far as can be determined, Fuller never commented on abortion in his writings. He believed that law should stand the scrutiny of reason and stressed the importance of *good order*ⁱ (emphasis added). He criticized the views of philosophers such as Hans Kelsen, H.L.A. Hart, Ronald Dworkin, and Marshall Cohen. Fuller opposed legal positivism, the idea that law is no higher than a particular authority, that is, a sovereign state or a rule of recognition, is morally neutral, and is merely an instrument of external ends such as utility.ⁱⁱ

His leading work on legal theory, *The Morality of Law* (1964, 1969), has been translated into several languages and has been used as the text for teaching legal principles in developing nations. The book advocated a kind of secular natural law,ⁱⁱⁱ and it was initially severely attacked by many lawyers and philosophers. The *Morality of Law* offers an extended discussion of the difference between the morality of duty and the morality of aspiration and took the position that the purpose of law was both practical and moral.

LIMITATIONS OF THE POSITIVIST PHILOSOPHY OF LAW

Fuller criticized legal positivism because he observed that “the analytical positivist sees law as a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen. It does not discern as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen—morally or immorally, justly or unjustly, as the case may be. The positivist philosophy asks of law not what it is or does, but whence it comes. Its basic concern is with the question ‘Who can make the law?’.”^{iv}

Legal decisions such as *Roe v. Wade* (1973),^v *Planned Parenthood v. Casey* (1992),^{vi} and *Stenberg v. Carhart* (2000)^{vii} are consistent with a positivist philosophy. These decisions take the position that abortion should be tolerated and emphasize the idea of “freedom of choice” of the woman. Their focus is on “who decides,” not on whether or not human life is destroyed or whether or not there may be any moral duty to protect that life. The framework of discussion is limited to the autonomous, independent woman versus governmental authority.^{viii}

John Noonan in his book *A Private Choice* (1979) concluded that “*Roe v. Wade* was premised on a society of isolated individuals.”^{ix} This conclusion was warranted because the proclaimed abortion right was based on the right of privacy, and the paramount value expressed was the self-determination of the woman. Later, in *Planned Parenthood v. Casey* (1992), the U.S. Supreme Court stated in connection with a spousal notification law, which was struck down as unconstitutional, that “the marital couple is not an independent entity with a heart and mind of its own, but an association of two individuals with a separate intellectual and emotional makeup.” Based on that definition of marriage, the Court concluded that “a husband has no enforceable right to require a wife to advise him before she makes her personal choices.”^x

The autonomy of the woman in these decisions is consistent with the contemporary liberal notion of liberty. George Will has observed that “the principal anxiety of modern liberalism is the fear of uniformity, usually called conformity. The principal

affirmation of modern liberalism is that every individual is a person of many parts, a person who assembles himself or herself. Every individual can be a self-constituting creature, manufacturing himself by choosing purposes or values by whatever principle he or she wishes from the universe of possibilities. Freedom is defined as hostility toward conventions. This notion...contrasts sharply with the notion (set forth by Aristotle, Hegel, and others) that man is a social creature and that the value of his life is, to some extent, a function of his association with persons whose similar moral construction derives from intercourse in a moral community.^{xii}

The Court in *Planned Parenthood v. Casey* understood that it was imposing the decision on the American people and recognized that its legitimacy was at risk by affirming the essential holding in *Roe v. Wade*. It stated that “the Court’s power lies in its legitimacy, a product of substance and perception, that shows itself in the people’s acceptance of the judiciary as fit to determine what the Nation’s law means and to declare what it demands.”^{xiii} This statement exposed one of the weaknesses of legal positivism, which emphasizes the notion of who has the power or authority to decide the law. In contrast, Lon Fuller believed that an essential element of a legal system is that there must be tacit cooperation between the lawgiver and the citizen as to what is moral or immoral, just or unjust, as the case may be. His view provides more opportunity for citizen participation through their elected representatives to enact laws and makes it less likely that such laws would be held unconstitutional by the courts. It also provides a framework for realization of the ideals of a republic, where the ultimate power rests with the people, not the courts.^{xiv}

Those who oppose abortion emphasize that there is a fundamental right to life of the unborn child that the courts and society have a duty to protect. They do not support the notion of the isolated independent woman who is free to dispose of the unborn child as she desires. It thus appears that those on differing sides of the debate over whether or not abortion should be legal are discussing fundamentally different views of law without

realizing it. Because of these fundamental differences, both sides might sincerely believe that they are advancing human rights but, because of the differing underlying presuppositions, no meaningful dialogue takes place and legal issues relating to abortion are endlessly litigated.

In the abortion debate, legal decisions asserting a woman's right to abortion exhibit a strong notion of utility. In this view, abortion is expedient to advance the freedom of the woman. Abortion is seen as useful to the woman in realizing her goals and aspirations. For example, in *Planned Parenthood v. Casey* (1992) the Court opined that "the ability of women to participate in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives."^{xiv} Fuller observed that a utilitarian philosophy has a major influence on legal positivism. He believed that utilitarianism encourages the notion that means are a mere matter of expediency. However, he also believed that means and ends stand in a relationship of pervasive interaction. He saw legal positivism as "merely an attempt to serve a managerial function which does not fully express the meaning and scope of law."^{xv}

Legal positivism also attempts to remain morally neutral. This is criticized by Fuller because it fails to recognize the role legal rules play in the making possible an effective realization of morality in the actual behavior of human beings. He states: "Moral principles cannot function in a social vacuum or in a war of all against all. To live the good life requires something more than good intentions, even if they are generally shared; it requires the support of firm base lines for human interaction, something that—in modern society at least—only a sound legal system can supply."^{xvi}

In its legal analysis of abortion, the Court never considers whether the unborn child might have a moral status or whether or not abortion may be immoral. For example, in *Stenberg v. Carhart* (2000) the State of Nebraska claimed that partial-birth abortion could be banned because the practice was immoral. This was ignored by a majority of the Court. However, In his dissent, Justice Kennedy complained that "the decision nullifies a law expressing

a will of the people of Nebraska that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including the life of the unborn. Through their law the people of Nebraska were forthright in confronting an issue of immense moral consequence.... The Court closes its eyes to these profound concerns.”^{xvii} In this moral, social, and ethical vacuum, abortion is legally treated as the equivalent of childbirth.^{xviii}

THEORY OF SOCIAL ORDER

Fuller illustrates his theory of the social order in his theory of natural law with the following metaphor. “Imagine that you hold in your hand about twenty pieces of cardboard, cut in irregular shapes. Each represents a human being, with his own particular capacities, desires, and interests. The pieces are irregular and varied because men are that way. Before you on a table lies a circle within which you must place all of these pieces. This circle represents the total means of satisfying human desires and realizing human capacities. If you allow the pieces of cardboard to drop within the circle in random order, you will find many of them will be stacked on top of one another, leaving blank spaces where there are no pieces—unused space, in other words. By experimenting and patiently rearranging the pieces, you will find that it is possible to reduce radically the instances in which the pieces overlap and push against one another. There is, in other words, a law already given by the dimensions of the circle and by the dimensions and shapes of these pieces, which determines, in some measure, how they must be arranged to utilize the available space to the fullest advantage and with the least overlapping.”

Fuller recognized that the actual pieces are not only individual human beings, but a complex of human beings and human institutions, which also change shape constantly. Furthermore, he knew that “the task is not to arrange the pieces so that they may lie inertly alongside one another, but so they may work together.”^{xix}

THE MORALITY OF ASPIRATION AND THE MORALITY OF DUTY

In discussing the nature of law, Fuller introduces two important concepts. These are “the morality of aspiration” and “the morality of duty.” These concepts did not originate with Fuller, but he appears to be the originator of the nomenclature. The morality of aspiration he describes as “most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers. In this concept one might be condemned for failure, [but] not for failure to perform a duty, for shortcoming, but not for wrongdoing.” Generally with the Greeks, according to Fuller, “instead of the ideas of right and wrong, of moral claim and moral duty, there was rather the conception of proper and fitting conduct, which represented a human being functioning at his best. The morality of aspiration stands in intimate kinship with anesthetics and has to do with our efforts to make the best use of our short lives.”^{xx}

In contrast, according to Fuller, “while the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark. The morality of duty finds its closest cousin in the law. The morality of duty is the morality of the Old Testament and the Ten Commandments. It speaks in terms of “thou shalt not” and, less frequently, of “thou shalt.” It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living. The moral injunction “thou shalt not kill” implies no picture of the perfect life. It rests on the prosaic truth that if men kill one another off, no conceivable morality of aspiration can be realized.”^{xxi}

DUTY OR ASPIRATION IN THE PROTECTION OF UNBORN HUMAN LIFE

In the abortion decisions of the Court, the aspirations of the woman are deemed paramount, not the duty to protect human life.

Whether or not there is or may be a duty by the woman or society to protect human life in the womb is given little or no consideration. In *Roe v Wade* the legalization of abortion was based upon a claimed right of privacy of the woman and the right of self-determination of the woman in consultation of with a medical doctor. In *Planned Parenthood v. Casey* (1992) the Court held that the decision to have an abortion was a constitutional liberty. The Court claimed that “the abortion decision may originate within the zone of conscience and belief.... The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.” At another point in the decision, the Court stated that “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.”^{xxii} In *Stenberg v. Carhart* (2000) the Court struck down a law banning partial-birth abortion, in part, because it did not contain an exception for the preservation of the health of the woman. Earlier decisions in *Roe v. Wade* and *Planned Parenthood v. Casey* also required that laws restricting abortion must have an exception to protect the health of the mother. The paramount importance of health is also an example of the dominant position of the morality of aspiration.

THE LAW OF RECIPROCITY

Fuller observed that writings of ethicists discussing the importance of duty are filled with references to the principle of reciprocity. He noted that even in the midst of the exalted appeals in the Sermon on the Mount there is a repeated note of sober reciprocity: “Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged; and with what measure ye mete, it shall be measured to you again.... Therefore all things whatsoever ye would that men should do to you, do ye even also to them: for this is the law and the prophets.”^{xxiii}

Fuller says that what the Golden Rule attempts to convey is not that society is composed of a network of explicit bargains, but that it is held together by a pervasive bond of reciprocity. Traces

of the concept are to be found in every morality of duty, from those representing heavy appeals to self-interest, to those resting on the lofty demands of the Categorical Imperative. In the broad sense, there is a notion of reciprocity implicit in the very notion of duty—at least every duty that runs toward society, such as voting in elections, or toward another responsible human being.”^{xxiv}

Various philosophers have applied the concept of the Golden Rule to unborn children. One philosopher stated that we should make similar ethical judgments about the same sort of circumstances. He believes that the pro-abortion position is inconsistent because the advocate is supporting certain moral principles about the treatment of others that he would not wish to have followed in their actions toward him.^{xxv} Another philosopher argues that we should do unto others what we are glad was done to us. Since we are glad that we were conceived, not aborted, and not killed as infants, we too ought to conceive, not abort, and not kill infants.^{xxvi} Philosopher Don Marquis also adopts a form of the Golden Rule and attempts to follow an objective approach to morality. He argues that abortion is immoral because the victim has a loss of a future like that of a person who is already born.^{xxvii}

APPLICATION OF DUTY OR ASPIRATION

How is it known whether duty or aspiration should prevail? Fuller believed that “as soon as contributions are designated and measured, which means as soon as there are duties, there must be some standard, however rough and approximate it may be, by which the kind and extent of the expected contribution is measured. The standard must be derived from the pattern of a social fabric that unites strands of individual action. A sufficient rupture in this fabric must, if one is to judge the matter with any rationality at all, release men from those duties that had as their only reason for being, maintaining a pattern of social interaction that has now been destroyed.”^{xxviii}

According to Fuller, “there is no way by which the law can compel human beings to live up to the excellences of which they are capable. For workable standards of judgment the law must

turn to its blood cousin, the morality of duty. Nor is there any way open by which one can compel someone to live the life of reason. One can only seek to exclude from his life the grosser and more obvious manifestations of chance and irrationality. “He believed that it is possible to create the conditions essential for a rational human existence, which, although necessary, would not be fully sufficient for a social order.”^{xxix}

He also compares the morality of duty to that of the morality of aspiration and suggests an ascending scale. “The bottom of the scale starts with the conditions obviously essential to social life and ends at the top with the loftiest strivings toward human excellence. The lower rungs on the scale represent the morality of duty; the higher rungs represent the morality of aspiration. Separating the two is a fluctuating line of division, yet vitally important. If the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration, and spontaneity. If the morality of aspiration invades the province of duty, people may begin to weigh and qualify their obligations by standards of their own, and we may end with the poet tossing his wife into the river in the belief—perhaps quite justified—that he will be able to write better poetry in her absence.”^{xxx}

In making this statement, Fuller adheres to the cardinal principle of criminal law, which holds that good motives are not a defense to killing another. As one court stated, “Guiteau stoutly maintained to the end of his sanity that he felt he had a patriotic mission to fulfill in the taking of the life of President Garfield, to the salvation of a political party. The Hindu mother cast her babe to the advouring (sic) Ganges to appease the gods. But civilized society says both are murderers.... Society is organized on the theory, born of the necessities of human well-being, that each member yields up something of his natural privileges, predilections, and indulgences for the good of the composite community.... It is the very incarnation of the spirit of anarchy for a citizen to proclaim that like the heathen he is a law unto himself.”^{xxxi}

However, Fuller also believed that “the morality of aspiration offers more than good counsel and the challenge of excellence. It can speak and be heard across the boundaries and through the barriers that now separate people from one another. How and when we accomplish communication with one another can expand or contract the boundaries of life itself.”^{xxxii} He concludes that “within a functioning community, held together by bonds of mutual interest, the task of drafting a moral code is not difficult. It is comparatively easy to discern in this situation certain rules of restraint and cooperation that are essential for satisfactory life within the community and for the success of the community as a whole. If, however, there are no rational principles for determining who shall be included in the community, the internal code itself rests on what appears to be an essentially arbitrary premise. The solution to this dilemma cannot be obtained from the morality of duty for that morality is essentially a morality of the in-group. It presupposes those in living contact with one another, either through an explicit or tacit reciprocity embodied in the forms of an organized society.”

He believes that the morality of aspiration offers a measure of resolution to the problem of who should be included in the community. Fuller refers to the Bible, where the morality of duty includes the command: “Thou shalt love your neighbor as yourself.” A lawyer asked Jesus: Who is my neighbor? Jesus told the story of the parable of the Good Samaritan. The Samaritans were definitely members of the out-group. Fuller concludes that “we should aspire to enlarge the community at every opportunity, and to include within it ultimately, if we can, all those of good will.”^{xxxiii} It is precisely those who support the right to life of the child in the womb who see that child as their neighbor. This is in stark contrast to those who are willing to let the child be destroyed.

Fuller further adds that “the morality of aspiration is after all a morality of human aspiration and therefore cannot refuse the human quality to human beings without repudiating itself.” He quotes a passage in the Talmud that reads, “If I am not for myself,

who shall be for me? If I am for myself alone, what am I? If we are for yourselves alone, what are we?” Fuller says that “whatever answer is given to this last question must be predicated on the assumption that we are above all else human beings. If the answer is qualified by adding some biological tag to our own title, then we deny the human quality to ourselves in an effort to justify denying it to others.”^{xxxiv}

Therefore, the morality of duty is based on a minimum standard for a social order that requires that human beings, including human beings in the womb, cannot be killed even for supposedly good individual motives. The morality of aspiration attempts to enlarge the human community at every opportunity. Thus, the morality of aspiration plays a role by recognizing the unborn child as a member of the community.

CONCLUSION

In contrast to legal positivism, legal principles as outlined by Lon Fuller emphasize the importance of legal recognition of the interactive process of individuals and institutions in society and the importance of reciprocity, recognize the role that law plays in making possible an effective realization of morality, distinguish between the morality of duty and the morality of aspiration, and attempt to create a legal system where there is tacit cooperation between the lawgiver and the citizen as to what is moral or immoral, just or unjust. These principles help provide an additional framework for public and private dialogue to resolve the seemingly intractable legal and political dispute over induced abortion that continues to plague contemporary American society.

NOTES

i. Lon L. Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart,” 71 *Harvard Law Review* 630 (1958).

ii. “A Reply to Critics” in *The Morality of Law* (New Haven: Yale

University Press, 1964, 1969), pp. 187-242; Robert S. Summers, "Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law," 92 *Harvard Law Review* 433 (1978).

iii. *The Principles of Social Order: Selected essays of Lon L. Fuller* (Durham: Duke Univ. Press, 1981) 11; *The Morality of Law*, p. 241, where Fuller observes that "there is a discernible trend away from structural theories and toward a study of inter-actional processes."

iv. *The Morality of Law*, p. 192.

v. *Roe v. Wade*, 410 U.S. 113 (1973).

vi. *Planned Parenthood v. Casey*, 505 U.S. 883 (1992).

vii. *Stenberg v. Carhart*, 120 S.Ct. 2597 (2000).

viii. Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard Univ. Press, 1987). She compares *Roe v. Wade* to the 1975 abortion decision of the Federal Republic of Germany and observes that *Roe v. Wade* embodies a society of separate autonomous individuals, while the West German decision emphasizes the connections among the woman, developing life, and the larger community.

ix. John T. Noonan, Jr., *A Private Choice* (New York: Free Press, 1979), p. 21.

x. *Planned Parenthood v. Casey*, 505 U.S. at 898.

xi. George Will, *Statecraft as Soulcraft: What Government Does* (New York: Simon and Schuster, 1983).

xii. *Planned Parenthood v. Casey*, 505 U.S. at 865.

xiii. See Paul Linton, "*Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court," *St. Louis Univ. Law Review* 13 (1) 1993 76-77 (noting the "profoundly anti-democratic tone to the Court's opinion."); "The End of Democracy? The Judicial Usurpation of Politics," *First Things* (Nov. 1996).

xiv. *Planned Parenthood v. Casey*, 505 U.S. at 856.

xv. See Edwin S. Corwin, "The Higher Law Background of American Constitutional Law," *Harvard Law Review* 42 (1928) 158: "There is

discoverable in the permanent elements of human nature itself a durable justice which transcends expedience, and the positive law must embody this if it is to claim the allegiance of the human conscience.”

xvi. *The Morality of Law*, p. 205.

xvii. *Stenberg v. Carhart*, 120 S.Ct. at 2628.

xviii. Bruce C. Hafen, “Individualism in Family Law” in *Rebuilding the Nest: A New Commitment to the American Family*, ed. David Blankenhorn, Steve Payne, Jean Bethke Elshtain (Milwaukee: Family Service America, 1990), pp. 161-77; this essay discusses the growing autonomous individualism in family law and the decline of morality.

xix. *The Principles of Social Order*, pp. 276-77.

xx. *The Morality of Law*, p. 5.

xxi. *The Morality of Law*, pp. 6, 11.

xxii. *Planned Parenthood v. Casey*, 505 U.S. 851-852.

xxiii. Matthew 7: 1-2, 12 (King James Version).

xxiv. *The Morality of Law*, p. 20. Reciprocity between mother and unborn child also occurs because the mother provides nurture and protection, and the unborn child acts as a positive benefactor and protector of the life and health of the mother. See the four-part series on “Childbirth as Protective of the Health of Women in Contrast to Induced Abortion,” *1998 Research Bulletins*, Association for Interdisciplinary Research in Values and Social Change: Washington, D.C.; *Levy v. Louisiana*, 391 U.S. 68,70 (1968), which notes that human beings are recognized under the Fourteenth Amendment because of their humanity; *Webster v. Reproductive Health Services*, 492 U.S. 490,520 (1989), whose plurality opinion recognizes that unborn human offspring are “a form of human life”; Gorby, “The ‘Right’ to an Abortion, the Scope of 14th Amendment ‘Personhood’ and the Supreme Court’s Birth Requirement,” 1979 *Southern Illinois University Law Journal*, No.1.

xxv. Harry J. Gensler, “A Kantian Argument Against Abortion” in *Philosophical Studies* 49 (1986).

xxvi. R. M. Hare, “Abortion and the Golden Rule” in *Philosophy and Public Affairs* 4 (1975) 201-22.

xxvii. Don Marquis, "Why Abortion Is Immoral" in *The Journal of Philosophy* 86 (1989); see esp. *The Abortion Controversy: 25 Years after Roe v. Wade*, ed. Louis P. Pojman and Francis J. Beckwith (Belmont: Wadsworth, 1998) for an extended discussion of the views of Don Marquis; for an analysis of the difference between moral subjectivism and moral objectivism, see "Moral Proofs and Moral Principles," Ch. 3 in *Philosophy, An Introduction through Original Fiction, Discussion, and Readings*, 3rd Edition, ed. Thomas D. Davis (1993).

xxviii. *The Morality of Law*, p. 22.

xxix. *The Morality of Law*, p. 9.

xxx. *The Morality of Law*, pp. 27-28.

xxxi. *U.S. v. Harmon*, 45 Fed. 414, 421-422 (1891); see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943) ("the right [of a parent] to practice religion freely does not include liberty to expose the child to ill health or death"); *Jacobson v. Massachusetts*, 197 U.S. 26 (1904) ("Liberty is not unrestricted license to act according to one's will").

xxxii. *The Morality of Law*, p. 186.

xxxiii. *The Morality of Law*, pp. 182-83.

xxxiv. *The Morality of Law*, pp. 183-84.