

# The Experience of Legal Injustice<sup>\*</sup>

Wouter Veraart

## 1 Introduction

Kristen Rundle has written a very interesting and extensive paper in which she tries to read together Arendt's and Fuller's thoughts on the fascinating relationship between the juridical person as a responsible agent and law's institutional framework. My response does not deal with all the aspects addressed by Rundle in her paper. Instead, my aim is to focus on a few points in the theories of Fuller and Arendt and to derive my main remarks or points of criticism from them. These points all revolve around the idea that the experience of legal failure or legal injustice – rather than the experience of law as such, as Rundle seems to suggest – is a pivotal junction for both thinkers. This shift in focus needs some preparation. For that reason, and before responding directly to some of Rundle's arguments, I will first explain my own reading of Fuller's and Arendt's thoughts on the experience of legal injustice in sections 2 and 3. Subsequently, in sections 4 and 5, I deal with two points of convergence between Arendt's and Fuller's legal thoughts, while also opening the discussion on some of Rundle's proposals and arguments along the way. Section 6 contains some concluding remarks.

## 2 Fuller's external morality of law

In the beginning of *The Morality of Law* Fuller famously distinguishes between the morality of duty and the morality of aspiration. Whereas the morality of aspiration deals with the higher aims in life, being excellence and the 'top of human achievement,' the morality of duty:

lays down basic rules without which an ordered society is impossible (...). (...) 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.<sup>1</sup>

In contrast to the morality of duty, the morality of aspiration is very difficult to grasp in a pluralistic, modern society. According to Fuller, it is far easier to know what 'is plainly unjust' than 'to declare with finality what perfect justice would be like.'<sup>2</sup> This knowledge of what is plainly unjust is much more a matter of

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1 Lon L. Fuller, *The Morality of Law* (revised edition) (New Haven: Yale University Press, 1969), 5-6.

2 Fuller, *The Morality of Law*, 12.

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mundane experience than of theoretical reflection or conceptual analysis. Fuller argues that it is a fallacy to suppose that we can only know what is unjust if we have clear-cut ideas about justice in the fullest, aspirational sense:

“This assumption is contradicted by *the most elementary human experience*. 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 realised.”<sup>3</sup>

In short, the morality of duty somehow defines the ‘basic requirements of social living,’ and the substantial core of these requirements flows from elementary – and therefore hardly controversial – human experience. Safeguarding these requirements is the (non-controversial) basic function of the legal order, at least in modern, secular, pluralistic societies:

“To live the good life (...) requires the support of firm baselines for human interaction, something that – in modern society at least – only a sound legal system can provide.”<sup>4</sup>

Rather than being repressive, law’s basic function is empowering since it creates the necessary conditions which enable people to flourish – according to their own wishes as responsible agents – in their interactions with one another. Fuller’s elaborate exposé on the ‘internal morality of law,’ with its eight, well-known, principles of legality (the idea that laws should be general, public, prospective, comprehensible, not demanding the impossible, non-contradictory, relatively stable over time and observed by the administration), should be understood in the context of this basic function (or ‘external morality’) of a modern legal system.<sup>5</sup> Fuller’s statement that a total failure to comply with one or more of these eight requirements would result in ‘something that is not properly called a legal system at all’<sup>6</sup> must be understood in the light of law’s basic function.<sup>7</sup> A legal system that ignores, contradicts or even aims to destroy the possibility of responsible human interaction as one of the basic requirements of social living no longer deserves the name ‘legal system’ because its basic function – providing a sound and stable framework for human interaction<sup>8</sup> – can no longer be fulfilled.

It is within this same context that Fuller’s notion of ‘the view of man implicit in legal morality’ has to be appreciated. This is also a key fragment in Rundle’s

3 Fuller, *The Morality of Law*, 222 [emphasis: WV].

4 Fuller, *The Morality of Law*, 205.

5 Fuller, *The Morality of Law*, 33-94.

6 Fuller, *The Morality of Law*, 39.

7 See also Pauline Westerman, ‘Means and Ends,’ in *Rediscovering Fuller. Essays on Implicit Law and Institutional Design*, ed. Willem J. Witteveen en Wibren van der Burg (Amsterdam: Amsterdam University Press, 1999), 145-68, at 147: ‘Only in the domain of “law”, defined by Fuller as a framework for the horizontal relations between free citizens, and as such distinguished from managerial direction, these requirements gain moral significance.’

8 Fuller, *The Morality of Law*, 210.

paper; for the purposes of this response, however, it is useful to quote it again in its entirety. Discussing the ‘substantive aims of law,’ Fuller states in *The Morality of Law*:

“To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view of man as a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of the law’s inner morality is an affront to man’s dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination. Conversely, when the view is accepted that man is incapable of responsible action, *legal morality loses its reason for being*. To judge his actions by unpublished or retrospective rules is no longer an affront, *for there is nothing left to affront* – indeed, even the verb “to judge” becomes incongruous in this context; we no longer judge a man, we act upon him.”<sup>9</sup>

There is an interesting circularity in this line of reasoning. Legal rules presuppose responsible agents, ‘capable of understanding and following rules,’ on the one hand, whereas the legal system, on the other hand, maintains and safeguards the institutional mediation which makes responsible agency possible. Fuller seems to suggest that in modern societies legal rules and responsible agents are caught in a symbiosis. Protecting the basic requirements of social living implies law’s constitution of a mediated space in which interactions between responsible agents become possible: providing a sound and stable legal framework is such an undertaking. However, if legal rules do not properly address themselves to responsible agents, they rapidly risk losing their meaning and, subsequently, their ‘legality’; in other words, their status of legal rules. Moreover, if responsible agents are not taken seriously by the legal system and its rules, they tend to ‘fade’: ‘there is nothing left to affront,’ when human beings are no longer approached by law as responsible agents but merely ‘acted upon.’ In a similar vein, Rundle remarks at the start of her paper on Fuller’s theory of the morality of law that ‘[l]aw speaks to agency, and so *must* also respect and sustain the capacities of the legal subject as a centre of initiative.’<sup>10</sup>

### 3 Arendt’s legal perplexities

Is this same symbiotic relationship between law and responsible agency also present in Arendt’s comments on legal injustice as expressed in *The Origins of Totalitarianism*? In the much quoted second part of Arendt’s chapter on ‘The Decline of the Nation-State and the End of the Rights of Men,’ called ‘The Perplexities of the Rights of Man,’ she describes ‘the deprivation of a place in the world which makes

9 Fuller, *The Morality of Law*, 162-3 [emphasis: WV].

10 Kristen Rundle, ‘Legal Subjects and Juridical Persons: Developing Public Legal Theory through Fuller and Arendt,’ elsewhere in this volume, 222 [emphasis: WV].

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opinions significant and actions effective' as 'the fundamental deprivation of human rights.'<sup>11</sup> Arendt speaks of 'the existence of a right to have rights,' which she describes as 'the right to belong to some kind of organized community,' conceptualized as 'a framework where one is judged by one's actions and opinions.'<sup>12</sup> Arendt's appeal to an 'organized community' or a 'framework' which makes one's actions and opinions meaningful and effective is clearly quite close to Fuller's description of the basic function of the legal order: providing a sound and stable framework for human interaction.

Not surprisingly in the context of a book on the origins of totalitarianism, Arendt describes at some length the consequences of this deprivation of a legal-political framework. This deprivation entails a loss of 'the most essential characteristics of human life': 'the loss of the relevance of speech' and 'the loss of all human relationship':<sup>13</sup>

'The survivors of the extermination camps, the inmates of concentration and internment camps and even the comparatively happy stateless people could see (...) that the abstract nakedness of being nothing but human was their greatest danger.'<sup>14</sup>

In short, the idea that the deprivation of an institutional framework that makes responsible action possible results in a breakdown of the human being as a responsible agent is something to which both Arendt and Fuller would definitely subscribe.

But what about the other side of Fuller's view on the relationship between law and the human being as a responsible agent? Does Arendt also subscribe to Fuller's thesis that legal rules themselves tend to lose their meaning whenever they (intentionally or accidentally) ignore or contradict the presumption of responsible agency of their addressees by, for example, depriving certain categories of people of their existing place in the legal order or simply by excluding them (i.e., by refusing to 'welcome' them and let them 'in')?<sup>15</sup> There is a good reason to doubt this. According to Arendt, the production of 'naked' human beings is not a characteristic only of totalitarian systems, but instead an alarming side effect of 'a global, universally interrelated civilization.'<sup>16</sup> Therefore, the exclusion of

11 Hannah Arendt, *The Origins of Totalitarianism* (San Diego/New York/London: Harcourt Brace, 1975), 296.

12 Arendt, *The Origins of Totalitarianism*, 296-7.

13 Arendt, *The Origins of Totalitarianism*, 297.

14 Arendt, *The Origins of Totalitarianism*, 300.

15 According to Nanda Oudejans, 'The Right to Have Rights as the Right to Asylum,' *Netherlands Journal of Legal Philosophy* 43(1) (2014): 16, Arendt's right to have rights appears 'first and foremost (...) at the boundaries of a polity that separate an inside from an outside and that are never wholly in the (legitimate) power of a people.'

16 Arendt, *The Origins of Totalitarianism*, 302. The (perplexing) production of 'naked life' as a hallmark of modern politics is the provocative point of departure of Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life* (Chicago/London: Stanford University Press, 1998).

specific categories of people from participation in a legal order is, in Arendt's thought, not incompatible with a (globalized and interrelated) legal order, but on the contrary an integral and dangerous part of it.<sup>17</sup> It is my impression that Rundle, in her own description of Arendt's position in her paper, tends to ignore this important aspect of Arendt's thought.

Nevertheless, a certain perplexity seems inevitable when one is confronted by a legal process directed at the killing of 'the juridical person in man' and which Arendt describes as '[t]he first step on the road to total domination.'<sup>18</sup> This phenomenon became most shockingly manifest in the way in which European Jews were systematically deprived of their rights by the Nazis during the Second World War. In some occupied countries, the Nazis used legal measures to strip Jewish citizens of their assets and their rights as a means of severely hindering them in their ability to participate in public, legal and economic life. The perplexity revolves around the fact that, as Fuller was well aware, legal rules address themselves necessarily to addressees who are presupposed to understand and follow rules, and to be capable of responsible action. A set of laws specifically designed to deprive its addressees of these capabilities simultaneously *confirms and negates* their position as responsible agents. With reference to Jürgen Habermas, it could be argued that this perplexing ambiguity amounts to a performative contradiction: the content of the legal rule contradicts the presuppositions of asserting it. This performative contradiction deepens as the annihilation process moves on, while the legal presupposition of responsible agency becomes increasingly redundant. At a certain point, *there is nothing left to address*. Then, according to Fuller's logic, 'legal morality loses its reason for being': it is no longer possible 'to judge a man,' but only 'to act upon him.'<sup>19</sup> This is also why Arendt could write that the killing of 'the juridical person' was merely an essential *first* step in a larger process of human annihilation; what follows can no longer be effectuated by general or public legislative means.<sup>20</sup>

17 In a similar vein, see Hans Lindahl, 'A-Legality. Postnationalism and the Question of Legal Boundaries,' *The Modern Law Review* 73(1) (2010): 54-56. According to Lindahl, finite legal orders always set boundaries which can never be all-inclusive. Every inclusion necessarily produces (another) exclusion; boundaries always 'exclude by including,' as Lindahl puts it. The mere facts of legal finality and political pluralism ('the acknowledgement that the human can be irreducibly alien') are incompatible with an 'all-encompassing legal unity.' Consequently, the idea of 'one humanity under one law' is not of this world.

18 Arendt, *The Origins of Totalitarianism*, 447.

19 See *supra*; Fuller, *The Morality of Law*, 162-3.

20 Arendt, *The Origins of Totalitarianism*, 447. See also Uwe Wesel, *Geschichte des Rechts. Von den Frühformen bis zum Vertrag von Maastricht* (Munich: C.H. Beck, 1997), 481-2: 'Ziel der Nationalsozialisten war ein monolithische "arische" Volksgemeinschaft unter Ausschluß aller, die ihren autoritären Ordnungsvorstellungen und ihrem Rassenwahn im Wege standen. (...) Die Geschichte ihrer Ausgrenzung ist geprägt durch zunehmende Entrechtlichung. Das heißt, *das Recht spielte dabei immer weniger eine Rolle*. Zunächst wurde die Ausgrenzung noch juristisch betrieben durch Gesetze und Gerichtsentscheidungen (...). Aber *das führte immer weiter in einen rechtsfreien Raum*, der dann ausgefüllt wurde durch einfache Befehle der politischen Führung oder völlig freies Handeln von Behörden und Polizei, SS und Gestapo' [emphasis: WV].

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I am not completely sure whether Rundle, who addresses this same aspect in her paper and in her earlier article on ‘The Impossibility of an Exterminatory Legality,’ would agree with me on this point.<sup>21</sup> When discussing Arendt’s views on the juridical person and its dependency on a particular mode of institutional response, Rundle argues in her current paper that there is an idea of mutual constitution at play.<sup>22</sup> This seems very much in line with my reference to a ‘symbiotic’ circularity in Fuller’s thinking and also – albeit to a much lesser degree – in Arendt’s reflections on ‘the juridical person’ in *The Origins of Totalitarianism*. However, Rundle appears to be convinced that, in Arendt’s thought, ‘[t]he realm of the juridical is defined by the presence of an institutional structure within which recognition of the person as an individual centre of initiative is *sustained*.’<sup>23</sup> I do not understand how a tendency to sustain – rather than crush – recognition of the juridical person could *a priori* be a dominant characteristic of (non-utopian) institutional arrangements – as if those institutions neither could nor would be redesigned and used to crush much more than they would sustain. Indeed, in the light of Arendt’s gruesome remarks on the state of our post-war, non-totalitarian civilization, ‘forcing millions of people into conditions which, despite all appearances, are the conditions of savages,’ I would suggest quite the contrary.<sup>24</sup> Notwithstanding the paradox of the performative contradiction inherent in legal measures that purport to destroy the legal agency of human beings, as described above, it is clear that Arendt is pessimistic about law’s inherent resistance to being used as a tool to crush the juridical person in certain categories of people, at least up to a certain point.

There is another way of making this point. In the course of her discussion of Arendt’s legal thought, Rundle argues that there exists ‘an apparent tension within Arendt’s analysis between an essentially “anything goes” [read: purely instrumental, WV] conception of “legality,” and an idea of the “juridical” that appears to make strong normative demands on a site of political authority and the corresponding actions of legal officials when such authority expresses itself through a particular kind of institutional frame.’<sup>25</sup> The problem with this distinction is that it suggests a dichotomy between, on the one hand, a kind of debased,

21 Kristen Rundle, ‘The Impossibility of an Exterminatory Legality,’ *University of Toronto Law Journal* 59(1) (2009): 119: [T]he Jewish experience of Nazism brings into sharp relief the fact that so long as the Nazis used law as their primary means of persecution, and thus were bound by the condition of congruence that is the defining feature of legality, they necessarily recognized, relied on, and respected the moral capacities of those whom their racial-biological program sought to dehumanize’ [emphasis: WV]. This description amounts, in my eyes, to a performative contradiction, although I strongly object to the idea that *the Nazis themselves* respected the moral capacities of those they sought to dehumanize. A person cannot respect someone and simultaneously dehumanize that person. What is possible, though, is that the dehumanizing content of a legal rule contradicts its presuppositions – the fact that the rule as a rule ‘works’ only if the addressees are presupposed to be responsible agents, whereas the *content* of the rule is trying to take that capacity away from them.

22 Rundle, ‘Legal Subjects and Juridical Persons,’ elsewhere in this volume, 231.

23 Rundle, ‘Legal Subjects and Juridical Persons,’ 229 [emphasis: WV].

24 Arendt, *The Origins of Totalitarianism*, 302.

25 Rundle, ‘Legal Subjects and Juridical Persons,’ elsewhere in this volume, 229.

purely instrumental condition of legality – a condition to be associated with totalitarian systems – and, on the other hand, a healthy, normative condition of legality, in which human beings can flourish as juridical persons – a condition to be associated with the rule of law (and akin to Fuller’s analysis of law’s internal morality). However, in Arendt’s view, the position to be occupied by the ‘juridical person’ is *never* quite stable, neither in a totalitarian state, nor within its interactions with civilized, mundane legal systems. Therefore, according to Arendt, the instrumental ‘anything goes’-conception of legality has to be understood as a permanently recurring, pervasive characteristic of modern legal systems, including the most ‘civilized’ ones, whereas Arendt’s ‘juridical person’ has no secure condition or ‘natural’ place of residence. In short, within Arendt’s thinking, ‘the juridical’ as a healthy, stable condition of legality offering a *sustained recognition* of human beings as centres of initiative, appears to operate as a ‘non-place’ (‘u-topia’), never really to be fulfilled within actual legal systems – being producers of ‘naked life’ and statelessness – but rather functioning, in Arendt’s thinking, as an external, critical-normative yardstick with a (productive) utopian value.

#### 4 Commonalities

Given the argument developed so far, what can Fuller and Arendt be said to have in common? Firstly – and on this point I fully agree with a main point in Rundle’s paper – both thinkers believe that in modern societies the legal subject as responsible agent cannot be thought of outside a legal-political framework constituting a mediated space in which actions become relevant and effective, or – as Rundle puts it – conditions of legal subjectivity or juridical personhood ‘exist only in so far as they are institutionally constituted.’<sup>26</sup> This idea, of course, is not new, but belongs to a venerable tradition within legal philosophy and dates back to Aristotle, who, as Arendt politely reminds us in *The Origins of Totalitarianism*, defined the human being as ‘commanding the power of speech and thought’ and in particular as a ‘political animal.’<sup>27</sup> Working in this same tradition Paul Ricoeur elegantly captured this same idea in his essay on ‘Who is the Subject of Rights?’:

‘Without institutional mediation, individuals are only the initial drafts of human persons. Their belonging to a political body is necessary to their flourishing as human beings, and in this sense, this mediation cannot be revoked. On the contrary, the citizens who issue from this institutional mediation can

26 Rundle, ‘Legal Subjects and Juridical Persons,’ 231.

27 Arendt, *The Origins of Totalitarianism*, 297. See also Fuller, *The Morality of Law*, 13: ‘If we were cut off from our social inheritance of language, thought, and art, none of us could aspire to anything much above a purely animal existence.’ On Arendt’s view on the Aristotelian notion of ‘the political animal,’ see Jan Klabbers, ‘Possible Islands of Predictability: The Legal Thought of Hannah Arendt,’ *Leiden Journal of International Law* 20 (2007): 1-23, at 5.

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only wish that every being should, like them, enjoy such political mediation.<sup>28</sup>

It is interesting that the second phrase in this quotation is akin to Arendt's notion of 'a right to have rights,' a 'right' to take part in 'a framework where one is judged by one's actions and opinions.' After all, what Arendt tries to capture with her notion of a 'right to have rights' shows similarities with what Ricoeur carefully coins as a *wish* that citizens already enjoying such institutional mediation *should have* with regard to everyone else not yet enjoying such mediation. In other words, such a wish is an aspiration with a flavour of Kantian duty to it. Ricoeur's formulation can be used to clarify Arendt's 'right to have rights' as something that cannot be called a 'right' in the legal sense. This is because the (lawless and excluded) claimant is completely dependent on the benevolence of those who already enjoy institutional mediation and who, from within the community, can potentially decide on the inclusion of those who are excluded.<sup>29</sup>

Fuller discusses the same point in a slightly different way in *The Morality of Law*. Instead of Arendt's 'place in the world,' Fuller speaks of a 'moral community,' which he defines as a 'community within which men owe duties to one another and can meaningfully share their aspirations,' but which also gives 'access to the essentials on which a satisfactory and dignified life can be built.'<sup>30</sup> Fuller maintains that the question of inclusion or membership of the moral community is a decision of the community itself, and that the nature of this decision is first of all aspirational; in other words, based on a form of generosity of the 'in-group,' which cannot be exacted from outside.<sup>31</sup> However, the question of including other human beings within the 'moral community' may occasionally transform into a moral duty. In what seems to be a covert reference to the case of slavery, and its abolition, in the United States, Fuller suggests that the distinction between the morality of aspiration and the morality of duty may in specific cases 'break down':

"The morality of aspiration is after all a morality of *human* aspiration. It cannot refuse the human quality to human beings without repudiating itself."<sup>32</sup>

This remarkably categorical 'cannot refuse' within the morality of aspiration is, again, very similar to Ricoeur's 'wish' that citizens 'should' have as quoted above. It does not, however, alter anything about the fact that those at the border and claiming their 'rights to have rights' are left empty-handed from a legal perspective.

28 Paul Ricoeur, 'Who is the Subject of Rights?', in *The Just*, Paul Ricoeur (Chicago/London: The University of Chicago Press, 2000), 10.

29 In a similar vein, see Oudejans, 'The Right to Have Rights,' 14.

30 Fuller, *The Morality of Law*, 181.

31 Fuller, *The Morality of Law*, 183.

32 Fuller, *The Morality of Law*, 183.



Secondly, both Fuller and Arendt share a vivid interest in the human experience of (legal) injustice. Fuller's legal theory, as developed in *The Morality of Law*, is premised on the assumption that from our experience of what is plainly unjust it is possible to derive the basic requirements of social living in a non-controversial way. Law's basic function is to safeguard these core requirements by providing a sound and stable framework for human interactions, thus making responsible agency possible. In *The Origins of Totalitarianism*, Arendt's notion of 'a right to have rights' is directly based on the experience of (legal) *injustice*, more specifically on the historical experience of the partly legal process by which specific categories of people have been systematically deprived of the protection of their participation in a legal-political framework.

What interests me, in responding to Rundle's paper, is the fact that the notion of 'experience' is indeed vital for both Fuller's and Arendt's legal thought. However, my own reading of Arendt and Fuller is that this notion of experience is fruitful in a slightly different way from how Rundle seems to understand it. According to Rundle, what is needed 'is not just an orientation towards the legal subject. It also requires a wider methodological attitude that regards how a person actually experiences the legal frame around her as central to the value of the theoretical perspective ultimately offered.'<sup>33</sup> In short, in Rundle's argument, the focus is on how a subject experiences law, meaning that the 'experience' of the legal subject serves as a litmus test for the extent to which law's institutional frame is embodying an idea of the 'legal' or the 'juridical.' Here, my more critical point is that this kind of experience becomes 'central' or acute in only the most dire circumstances; in other words, when the legal subject or juridical person is directly threatened in its capacities or in its survival as a legal subject, or when it is already in the process of institutionally 'fading away.'

I will briefly elaborate on this point in the remainder of this paper. The upshot of this line of criticism is that if we try to concentrate on the point where Fuller's and Arendt's thoughts on legality and the legal subject appear to converge, we can see that they certainly have valuable things to say on the connection between the boundaries of legality and the experience of legal injustice, but a lot less on the state of law's institutional framework in less radical circumstances.

## 5 Fuller's debasement thesis and Arendt's rhetorical use of the ordinary criminal

In his discussion of the inner morality of law Fuller introduces King Rex, whose subsequent failures to make laws illustrate the (morally relevant) boundaries of law making. Nevertheless, Fuller realizes that the demands of the inner morality of law are most of all 'affirmative in nature,' meaning that if we approach them as positive guidelines or regulative ideas, making them really work demands much creativity and energy. In this aspirational context a checklist of do's and don'ts (as

33 Rundle, 'Legal Subjects and Juridical Persons,' elsewhere in this volume, 234.

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in the morality of duty) is not particularly helpful. Given the craftsmanship-like nature he ascribes to his inner morality of law, Fuller even concludes at some point 'that the inner morality of law is *condemned* to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and the pride of the craftsman.'<sup>34</sup>

Fuller's use, at this point, of the word 'condemned' may indicate that, at least as a legal philosopher, he is not perfectly happy with this preliminary 'conclusion.' Why not? Perhaps because he feels that his moral approach to legality ultimately has more pertinent things to say on clear cases of 'plain' legal failure than on the equally or even more important, but potentially countless ways of seeking to achieve legal perfection. Fuller's remark, quoted above, that it is far easier to know (by experience) what 'is plainly unjust' than 'to declare with finality what perfect justice would be like' is of course very relevant here.<sup>35</sup>

Indeed, Fuller's descriptions of the failures of King Rex to make laws – trying to regulate behaviour with a retroactive law, proclaiming a law that is utterly incomprehensible or otherwise prescribing an action that is impossible to perform and so on – are more convincing and lasting examples of debasement of legal forms than his much more hesitant discussion of 'trends in the law that serve to obscure the citizen's role as a self-determining agent,' as exemplified *inter alia* by his misgivings about the subtle perversions of tax law, nudging (corpulent) taxpayers into courses of action (i.e., adjusting their diets) that they themselves would not have taken in less adverse circumstances.<sup>36</sup> By this, I do not mean to suggest that Fuller's sharp awareness of the fragile legal status of the 'citizen as a self-determining agent' is not important – on the contrary. However, I believe that his *normative* stance on current forms of legal debasement is much more poignant and accurate when he focuses on rare instances of total legal failure than when he, quite randomly, speculates on the moral limits of legal figures in the immense grey zone of the always imperfect and debatable world of human law making.

In a different way, Arendt's ideas on the juridical person in *The Origins of Totalitarianism* cannot be isolated from her narrow focus on law's perplexing capacity to deny this status to human beings inside or outside its borders. Arendt's comparison between the stateless person – defined as someone who is excluded from a legal framework and therefore deprived of all rights, including the possibility to display responsible agency – and the ordinary criminal – defined as someone who is still taken seriously by a legal system – is designed to sharpen the reader's awareness of the lawless position of the stateless person, and not the other way round.<sup>37</sup> Although I agree with much of what Rundle has to say in this context,<sup>38</sup> I would like to emphasize that Arendt's description of the criminal serves primarily

34 Fuller, *The Morality of Law*, 43 [emphasis: WV]. On this point, see also Westerman, 'Means and Ends,' 165-6.

35 Fuller, *The Morality of Law*, 12.

36 Fuller, *The Morality of Law*, 166-7.

37 Arendt, *The Origins of Totalitarianism*, 286-7; 447-9.

38 Rundle, 'Legal Subjects and Juridical Persons,' elsewhere in this volume, 226-228.

as a rhetorical device and an ironical mirror image, *not* in order to shift the attention away from the perplexity of legal exclusion and in the direction of the vicissitudes of a more or less ‘healthy’ legal system, but on the contrary to highlight the deplorable state of utter lawlessness in the context of which even the awkward position of the captured criminal – who is accountable for his actions and ‘knows’ the reason for his custody – becomes an alluring prospect. That’s also why I cannot follow Rundle where she states, at the end of her paper:

‘When Fuller explores what it means to be a legal subject, he proceeds “negatively” by emphasizing what happens in the degeneration and ultimate absence of law’s frame. Arendt, by contrast, proceeds from the more “positive” perspective of what is generated, in terms of the status of personhood, through the transformative effects of the juridical frame: that is, she emphasizes less what is *lost* through the loss of the juridical, than what is *gained* through it, even if the wider context of her analysis concerns precisely the fundamental deleterious effects of the loss of rights.’<sup>39</sup>

The assertion that Arendt would proceed ‘from the more “positive” perspective of what is generated, in terms of the status of personhood, through the transformative effects of the juridical frame’ is curious and unfounded; on the contrary, I would suggest that it is exactly the deliberate *absence* of such a positive perspective that is characteristic of Arendt’s contribution to legal philosophy, including Fuller’s.

## 6 Conclusion

In evaluating Rundle’s account of the point where Arendt’s and Fuller’s legal theories converge, my main point is that when taken together, Arendt and Fuller seem to share a vivid interest in the experience of legal injustice, but as a ‘couple’ do not have much to say on the more ordinary challenges of law’s institutional framework. In Fuller’s case, his interest in legal injustice comes to the fore in his forceful description of moments of partial or total failure in the process of law making, and also those occasions where the fact that the legal framework no longer supports human action results in human beings being deprived of their capacities to demonstrate responsible interaction. Arendt is equally interested in those terrifying moments where legal institutions no longer offer a framework for people’s actions and opinions, but instead start to produce inhumanity and lawlessness. In Arendt’s thought, the exclusion of specific categories of people from the humanizing framework offered by legal institutions is not incompatible with a (globalized and interrelated) legal order; instead, and on the contrary, this production of lawlessness and naked life appears to be an integral and dangerous part of it. In my opinion, Rundle’s exposé touches on all these points in some ways, but nevertheless makes both too much and too little of them.

39 Rundle, ‘Legal Subjects and Juridical Persons,’ 237.

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Too much in that I cannot yet see how the 'experience' of the legal subject may serve as a central measure for the extent to which law's institutional frame is sustaining them by fostering a certain idea of the 'legal' or the 'juridical.'<sup>40</sup> To my mind, this kind of experience becomes 'central' or vital only when the juridical persons themselves are directly threatened in their capacities or in their survival as legal subjects, or when they are already in the process of institutionally 'fading away.'

Too little in that, in Rundle's account, the theme of the exclusionary effects of legal boundaries, depriving human beings of the possibility of conducting their lives within a legal framework which makes responsible interaction possible, is still underdeveloped. The modes of excluding people who dwell at the legal fringes (in-between an inside and an outside) of civilized political-legal communities and who repeatedly try to connect to a legal frame are unavoidably an inherent part of modern legal systems. However, these common modes of legal exclusion cannot be neutralized simply by pointing to forms of legal 'debasement' or to other explicit or implicit 'failures' of the morality of law.

40 Rundle, 'Legal Subjects and Juridical Persons,' 222, 228-229, 234.