

ESSAY

FULLER KNOWS BEST: PARENTING AND FULLER'S DEFINITION OF LAW

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One of the primary tasks of jurisprudential study over the last few centuries has been to define the concept of law. The late Lon Fuller, in his classic work, *The Morality of Law*, defined law as "the enterprise of subjecting human conduct to the governance of rules."¹ But is this definition valid? Fuller's definition can be tested by measuring it against real life categories of human conduct. We may then ask whether it makes sense to describe these categories as law.

One category of activity that fits Fuller's definition is the raising of children. Although many of us who raise children would assert that we do more than merely subject the children's conduct to the governance of rules, virtually all of us would concede that we do at least that much. Therefore, even though there may not be a total congruence between raising children and all of those activities that Fuller describes as law, there is at least a partial fit.²

In the second edition of his book, however, Fuller qualified his definition. He warned his critics not to confound law with managerial direction and commented:

A general and summary statement of the distinction between the two forms of social ordering might run somewhat as follows: The directives issued in a managerial context are *applied* by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not *apply* legal rules to serve specific ends set by the lawgiver, but rather *follows* them in the conduct of his own affairs, the interests he is presumed to serve in following legal rules being those of society generally. The directives of a managerial system regulate primarily the relations between the subordinate and his superior and only

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1. L. FULLER, *THE MORALITY OF LAW* 106 (rev. ed. 1969).
2. Fuller was quite comfortable with the application of his definition to the internal regulations of churches, clubs, universities and labor unions. Therefore, he would have had no objection to its application to parenting. *Id.* at 124-29, 196.

collaterally the relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed.³

Parenting encompasses both what Fuller calls law and what he calls managerial direction. Requiring a child to help with household chores is closer to managerial direction, while requiring one's children to get along with one another is closer to law. Therefore, if Fuller's definition of law is to be tested, care must be taken to consider only those aspects of parenting that he would call law and to reject those that he would call managerial direction.

Initially, it is not apparent whether any aspects of parenting may be described as law. Therefore, it is necessary to see what else Fuller says about law to determine whether the enterprise of parenting is a good fit.

Fuller proposes eight aspirational goals for the internal morality of law.⁴ They are:

1. Laws should be general.
2. Laws should be promulgated.
3. Laws should not be retroactive.
4. Laws should be clear.
5. Laws should not contradict one another.
6. Laws should not require the impossible.
7. Laws should be constant through time.
8. There should be a congruence between official action and declared rules.

I propose to test Fuller's definition by applying these aspirational goals to my relationship with my two children. If Fuller's aspirational goals for law are appropriate aspirations for me, then this definition can be supported. If they are not, then perhaps his definition needs revision.

First, a word about my situation is in order. I have two children, a boy age eleven and a girl age six. My wife and I love them both very much. Either individually or in concert, they can drive us crazy. I think I have said enough to demonstrate that my family situation is normal. Thus, my family presents an adequate testing ground for the relevance of Fuller's precepts. I should also note at the outset that Fuller was well aware of the implications of his use of the word "enterprise." He wrote: "To speak of the legal system as an 'enterprise' implies that it may be carried on with varying degrees of success."⁵ So too with parenting.

I now proceed to Fuller's aspirations.

3. *Id.* at 207-08.

4. *Id.* at 39.

5. *Id.* at 122.

1. *Generality*

Fuller suggests that law should be a series of general guidelines for general situations, instead of specific ad hoc directives for situations as they arise. Happily, Fuller notes that it is almost impossible to achieve total failure on this goal. He notes:

Some generalization is implicit in the act of communicating even a single wish. The command to a dog, "Shake hands," demands some power of generalization in both master and dog. Before he can execute the command the dog has to understand what range of slightly different acts will be accepted as shaking hands.⁶

In communicating with my children, I, too, have achieved some modicum of success at generalization. My children know that when I ask them to wipe the kitchen table, they are to procure a wet rag, hold it above the table, and make back and forth motions with it. However, the range of acceptable behavior traverses more than one set of variables. For example, the proximity of the rag to the tabletop is one variable and the number of back and forth motions is another. Moreover, the range of acceptable behavior within each of these variables is not fixed. Minimum standards of quality for each of the variables are a function of such factors as the relative energy levels of parent and child, whether or not company is expected, and the score and time remaining in any sports event that may happen to be on television at the time.

Apparently, even more generality can creep into the communication of a single wish to a child than would creep into a similar communication to a dog. But this generality is achieved at some cost in terms of Fuller's other aspirations, especially clarity and constancy.⁷ The difficulty in fulfilling all aspirations simultaneously, however, is no more true in parenting than in other forms of law.

2. & 3. *Promulgation and Nonretroactivity*

I have grouped these two aspirations together because I believe that, from the perspective of law, they make the same point. It is not fair to subject someone's conduct to a rule unless he knows what the rule is before he engages in the conduct.

When I try to recall instances when my own children complained of a lack of prior warning, I find that most of the desired warnings would have been much too specific and thus would have violated Fuller's aspiration toward generality. The problem with specific warnings such as, "If you hammer nails into the coffee table, you will be punished," is that they tend to be taken as threats, or even worse, as dares. At the very least,

6. *Id.* at 48. This example, like my example of wiping the table, smacks more of managerial direction than of law. In Fuller's defense, it should be noted that he wrote this passage long before he wrote the passage distinguishing managerial direction. That latter passage first appeared in the revised edition.

7. *Id.* at 45.

they might suggest a prank that might not have occurred to the child.

Luckily, Fuller's general warnings do not share these problems. However, they have problems of their own. For example, there is the developmental nature of the children. Most children are physically capable of breaking general rules long before they are mentally capable of understanding them. For these children, prior warnings are impossible.

One could respond that Fuller's definition does not apply to these children, for their conduct could not possibly be made subject to rules they do not understand.⁸ However, the fact remains that most of the children who cannot now be subjected to law will eventually mature and thus become capable of being subjected to law. Indeed, every one of us who is now subjected to law began life not capable of being subjected to law. This fact makes promulgation a bit problematic, since promulgation of a rule probably begins the first time it is broken. None of this analysis is meant to suggest that prior warnings are not valid aspirations for parenting. It does suggest, however, that posting a written notice on the crib rail is not the way to go about it.

4. *Clarity*

Clarity is undeniably a goal of any sort of communication. However, even Fuller acknowledges that some things are clearer than others. Fuller concedes: "Nor can we ever, as Aristotle long ago observed, be more exact than the nature of the subject matter with which we are dealing admits. A specious clarity can be more damaging than an honest open-ended vagueness."⁹ This concession of Fuller's makes me feel *only slightly* better about the trouble I have with both children in explaining the concept of "talking back."

5. *Contradiction*

Fuller begins his discussion of contradictions by noting:

It is rather obvious that avoiding inadvertent contradictions in the law may demand a good deal of painstaking care on the part of the legislator. What is not so obvious is that there can be difficulty in knowing when a contradiction exists, or how in abstract terms one should define a contradiction.¹⁰

Fuller proceeds to describe two forms of contradictions. The first is the true logical contradiction, which would violate the law of identity that states that "A" cannot be "not A."¹¹ A set of laws that poses two logically opposite requirements would, of course, be impossible to obey. Fuller sug-

8. Fuller's comment, that "it would serve little purpose, for example, to attempt a juristic ordering of relations among the inmates of a lunatic asylum," is to the same effect. *Id.* at 219.

9. *Id.* at 64.

10. *Id.* at 65.

11. *Id.*

gests that this sort of contradiction does not occur very often in law, and that this sort of logical principle has little value in legal analysis. I would suggest, however, that the true logical contradiction occurs frequently in the enterprise of raising children, though it is indeed difficult for the parent to realize that it exists. Take, for example, the two rules:

1. Take care of your sister while we are away,
and
2. Do not fight with your sister.

Initially, these rules appeared to be totally consistent to me. However, I now realize that, seen from a child's perspective, the two directives taken together create an absolute logical contradiction.

Fuller suggests that the second and most frequent type of contradiction is more aptly described as an incompatibility. Two laws might not be logically inconsistent, but they might "fight each other without necessarily killing one another off."¹² Fuller comments: "To determine when two rules of human conduct are incompatible, we must often take into account a host of considerations extrinsic to the language of the rules themselves."¹³ Once again, I would submit that in parenting, the major consideration is the child's perspective. Take, for example, the two precepts:

1. Bring your bicycle inside the laundry room each night,
and
2. Never slam the laundry room door.

These precepts appear to be perfectly compatible until one considers them from the perspective of a six-year-old with a six-year-old's height and reach.

On a less mundane matter, I had not thought that the two precepts:

1. Feel free to discuss your feelings with your parents, even those feelings that relate to parental decisions that you dislike, and
2. Treat your parents with respect,

were incompatible. However, when I review them as Fuller directs, in the context of the "whole institutional setting of the problem—legal, moral, political, economic, and sociological,"¹⁴ I realize that they are very incompatible indeed.

6. *Impossibility*

Fuller suggests that the most problematic category of impossibility is inadvertence. A law that imposes penalties upon inadvertent conduct imposes penalties upon conduct that would have been impossible for the actor to prevent. Therefore, such a law violates Fuller's aspirational goal to avoid laws that require the impossible. Yet Fuller also suggests that any legislative recognition of inadvertence as a defense raises significant

12. *Id.* at 69.

13. *Id.*

14. *Id.* at 70.

evidentiary problems. So too with parenting. Recently, my son and daughter came running to me. My daughter was whimpering softly. My son said, "I didn't mean to kick her." The fresh footprint on the front of my daughter's white dress was clearly sufficient evidence of the commission of the act. However, where would I get evidence of its inadvertence?

Fuller comments on another aspect of impossibility. He notes:

The technique of demanding the impossible is subject to more subtle and sometimes even to beneficent exploitation. The good teacher often demands of his pupils more than he thinks they are capable of giving. He does this with the quite laudable motive of stretching their capacities. Unfortunately in many human contexts the line can become blurred between vigorous exhortation and imposed duty. The legislator is thus easily misled into believing his role is like that of the teacher. He forgets that the teacher whose pupils fail to achieve what he asks of them can, without insincerity or self-contradiction, congratulate them on what they did in fact accomplish. In a similar situation the government official faces the alternative of doing serious injustice or of diluting respect for law by himself winking at a departure from its demands.¹⁵

Fuller makes two points that are debatable. First, Fuller's comments suggest that there is a difference between the role of teacher and the role of legislator. Yet according to Fuller's definition, teachers are engaged, at least in part, in law.

Much of the enterprise of teaching, whether inside or outside the family context, takes the form of the teacher assigning tasks to the student with the hope that learning will result from the performance of the tasks. The following rule can be postulated: "If the student is to learn, then he must perform the tasks assigned by the teacher." The only discernible difference between this rule and other rules would be that this teaching rule has no extraneous penalty for noncompliance other than the failure of the learning enterprise. Yet Fuller does not define "rule," nor does the context of this essay suggest that a rule must have an extraneous penalty. Moreover, since the aim of the teaching is more to benefit the class than to benefit the teacher, it is submitted that teaching is closer to law than it is to managerial direction. Because much of parenting is teaching, the teaching function performed by parents is also partially law. Therefore, Fuller's assertion of a difference between the role of teacher, whether parent or not, and the role of legislator is incompatible with his definition of law.

Second, Fuller suggests that a teacher or parent can wink at a failure to comply with an impossible demand while a government official cannot. I submit that this assertion is a perversion of the meaning of the word "demand."¹⁶ "Demand" suggests that non-compliance will be penalized. No one should exact a penalty for non-compliance with an impossible de-

15. *Id.* at 71.

16. In fact, it is noteworthy that, when Fuller makes this assertion with respect to teachers, he uses the phrase "what he asked of them," rather than "what he demanded." *Id.*

mand. Yet failure to exact the penalty impairs the credibility of the maker of the demand, whether legislator, teacher or parent.

Asking the impossible is slightly better, but such a request is still inappropriate. There is simply no reason for government, teacher, or parent to create a situation that guarantees failure on the part of the subject, even if no penalty or disapproval will result.

7. *Constancy*

On first impression, the aspiration of constancy apparently makes no sense in the parenting context. All of the rules—bedtimes, responsibilities, expectations—are continually changing as my children grow older. Yet there are analogues in the relationship of government to citizen. First, there are many legal rights and obligations that are either lost or gained as a person grows older. The laws of truancy, drinking, driving, voting, and the various ages of consent are but a few examples. Moreover, there are other laws that recognize other dynamic situations and provide accordingly. Tax indexing is one example of such a law. One doubts that Fuller would have criticized any of these laws despite their lack of constancy.

Is there a difference between the seemingly appropriate dynamics of these laws and the flux of parenting? Only one difference comes to mind. In the arguably acceptable laws, the whole scheme, including all possible changes in the law and the events that trigger those changes, is set forth before the fact. On the other hand, changes in the parent-child relationship seem to occur willy-nilly. However, upon reflection, this difference is more apparent than real and probably stems from the inappropriateness of posting written statutes in the family context. I do not think that either of my children sees his or her evolving matrix of restrictions, freedoms and responsibilities as patternless. They both know that as they get older, bedtimes will get later, restrictions will ease, and responsibilities will increase. Of course, this general knowledge is a far cry from a specific timetable. In fact, my son has often asked exactly when his bedtime will change. He has not always been entirely satisfied with my response: "When I think you're ready."¹⁷ However, I submit that a general knowledge of the pattern is enough to satisfy Fuller's aspiration.

8. *Congruence*

Congruence is clearly a valid aspiration for the law. If the law as administered differs from the law as promulgated, then how will those subject to the law know what the law is? Indeed, what is the use of promulgating laws if the administrators don't follow them?

I submit that a significant cause for the lack of congruence between official action and promulgated law is that, in most legal systems, one

17. Curiously, my son is no more pleased with my much more specific response to the question, "When will I be allowed to own a BB gun?" (Never.) Perhaps I should have him read Fuller.

group promulgates the law and a different group administers it. Given this lack of identity between the two functioning groups, it should not be surprising that sometimes the two groups have different ideas about the meaning or purpose of the laws in question. This problem should be considerably less burdensome to parents than to other law givers, for parents normally function both as promulgators and administrators of the law.

Some difficulties, however, do remain, including problems of interpretation. Assume that my wife announces the rule that the children must clean their rooms before they will be allowed to go outside and play. Then she leaves to go shopping, and I am left to enforce her rule. Is my notion of what constitutes a clean room the same as hers?

In addition to the problem of interpretation, there is also the problem of capacity. Often, the incongruence in a legal system stems from the incapacity of the system to punish violations of the promulgated law. Inadequate prison capacity provides an example of this phenomenon.

Insufficient prison space is not normally considered a problem in parenting. Yet, in an analogous way, insufficient capacity to punish often leads to congruence problems. Assume for example, that one parent decides that, as punishment, a child will be forbidden to play with friends the next day. What if, on the next day, it is the other parent who has to endure the bitterness of the grounded child moping around the house?

Congruence, then, is a valid aspiration for any system of law. The fact that this aspiration can be more easily achieved in the nuclear family and other oligarchic forms of government makes the goal neither less worthy nor less appropriate.

A SUMMARY AND SCORECARD

It has been shown that all eight of Fuller's aspirational goals are appropriate for parenting, though some more so than others. Therefore, it does make sense to call a significant amount of the parenting process law. Fuller's definition, which extends to parenting, can thus be supported.

This conclusion does not mean that parents need training in legal skills (though it wouldn't hurt), or that children need training in legal skills (they already are much more skilled than some of us would wish). It certainly does not mean that lawmakers should always consult Dr. Spock (at least as to his views on child care). Many of us would assert that our lawmakers treat us too much like children already. It does suggest that a broad definition of law is viable. Accordingly, an openness to analogies from other areas of experience might well engender a fuller understanding of those things that even a narrower definition would call law.