

THE GOLD STANDARD: LEGAL THEORY AND FULLER REVISITED

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ABSTRACT

Just as King Midas had the ability to turn everything he touched into gold, the law can turn everything that it touches into law. This Midas-inspired approach to jurisprudence offers a conceptually sophisticated account of legal positivism that should dissolve the debate between inclusive legal positivists and exclusive legal positivists. Yet, not everything that glitters is gold. Despite the explanatory achievements of the Midas approach, it misses crucial aspects about the nature of law. In particular, it overlooks law's internal morality, which is identified in the work of American legal philosopher Lon Fuller and illustrated through Fuller's cautionary tale of another king: Rex. Accordingly, my goal in this Article is twofold—to explore the strengths of the Midas approach to legal theory and to critique its foundations using the insights of Lon Fuller's legal theory.

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INTRODUCTION

I present to you a tale of two kings—Midas and Rex—one foolish and avaricious, the other ambitious but bungling, and both of whom benefit from correctives drawn from the legal philosophy of Lon Fuller. Famous from ancient Greek myth, Midas was granted the power to turn everything he touched into gold. His wish turned to his misery as his newfound ability proved to be the undoing of that which brought him happiness. Midas's story has been developed by some legal philosophers into an analogy for a more strongly positivist and purely descriptive¹ legal theory than leading positivist accounts.² The Midas Theory of Law—which is based on the ability of law to turn what it touches into law³—can upset and enrich debates in legal philosophy by bringing forward descriptively powerful ideas about the relationships between disciplines and the concepts that disciplines share. On the other hand, Fuller told the allegory of Rex, a zealous reformer king who aspired to greatness as a lawmaker. Rex's ambition turned into frustration as he failed to even make law, never mind reform it. Rex figured in Fuller's writing as an illustration of how violating

1. See generally Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 OXFORD J. LEGAL STUD. 683, 683 (2006). Marmor explains, "[L]egal positivism is best understood as a descriptive, morally neutral, theory about the nature of law By 'descriptive' I mean that such an account does not purport to justify or legitimize any aspect of its subject matter. By 'morally neutral', I mean that the theory need not take a stance on any particular moral or political issues, nor is it committed to any moral or political evaluations." *Id.*

Kelsen uses a formulation that may be driving at the same ideas about positivism, descriptiveness, and moral neutrality. Newer formulations are preferable to Kelsen's, however. Kelsen argues, "[T]he function of the science of law is not the evaluation of its subject but its value-free description. The legal scientist does not identify himself with any value, not even with the legal value he describes" HANS KELSEN, *PURE THEORY OF LAW* 68 (Max Knight trans., 2d German ed., Univ. of Cal. Press 1967) (1960). The second sentence in this quote, about the author not identifying himself with the legal value that he describes, sounds similar to Marmor's statement about being "morally neutral," meaning not taking a stance on moral or political issues in the subject matter being studied. That sentence is in line with what I mean by descriptive. Kelsen's first sentence, however, is not possible, especially in the study of a normative field. See Leslie Green, *Legal Positivism*, § 4.3, STAN. ENCYCLOPEDIA PHIL. (Mar. 8, 2018), <https://plato.stanford.edu/entries/legal-positivism/> [<https://perma.cc/Z6XV-3M3J>] (arguing that description of law, a normative domain, cannot be "value-free," also rejecting the "neutrality thesis").

I thank Brian H. Bix for his suggestion that "non-prescriptive," "conceptual," or "analytic" may be better terms than "descriptive." Marmor also admits some lack of clarity in these terms because "descriptive" is often contrasted with "normative," though the two are "not necessarily opposed or mutually exclusive." See Marmor, *supra* note 1, at 683–84. Having given the explanations in this footnote, I am satisfied that my use of the term "descriptive" can be sufficiently understood, and situated in the literature on legal philosophy, for the purposes of this Article.

2. Leading positivist accounts are those given by inclusive legal positivists and exclusive legal positivists, summarized below in Part I.A. These theories often give moral and political reasoning in support of their account of the independence of law from morality.

3. By creating legal conceptions of concepts that law shares with other domains of knowledge.

law's internal morality can lead to a failure to make law; he served as a contrast to Fuller's account of lawmaking in accordance with the rule of law.

In this Article, I will draw out the insights that the Midas Theory of Law can provide to the philosophy of law. Using Fuller's work, I will also present a critique of the Midas Theory. In making my Fullerian critique, I propose a distinction between "substantive function" and "formal function." The idea of substantive function assists in understanding the Midas Theory's account of the separation between law and other domains of knowledge (including morality). Formal function explains the importance that Fuller's internal morality of law has for the ontology of law. Though the Midas Theory provides a rich account of law's substantive function, the theory cannot get off the ground without addressing Fuller's arguments about law's formal function. This Article should be taken as a largely favorable treatment of the Midas Theory bundled with a targeted and crucial criticism. The Midas Theory provides a sophisticated description of the ontological implications of the vast majority of interactions that law has with morality, addressing law's substantive function. Fuller, however, furnishes a narrow but ontologically vital level of interaction between law and morality that the Midas Theory has not addressed. The internal morality of law takes ontological priority⁴ before law's Midas capacities. However, Fuller's internal morality of law stops well short of nullifying the insightful analysis given by the Midas Theory.

Part I introduces the topic and ideas on which this Article is based: explaining the debate in legal philosophy that the Midas Theory purports to dissolve (I.A); and providing a summary of the Midas Theory as it is applied in legal philosophy to explain the separation between law and other domains of knowledge (I.B). Part II contains a critique of the Midas Theory on the basis of Fuller's procedural naturalism: explaining Fuller's idea about the internal morality of law (II.A); using Fuller's theory to critique the Midas Theory (II.B); continuing the critique and arguing that the two theories can be alloyed together (II.C); and describing the new alloyed theory (II.D).

4. In this Article, ontological priority is about dependence. If thing B has ontological dependence on thing A and thing A does not depend on thing B, then thing A has ontological priority over thing B. See Michael M. Gorman, *Ontological Priority and John Duns Scotus*, 43 THE PHIL. Q. 460, 460 (1993). To say that the internal morality of law has ontological priority before law's Midas capacities is to say that the Midas capacities depend on the internal morality of law and that the internal morality of law does not depend on law's Midas capacities.

I. THE MIDAS TOUCH & LEGAL PHILOSOPHY

A. *Standard Jurisprudential Metallurgy*

The Midas Theory contributes a unique positivist vision to the broader debate between natural law theorists and legal positivists. This broader debate has centered on the relationship between law and morality, especially the question of whether the validity of law depends on law's moral merits. In this Article, the term "validity," as in "legal validity," or "legally (in)valid," refers to the ontological status of a "legal system" or particular "law."⁵ Speaking of particular "laws," Joseph Raz says, "A rule which is not legally valid is not a rule at all. A valid law is a law, an invalid law is not."⁶ Focusing the usage of the term "validity" in this way raises the question of law's ontological dependence on, or independence from, morality.

Specifically, the question of legal validity in debates between some natural law theories and legal positivism is about whether law has essential ontological dependence on morality. Essential ontological dependence "involves requirements for identity or essence: an essentially dependent object is one which, as it were, would not be the object that it is had a condition of a certain sort not been met."⁷ Essential dependence is contrasted with existential dependence, in which one thing depends on another in order to exist at all. Crucially, if law is essentially dependent on morality and a purported "legal system" or purported particular "law" fails to meet the essential requirements that morality sets, then the thing that was incorrectly purported to be law still exists, but that thing is not law.

Speaking broadly, "Natural law theory is a mode of thinking systematically about the connections between the cosmic order, morality, and law."⁸ Natural law theories suggest important and often necessary

5. Hereinafter, the terms "legal system," "law," and other relevant variants will be put in quotation marks when their membership in the ontological category of law is being discussed, especially in relation to rule of law requirements.

6. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 146 (2d ed. 2009).

7. Fabrice Correia, *Ontological Dependence*, 3 *PHIL. COMPASS* 1013, 1014 (2008).

8. BRIAN H. BIX, *Natural Law Theory*, A *DICTIONARY OF LEGAL THEORY* 143 (2004). My thanks to David Novak for highlighting for me that some natural law theories have not given a central role to, or have even eschewed discussion of, the cosmic order and its relationship to law and morality. Somewhat arranged in order from authors who engage more with cosmic/religious questions to authors who are more secular in outlook, *see generally* SAINT THOMAS AQUINAS, *TREATISE ON LAW* (Richard J Regan trans., 2000); DAVID NOVAK, *NATURAL LAW IN JUDAISM* (1998); ANVER M. EMON, *ISLAMIC NATURAL LAW THEORIES* (2010); ANVER M. EMON, MATTHEW LEVERING & DAVID NOVAK, *NATURAL LAW: A JEWISH, CHRISTIAN, AND MUSLIM TRIALOGUE* (2014); Germain G. Grisez, *The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94*,

connections between law and morality. With respect to law's connections to morality (especially law's necessary connections to morality), most natural law theories do not make the following specific claim: legal validity depends on law's moral merits because law has essential ontological dependence on morality.⁹ Nevertheless, one theme that emerges in some natural law theories, including in this Article, is the argument that law's validity depends on law's moral merits because law's ontological essence depends on morality (i.e., on law meeting certain moral conditions).¹⁰

According to positivism, the validity of law does not depend (at least not necessarily) on law's moral merits; law does not need (by necessity) to meet any moral standards to be valid.¹¹ Law is ontologically independent of morality. In particular for this debate, law's ontological essence does not require law to meet any moral conditions. Additionally, legal positivists argue amongst themselves about whether morality can be incorporated into legal systems, especially as conditions for the validity of law. An example of such incorporation would be a particular legal system bringing moral norms about fairness into its constitution. Inclusive legal positivists (or soft legal positivists) contend that morality can be incorporated into law by contingent choices made by legal institutions to adopt morality, e.g., moral norms about fairness, into positive law. Exclusive legal positivists (or hard legal positivists) reject the idea that morality can be incorporated into law.¹²

Positivist descriptions of the interactions between law and morality (including the competing visions of inclusive positivism and exclusive positivism) are supported by different lines of argumentation. Most prominently, Joseph Raz claims that law provides an authoritative settlement of disputes, and guide for action, by replacing the differing substantive claims (the differing reasons for action) underlying those

Article 2, 10 NAT. L.F. 168 (1965); Germain G. Grisez, Joseph Boyle & John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99 (1987); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* (1999); LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992).

9. Most of the authors in the previous footnote do not make the claim that legal validity depends on law's moral merits because law has essential ontological dependence on morality.

10. See Andrei Marmor & Alexander Sarch, *The Nature of Law*, § 1.1, STAN. ENCYCLOPEDIA PHIL. (Aug. 7, 2015), <https://plato.stanford.edu/entries/lawphil-nature/> [<https://perma.cc/M4YJ-NANB>] (theories that do, and theories that do not, claim that law's validity depends on its moral merits). The extent of this dependence is debated.

11. See BIX, *supra* note 8, at 120–21; Marmor & Sarch, *supra* note 10, at § 1.1.

12. See BIX, *supra* note 8, at 123; Ralf Poscher, *The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate*, in *CONCEPTS IN LAW* 99, 109 (Jaap C. Hage & Dietmar von der Pfordten eds., 2009).

disputes (e.g., differing views about moral values/norms) with legal reasons for action (i.e. legal sources and judgments containing legal values/norms). Thus, rather than bringing differing viewpoints and arguments (about morality and other topics) into all practical interactions, people and institutions (public and private) can cite legal resolutions as the basis for their actions and for their expectations of others' actions.¹³ This reasoning stands against theories that suggest that law's own validity conditions can or must depend upon morality and against theories which say that law can incorporate moral content. Law cannot perform this authoritative replacement role if law must be consistent with the reasons for action (i.e., moral values/norms) that law was meant to replace.¹⁴ To the extent that they allow morality to become part of the validity conditions of law, inclusive positivism and natural law theory will be more awkward fits for the dispute resolution function explained by Raz than exclusive legal positivism is.

Raz's argument about law's authority can be read descriptively and prescriptively. He describes law's independence from morality as being based on law's authority; the argument also provides politically and morally grounded prescriptions about when and how to act in a way that is guided by law's authority.¹⁵ Law's dispute resolution function is politically and morally valuable because the authoritative resolution helps individuals who have a plurality of viewpoints live peacefully and cooperatively with one another in the same society.¹⁶ While insightful, these prescriptive arguments in political and moral philosophy put positivist theory itself in the position of being entangled with morality, the very field from which positivists are seeking to ontologically disentangle legal validity. There is no contradiction in providing a moral or political argument in favor of the separation of a domain (in this case, law) from morality.¹⁷ Consider, however, a positivist viewpoint—the Midas Theory—that is not so entangled with politics and morality.

13. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 41–42 (1986). Therein, Raz gives his famous arbitrator example, explaining law's dispute resolution function.

14. See *id.* at 42, 47–48. See generally *id.* at 57–62, for Raz's discussion of pre-emption of authoritative reasons for action.

15. See *id.* at 63–66, where Raz explains that his account of authority is both conceptual and normative.

16. See *id.* at 58, 63–66.

17. Doing work that is more prescriptive in aim, some authors have given a greater role to morality in legal positivism by arguing that “the separation of law and morality...[is] a good thing, something to be sought for various political or moral reasons.” BIX, *supra* note 8, at 124. See generally TOM CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* (1996) (providing a moral case for positivism); Neil MacCormick, *A Moralistic Case for A-Moralistic Law?*, 20 VAL. U. L. REV. 1 (1985) (also providing a moral case for positivism).

B. Jurisprudential Alchemy

Some legal theorists, including Hans Kelsen,¹⁸ adopted a particular positivist viewpoint called the Midas Theory of Law. The Midas Theory is explained well—and endorsed—in the work of the legal scholar Ralph Poscher.¹⁹ Poscher elucidates the sophisticated reason why these positivists believe that law can maintain its ontological separation from morality (keeping legal validity independent of law’s adherence to moral norms and knowledge) even as law interacts with morality. This reasoning is based in the Midas Theory’s understanding of law’s relationship to all other disciplines, not merely morality.

Moreover, Poscher argues that the Midas Theory better explains law’s relationship with morality than either inclusive legal positivism or exclusive legal positivism do. Both inclusive legal positivism and exclusive legal positivism—the Midas Theory says—are based on a misunderstanding of the way in which domains of knowledge interact, and which the Midas Theory clarifies. The Midas Theory can thereby concurrently enrich traditional jurisprudential debates about law’s relationship with morality and provide an impetus to expand legal philosophy beyond the well-worn ground that focuses on law’s interaction with that single domain of knowledge.

Explaining the way in which law deals with norms and knowledge from other domains, Poscher argues that law develops its own conceptions of concepts that it shares with other domains of knowledge. He describes the independence of legal conceptions as a “linguistic fact” that “has a deep and profound cause in the structure of the institutional and doctrinal practice of law, which develops methods, doctrinal standards, and institutions that set the parameters for legal conceptions.”²⁰ Ontologically legal conceptions serve law’s institutional and doctrinal needs. Law’s substantive goals provide the impetus for law’s ontologically distinct conceptions. The processes of law provide the means by which legal institutions create and modify these distinct conceptions and give these conceptions legally normative force. Law’s ontological independence from other domains of knowledge is guaranteed by law’s freedom to develop its own goals, methods, and institutions apart from the conceptions of other

18. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 161 (Anders Wedberg trans., Russell & Russell 1961) (1945).

19. See Poscher, *supra* note 12. See also Danny Priel, *Farewell to the Exclusive-Inclusive Debate*, 25 OXFORD J. LEGAL STUD. 675 (2005). Priel proposes a similar take on law that resolves the exclusive positivist and inclusive positivist debate.

20. Poscher, *supra* note 12, at 108.

disciplines. The nature of the relationships between disciplines themselves, rather than additional political and moral argumentation of the kind that some positivists give,²¹ allows law to both interact with other domains of knowledge and maintain its ontological independence from those domains. The theory that Poscher elaborates is more purely descriptive than any other positivist theory—not relying on, or offering, supporting arguments (especially prescriptive arguments) from political or moral philosophy.

The Midas Theory says that when the law seems to adopt conceptions from other domains of knowledge, the law is actually creating a legal analogue, an *ontologically legal conception* of the *shared concept* that law has in common with that other field.²² Thus, law is neither incorporating aspects from another field²³ (as in inclusive positivism), nor making use of those same aspects as they remain ontologically within another field (as in exclusive positivism). Even when it interacts with other domains of knowledge, law is creating its own materials that, through law’s Midas touch, are as aureate as other legal conceptions. Law’s conceptual wealth is ontologically independent from other domains of knowledge. This is true whether the law shares concepts with domains of knowledge in the humanities, the social sciences, the sciences, or morality.²⁴

To illustrate the way in which law’s Midas touch works, Poscher references law’s relationship with a branch of the atmospheric sciences: meteorology. Showing the way in which law shares a concept with

21. RAZ, *supra* note 13, and text accompanying notes 11-13.

22. Poscher uses the terms “concepts” and “conceptions,” borrowing from W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS ARISTOTELIAN SOC’Y 167 (1955-56). Poscher explains that he will use the terms in a way that is enriched by the extension/intension distinction. Poscher, *supra* note 12, at 100-02.

“The *extension* of an expression [or term] is the object or objects to which the expression applies [or refers]. For example, the extension of the noun ‘rose’ is the collection of all roses The *intension* of an expression [or term] is its meaning.” Harry Deutsch, *Extension/Intension*, in A COMPANION TO METAPHYSICS 254 (Jaegwon Kim, Ernest Sosa, & Gary S. Rosenkrantz eds., 2d ed. 2009). *Accord Extension/Intension*, in A COMPANION TO THE PHILOSOPHY OF LANGUAGE 1091 (Bob Hale, Crispin Wright, & Alexander Miller eds., 2d ed. 2017); David Braun, *Extension, Intension, Character, and Beyond*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LANGUAGE 9, 9 (Gillian Russell & Delia Graff Fara eds., 2012) (addressing “extension”); *id* at 12-13 (addressing “intension”).

Poscher explains that, under the extension/intension distinction: “One term can share a core of its extensions across different fields, while having slightly or even radically differing intensions. Owing to the common core of the extension, it is justified to consider such a term ranging across fields as referring to the same concept in the sense of the two-fold distinction between concepts and conceptions.” Poscher, *supra* note 12, at 101. He goes on to say: “I will speak of a *shared concept*, if a term [e.g., ‘fog’], employed in different areas of discourse [e.g., in law and meteorology], shares a core of extensions but might well have distinct intensions [when used in different contexts or fields]. The latter shall be referred to as distinct conceptions.” *Id.*

23. For example, moral values or norms and competing conceptions thereof.

24. See Poscher, *supra* note 12, at 100, 102-03.

meteorology without being limited by meteorological conceptions, Poscher argues:

If a road sign sets a special limit in case of fog, the development of the legal concept[ion] of fog might draw on a meteorological concept[ion] of fog, which describes and defines the notion by appeal to a certain ratio of humidity, temperature and barometric pressure. But it might also modify the meteorological concept[ion] by relying on a sight-factor, for the rationale for the special speed limit is the impairment of sight.²⁵

In Poscher's example, law draws upon a concept that it shares with another field, and upon knowledge from that field, to inform a legal norm that sets traffic rules on a road. Law is not bound to take up the knowledge from meteorology without modification, but rather adapts the meteorological conception of the term "fog" into a legal conception that refers to the effect (reducing sight-factor) that fog²⁶ has on the person who law seeks to regulate (i.e., a person driving in foggy conditions).

Poscher elucidated that law keeps its conceptions independent from the conceptions of other fields by always having the prerogative to tailor its own conceptions to its own exigencies. This prerogative, he argues, also exists in the relationship between legal conceptions and moral conceptions.²⁷ Poscher explains that there is nothing special to distinguish the way that law shares concepts with morality that would make for a necessary connection (or I would add ontological dependence) between legal and moral conceptions. There would also be no special relationship in which legal validity depends upon law's adherence to moral conceptions. He argues that the only feature that is special in the relationship between law and morality is that the concepts that are the central focus of one field are also the focus of the other; both law and morality are greatly concerned with their own conceptions of shared concepts such as equality, freedom, and dignity.²⁸ According to Poscher, however, the mere fact that these two fields are centrally concerned with the same concepts does not mean that the Midas Theory's standard

25. *Id.* at 100. The word "concept" is modified to say "conception" here because "conception" better reflects the concept/conception distinction that Poscher makes, and uses repeatedly, just after this quote. *See id.* at 100–02.

26. Meaning the extension of the term "fog."

27. Poscher, *supra* note 12, at 104–05, 108.

28. *Id.* at 105.

separation between law and other domains of knowledge does not also exist between law and morality.²⁹

Like the example involving meteorology, Poscher grounds the independence of legal conceptions from moral conceptions in an understanding of the relationships between disciplines and the way in which these disciplines share concepts and knowledge contained in conceptions. Poscher explains:

It is not a lack of objective moral truth or its epistemic status that account for the development of distinctly legal conceptions. Rather, that development is owing to the legal method and the doctrinal and institutional exigencies of law that are peculiar to it.

In developing legal conceptions of liberty, equality, dignity and the like, the law can inform itself about similar conceptions in moral and political philosophy It does so just as it informs itself in a preliminary way about meteorology, medicine, and biology. Whatever insights such a consideration of conceptions in other areas of discourse might bring about, these insights will always have to be built into a specific legal conception that takes into account the specific legal history, methodology, forms of argumentation and institutional setting of law.³⁰

In Poscher's view, responding to the natural law and inclusive positivist idea that morality is incorporated into the law through law's use of moral concepts such as "fairness" requires rebutting a misapprehension that can arise from looking at two things that appear alike. These lookalikes are *legal conceptions* and *moral conceptions*, each of which originate from a common source: the yet unadulterated shared *concept* (e.g., fairness). Despite this common basis, the conceptions are ontologically independent and developed in accordance with the domains of knowledge to which the conceptions belong. According to the Midas

29. *Id.* Poscher also argues: "The difference between the relation of the law to moral philosophy on the one hand and other disciplines on the other is not structural but quantitative and qualitative. Quantitatively many, though not all, legal questions have an equivalent in moral or political theory; qualitatively the two disciplines for one thing share some of their most important and crucial concepts, not only profane ones as in the case of meteorology; for another they are both normative disciplines." *Id.* at 108–09.

Compare Leslie Green's discussion of necessary connections between law and morality that do not undermine the idea that law can fail to meet moral standards but still be valid law. Green says that law necessarily: "regulates objects of morality," "makes moral claims of its subjects," "is justice-apt," and "is morally risky." Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1047–54 (2008).

30. Poscher, *supra* note 12, at 107.

Theory, natural law theorists, Dworkinian interpretivists, inclusive positivists, and exclusive positivists have failed to fully appreciate that law and morality are ontologically distinct fields with their own conceptions that have shared terms and common unadulterated conceptual sources.

When law and morality interact, the domains have two ontologically independent conceptions of a shared concept, not one concept existing in the moral domain with which law interacts. As Poscher puts it:

[I]f law is like King Midas, then the entire debate [between Dworkinian interpretivism, inclusive legal positivism, and exclusive legal positivism] rests upon a common error and deflates. The law and morality only share common concepts but not common conceptions To draw on moral reasoning in the process neither leads to morality's becoming part of the law, nor does it make the relation between the law and morality structurally unique by comparison with its relation to other disciplines. The law draws on moral conceptions as it draws on meteorology, medicine, or biology – without any need to trigger philosophically intense debates about the law being necessarily meteorological, or law having incorporated biology.³¹

With this argument, Poscher closes an avenue that some natural law theorists would want for proving that there is a necessary connection between law and morality, and which would also be the basis of the debate between inclusive positivism and exclusive positivism. Although law is centrally concerned with value-laden terms such as justice, the law deals with such concepts not by reaching into morality and ontologically incorporating moral conceptions into law, but instead by creating conceptions that belong to the category of law. Since law develops its own conceptions of concepts that it shares with morality, law's interaction with morality does not entail that law's validity is tied to law's moral merits. Poscher supports that view with an analogy to the relationship between

31. *Id.* at 111–12. My thanks to Robert Atkinson for raising the issue with me that law's relationship with normative systems outside of law is different than law's relationship with non-normative domains. As Atkinson rightly observes, normative systems (such as morality) and their conceptions, might be law's ends, whereas non-normative fields (such as meteorology), and their conceptions, might be law's "means or materials." These points can provide the grounding for a reply to Poscher's Midas Theory that focuses more on substantive natural law thinking, as distinguished from the Fullerian procedural naturalism that is the focus of this Article. Atkinson's point can be considered under law's substantive function, discussed below in Part II.A. In line with Atkinson, one could argue that the Midas Theory does not apply equally to all extra-legal domains because some of those extra-legal domains are law's substantive ends, as opposed to the "means or materials" that seem to be Poscher's focus. It cannot be taken for granted that law's Midas touch would be equally effective on law's ends and law's means.

two other fields: architecture and religion. He says:

The relationship between law and morality is structurally comparable to the relation between morality and other disciplines, such as architectural statics. Sacral buildings may become socially dysfunctional if they violate religious laws. A mosque not facing Mecca might not be accepted by a Muslim community, but it will not collapse. Structurally the functional relationship between the law and morality is not different from the relationship between architecture and religion.³²

Just as no amount of failure (caused by law's dissonance with meteorology) to achieve law's functional exigencies in the regulation of traffic will disqualify the positive law on driving from belonging to the category of law, no amount of failure (caused by law's dissonance with morality) to achieve law's functional exigencies in relation to moral problems will deny the positive law membership in the category of law. It is law's ability to independently *pursue* its exigencies (i.e., to pursue these exigencies in a way that can deviate from the knowledge and prescriptions of other domains of knowledge) that guarantees law's ontological independence. Law can learn from an external field but is always free to modify its own conceptions.

Poscher's Midas Theory emphasizes that law is an ontologically independent domain of knowledge that interacts with other domains of knowledge on deep levels. His theory does not take on more conceptual or metaphysical baggage than is required to explain law's ontological independence during these interactions. The Midas Theory is as pure a descriptive effort as one can find in legal philosophy, especially in describing the relationship between law and morality. Poscher argues for a sharp fact/value distinction and does not make use of political or moral values or arguments³³ to support what he thinks is ultimately a factual point. If everything that the law touches turns to law, and if this is also true when law touches morality, then the Midas Theory has a powerful response to the way in which natural law theorists, Dworkinian interpretivists, inclusive positivists, and exclusive positivists explain the relationship between law and morality. The Midas Theory dissolves the debates between some natural law theorists and the inclusive and exclusive varieties of legal positivism.

The issue that arises, however, is that Poscher concludes, from his

32. *Id.* at 112.

33. For further explanation, see note 1 and accompanying text (stating this Article's focus on the most descriptive positivist accounts).

sophisticated reply to the theories just mentioned, that the relationship between law and morality “is structurally comparable to the relation between morality and other disciplines” and that, “[s]tructurally[,] the functional relationship between the law and morality is not different from the relationship between architecture and religion.”³⁴

II. INSIDE THE JURISPRUDENTIAL CRUCIBLE

A. A Prerequisite for Jurisprudential Metallurgy

Lon Fuller did not himself engage in the debate about relationships between domains of knowledge that is raised by the Midas Theory, but aspects of Fuller’s jurisprudence can be used to identify a major limitation in the Midas Theory. In his procedural naturalist theory of law, Fuller proposes that the rule of law (which he describes as an internal morality of law) provides a necessary connection between law and morality. The way in which Fuller establishes the connection between law and morality is based in the conditions upon which the ontological essence of law depends.

As explained by Brian Leiter in his work on law and objectivity:

The class of legal reasons can come to include moral reasons in two ways. First . . . sources of law—like statutes and constitutional provisions—may include moral concepts or considerations. The United States Constitution provides the most familiar examples, since it speaks of ‘equal protection,’ ‘liberty,’ and other inherently moral notions.³⁵

The legal theories that have been discussed so far in this Article are largely of this first kind, especially the debates between inclusive legal positivists, exclusive legal positivists, Dworkinian interpretivists, and natural law theorists who do not claim that legal validity depends on law’s moral merits.³⁶

The Midas Theory gives descriptive reasons for denying that this first way can happen at all. Law does not actually include moral concepts but instead performs law’s Midas touch. Poscher’s explanation of the interaction between law and other domains of knowledge shows the way in which law maintains its ontological independence from other domains

34. Poscher, *supra* note 12, at 112.

35. Brian Leiter, *Law and Objectivity*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 969, 978 (Jules L. Coleman & Scott J. Shapiro eds., 2002).

36. See Part I.A of this article for this discussion.

(including morality), even as legal sources interact with norms and knowledge from other domains. Rather than “including,” or incorporating, concepts from other domains, the Midas Theory argues that law creates an ontologically legal conception of concepts that it shares with other domains.

“Secondly,” Leiter argues, “moral reasons might be part of the class of legal reasons because they are part of the very criteria of legal validity.”³⁷ Leiter explains, “Satisfying the moral criteria might be *necessary* for a norm to be a legal norm, or it might be both necessary and sufficient. The strongest forms of natural law theory hold the latter.”³⁸ In an effective and moderate way,³⁹ Fuller’s theory of the internal morality of law holds out the rule of law as a necessary condition for being a legal norm. Stated briefly, there is a set of moral conditions that “legal systems” and particular “laws” must meet in order to perform the function of law. Since law’s essence involves the performance of this function, these moral conditions are also requirements for belonging to the ontological category of law.⁴⁰ Being so foundational to the ontology of law allows Fuller’s procedural naturalism to gain an advantageous position on the Midas Theory of Law.⁴¹

37. Leiter, *supra* note 35, at 978.

38. *Id.*

39. The moderation becomes especially evident below in Part II.D.

40. Fuller addresses the essence of law in a way that is central to this Article, and that has largely been the focus of the scholarly attention given to this work, which has packaged Fuller’s theory in terms that are workable for a debate in jurisprudence that is concerned with legal validity. Kristen Rundle discusses the awkward fit that legal validity has in Fuller’s jurisprudence. She notes that the term “legal validity” has its inheritance in legal positivist jurisprudence and explores the extent to which legal validity occupied Fuller’s thinking and the place that legal validity takes in his work. See KRISTEN RUNDLE, *FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER* 76–85 (2012). Rundle is right to say that “Fuller’s writings are otherwise concerned with the much broader task of understanding law as a distinctive form, and with rejecting pathological instances of that form as rightly belonging within the meaning of law as a concept.” *Id.* at 79. I thank Rundle for her commentary on the present Article, in which she highlighted the extent to which I am packaging Fuller’s ideas for my purposes. I have indeed packaged Fuller’s work in a way that focuses on the language of legal validity, and which was not the focus of Fuller’s work. At the same time, Rundle has not suggested that discussion of Fuller’s commentary on legal validity is illegitimate or even a misreading of his work. Questions about legal validity deal with a slice of Fuller’s work, but the slice is important and doing a deep dive into it does not need to distort Fuller’s broader ideas. Compare with N.E. Simmonds, who cautions Rundle against too strongly reclaiming Fuller’s work from his debates with positivists like Hart, in which legal validity was the focus. Simmonds argues that this debate “is a battle where Fuller’s general strategy offers every prospect of victory,” and that seeking to move focus away from Fuller’s contribution to this debate “risks conceding important territory to those who have in reality failed to achieve the outright victory that is sometimes ascribed to them.” N.E. Simmonds, *Freedom, Responsible Agency and Law*, 5 *JURIS*. 75, 76 (2014) (reviewing RUNDLE, *id.*). Rundle and Simmonds are both astute here. The validity debate was not Fuller’s central focus, and yet Fuller has a vital insight to make about validity and law’s foundations.

41. Discussed in detail below in Part II.B.

Fuller’s idea of the “internal morality of law”⁴² has two main steps: a functionalist thesis and a moral thesis.⁴³ In legal philosophy, the first of these steps receives little contestation and the second is a minority position. The functionalist thesis posits that the rule of law is a necessary condition for the validity of law (or essence of law, in the terms used here) because the abidance of the rule of law is necessary for “legal systems,” and particular “laws,” to perform their functions as members of the ontological category of law. This function is guiding conduct. Described in broader terms, the function is subjecting human conduct to the guidance of rules. As Fuller quotes the words of Chief Justice Vaughan in the 1673 King’s Bench case *Thomas v. Sorrell*, “[A] law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them.”⁴⁴

Fuller provides eight desiderata that a purported “system of law,” and purported particular “laws,” cannot completely ignore and still belong to the category of law because failing in these conditions would be to fail to guide conduct.⁴⁵ King Rex stupendously misses the mark of making law by failing, in eight concerted efforts at lawmaking, to meet each one of Fuller’s desiderata. The desiderata are: (1) Generality—laws should be general rules; (2) Promulgation—laws should be published; (3) Prospectivity—laws should be forward looking; (4) Clarity—laws should be clearly stated and understandable; (5) Consistency—laws should be

42. For a fuller development of this argument, see generally FULLER, *supra* note 8, at 4, and especially chapter 2.

43. For discussions of this two-step thesis, see N.E. SIMMONDS, *LAW AS A MORAL IDEA* 65, 81 (2007); Jeremy Waldron, *Positivism and Legality: Hart’s Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1139–44 (2008). See also Noam Gur, *Form and Value in Law*, 5 JURIS. 85, 88–90 (2014) (reviewing RUNDLE, *supra* note 40). Gur additionally suggests a one-step reading that may be more favorable to Rundle’s reclamation of Fuller’s jurisprudence. *Id.* at 90–92. Kenneth Winston provides a six-step breakdown of Fuller’s internal morality of law (consistent with the two main steps outlined here). Winston’s breakdown highlights the central place of liberal political thought in Fuller’s work. See Kenneth I. Winston, *Introduction to the First Edition of LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 25, 53 (Kenneth I. Winston ed., Hart Publishing 2001) (1981).

44. FULLER, *supra* note 8, at 33 (alteration in original) (quoting *Thomas v. Sorrell* (1673) 124 Eng. Rep. 1098 (KB)).

45. See *id.* at 39. Beyond setting a minimal functional standard below which law cannot fall, Fuller recognizes that law can have the excellences of legality to greater or lesser degrees depending on its adherence to the morality of law. Thus, a “legal system” or particular “law” does not merely either qualify, or fail to qualify as law, in a binary fashion. Rather, the internal morality of law identifies a continuum of legality. See *id.* at 3–32, 41–44, 122–23. Fuller addresses the criticism that his theory makes it possible for the existence (or I would more accurately say essence, see Correia, *supra* note 7 and accompanying text) of a “legal system” to be a matter of degree, replying that “of course, both rules of law and legal systems can and do half exist.” *Id.* at 122–23. Accord Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 646 (1958) [hereinafter *Positivism & Fidelity*]; RUNDLE, *supra* note 40, at 78, 93, 137.

consistent with one another; (6) Possibility—laws should only prescribe behaviors that are possible; (7) Constancy—laws should be relatively stable, rather than subject to constant change; (8) Congruence—there should be consistency between the law as declared and as administered.⁴⁶ Fuller receives broad agreement on this first step of his procedural naturalism, including from inclusive legal positivists like H.L.A. Hart and exclusive legal positivists like Joseph Raz.⁴⁷

Fuller provides many of his own illustrations of how legislators (especially Rex) can fail to make law.⁴⁸ The following example shows how a particular “law” could violate at least three desiderata.⁴⁹ Consider the possibility of a secret “law,” about which the public, courts, and relevant parts of the executive branch are not informed,⁵⁰ stipulating that, from the period of January 1, 2019 to March 1, 2019,⁵¹ it was a criminal offence for John Smith⁵² to produce more than a specified amount of milk on his farm. Although law is not merely the subjection of human conduct to rules, doing so is part of the essence of law. This example is not even a rule; it cannot possibly perform law’s function of guiding conduct. Thus, the example also fails to belong to the ontological category of law.

Fuller’s theory applies to both “legal systems” and particular “laws.” Particular laws include statutes, case law, regulations, and possibly broader categories, such as particular customs in customary law. Conceptually, particular “laws,” just like “legal systems,” share in the function of the category of law: guiding human conduct using rules.⁵³ If

46. FULLER, *supra* note 8, at 39. See generally *id.* at 46–91, where Fuller undertakes a detailed exposition of these desiderata.

47. See generally Waldron, *supra* note 43, at 1144–69 (explaining a number of examples in which Hart shows more openness to Fuller’s view, in particular Fuller’s functionalist analysis); JOSEPH RAZ, *supra* note 6, at 219–26. See also *id.* at 226, containing Raz’s example of a knife’s minimal functional ability to cut. Raz uses this argument to criticize Fuller’s moral thesis. Nevertheless, the soundness of the functionalist portion of Fuller’s argument is recognized (even if done unenthusiastically).

48. See generally FULLER, *supra* note 8, at 33–41 for illustrations using the example of Rex; *id.* at 46–91 for Fuller’s broader examples of challenges that arise in abiding by the desiderata.

49. In addition to the three desiderata mentioned in this paragraph, this example “law” likely violates Fuller’s sixth desideratum, requiring that law be possible to obey. Timothy Stostad argues that Fuller’s desiderata can be subsumed under the sixth desideratum of possibility because the desiderata are grounded in the idea of obeyability. This means that all failures to abide by the internal morality of law are necessarily failures of possibility. See Timothy Stostad, *An Unobeyable Law is Not a Law: Lon Fuller’s “Desiderata” Reconsidered*, 7 DREXEL L. REV. 365 (2015).

50. The “law” is not promulgated.

51. The “law” is not prospective. These dates have elapsed before the publishing of this Article.

52. The “law” lacks generality.

53. Further clarification can be given here about the meaning of “particular laws.” One meaning of “particular laws” might be collections of rules in specific documents, such as statutes, court decisions, or regulatory documents. More granularly, another meaning of “particular laws” might

the function of guiding conduct is shared at the level of “legal systems” and the level of particular “laws,” then it can be asked whether all of Fuller’s eight desiderata are applicable to particular “laws,” and to what extent, or whether some conditions (though applicable to “legal systems”) might not affect the ability of particular “laws” to guide conduct. Determining these questions about each desideratum requires an examination of the relevance of each of Fuller’s desiderata to the function of particular “laws.”

The need for particular “laws” to abide by the desiderata of the rule of law in order to guide conduct is even more readily understood than it is for “legal systems” as wholes. Fuller’s desiderata are applied to particular “laws,” which can have, or fail to have, all the distinctively legal excellences that Fuller identifies in his eight desiderata. It is particular “laws,” not “legal systems,” that would fail to be promulgated or that would be retroactive, for example. When such defects are widespread enough in a purported “legal system,” the result is that the system does not qualify as a legal system because the system does not subject human conduct to the guidance of rules. Fuller’s desiderata are all necessary for particular “laws” to guide conduct.

As it is for “legal systems,” a complete failure to abide by Fuller’s desiderata would result in the failure of particular “laws” to perform their function. A particular “law” that: (1) is directed at only one person; (2) is not promulgated; (3) governs only past behavior; (4) is not clear; (5) is inconsistent with another particular “law” (if the inconsistent elements of both “laws” are intended to stay in force) or has provisions that are inconsistent with one another; (6) requires people to perform impossible actions; (7) is constantly changing; and (8) is not administered in a way that is congruent with the way that the law is declared, cannot guide conduct. This is a complete failure to perform law’s function, a failure relating to the first step of Fuller’s two-step argument. Thus, Fuller’s desiderata are applicable to particular “laws,” meaning that particular “laws” cannot completely disregard the desiderata and still belong to the ontological category of law.

The failure to perform law’s function—subjecting human conduct to the guidance of rules—by failing to abide by the rule of law is almost always more immediately ontologically consequential for particular “laws” than for “legal systems.” The complete failure of a particular “law” to meet the desiderata means that the purported particular “law” is not a

include specific rules within the types of documents just mentioned. The arguments here are intended to apply to both meanings.

rule. A single logical inconsistency in a key part of a statute might result in the failure of that particular “law” to guide human conduct. By contrast, a “legal system” can more easily survive a logical inconsistency in a particular “law,” or between particular “laws,” contained within the “legal system”—other than perhaps in a rule of recognition or other “law” of foundational significance.⁵⁴ The same can be true for a failure to promulgate a particular “law” or failure to make a particular “law” prospective. Such flaws can invalidate an entire particular “law” while the system as a whole will less frequently lose so much of the essence of law that it fails to be a legal system.

The present point is not that particular “laws” do not allow for degrees of variance from the rule of law before the particular “laws” lose so much of the essence of law that they are legally invalid. As noted by Fuller, the creation of case law does not adhere perfectly to the desideratum of prospectivity because developments in case law have an element of retroactivity for the parties whose case is being decided.⁵⁵ This departure from perfect adherence to the desideratum of prospectivity does not mean that case law cannot belong to the ontological category of law. Indeed, retroactivity for the parties whose case is being heard is the normal way in which case law is developed. The key to the present point is that “legal systems,” as wholes, can tolerate more widespread and varied departures from perfect adherence to the desiderata than a particular “law” can. Given that “legal systems” and particular “laws” share the basic functional requirements contained in the rule of law and that particular “laws” have even less room for variance from the desiderata than the “legal system,” there is no conceptual reason to apply Fuller’s theory only to “legal systems” and not also to particular “laws.”

Going beyond the question of whether law’s internal morality can apply to particular “laws,” rather than merely to “legal systems,” Fuller himself both applies his theory to particular “laws” and argues about “legal systems” in a way that allows for some “laws” to be invalid due to their failure to abide by the rule of law while other “laws” remain valid. This can be seen both in his broad discussion of his theory⁵⁶ and in his application of his jurisprudence to actual cases, including law in Nazi

54. See generally FULLER, *supra* note 8, at 66–70, for Fuller’s discussion of the ways in which “legal systems” handle contradictions and apparent contradictions in particular “laws.”

55. See generally *id.* at 55–58, for Fuller’s discussion of retroactivity in case law.

56. See, e.g., *supra* note 45 and accompanying text.

Germany.⁵⁷ As argued by Kristen Rundle, Fuller’s analysis, which recognizes continuums and degrees of legal validity, can conclude that some “laws” within a “legal system” may be valid while others are not. Rundle explores Fuller’s discussion of the Nazi “legal system,” which was a central case to which Fuller applied his jurisprudential theory. She points out that Fuller’s discussion of the Grudge Informer cases were “focused on the text and mode of administration of particular Nazi laws, rather than any broad commentary on the system as a whole (even if the laws in question were typical of the kind generated by that system).”⁵⁸ Rundle notes that, rather than always discussing the validity of the Nazi “legal system” as a whole, Fuller applies his critique of the validity of law in Nazi Germany to specific parts of the “law” in Germany, namely public “law,” and not to private “law,” “at least for those who were not the target of Nazi persecution.”⁵⁹

As specific examples of areas of private “law” that would not have run afoul of Fuller’s account of the rule of law, Rundle says that, “It is thus unlikely . . . that Fuller would have denied the title of law to legal transactions between Aryan Germans concerning wills and estates, or the buying and selling of property, because the structure of such legal relations was rarely affected by the institutional transformations of the Nazi ideological program.”⁶⁰ Fuller’s application of his theory, including in relation to Nazi “law,” “depends on the particular law, and the intelligibility of the particular legal relationship, in question.”⁶¹ Crucially, to evaluate the legal validity of particular “laws” is not to turn away from thinking about the validity of “legal systems.” The starting point of Fuller’s discussion of validity is the “formal health” of the “legal system,” which “remains in the background, even when Fuller is evaluating the characteristics of a particular law.”⁶²

The second aspect of Fuller’s procedural naturalism, his moral thesis, posits that the rule of law, and Fuller’s eight desiderata, are also moral conditions for the validity of law. The desiderata themselves implicitly

57. In the following discussion of Fuller’s application of his theory of the internal morality of law, making it clear that the theory applies to particular “laws,” I will focus on Fuller’s appraisal of the validity of Nazi law. Fuller’s application of his theory to particular “laws” can also be seen throughout FULLER, *supra* note 8, at 46–91.

58. RUNDLE, *supra* note 40, at 80. See generally David Dyzenhaus, *The Grudge Informer Case Revisited*, 83 N.Y.U. L. REV. 1000 (2008), for a detailed look into the Grudge Informer case that motivated debate between Fuller and Hart.

59. RUNDLE, *supra* note 40, at 80.

60. Kristen Rundle, *The Impossibility of an Exterminatory Legality: Law and the Holocaust*, 59 U. TORONTO L.J. 65, 84 (2009).

61. RUNDLE, *supra* note 40, at 80 (referencing Rundle, *supra* note 60, at 84).

62. RUNDLE, *supra* note 40, at 80.

recognize individual autonomy and set a baseline of respect for individual autonomy as a necessary condition for the validity (or essence) of law. As Fuller says while discussing the account of humanity that is implied in the internal 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 that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his default.”⁶³ Fuller describes law’s commitment to a view of human nature that recognizes people’s autonomy as “the most important respect in which an observance of the demands of legal morality can serve the broader aims of human life generally.”⁶⁴

Violations of Fuller’s desiderata fall below this baseline of respect for individual autonomy. Fuller goes as far as saying that “[e]very departure from the principles of law’s inner morality is an affront to man’s dignity as a responsible agent.”⁶⁵ Raising specific examples of departures from the rule of law, Fuller argues that, “To judge [a person’s] 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.”⁶⁶ This wrong can be especially egregious in the case of criminal law, where one can raise examples such as a citizen being required by a “law” to perform an impossible task and potentially being imprisoned for failing to perform the task. This example would result in a loss of liberty (through imprisonment) on the basis of a “law” that failed to respect the person’s autonomy in the first place.

Not every aspect of morality creates a validity condition for law based in the internal morality of law. Fuller recognizes this as he says, “I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues.”⁶⁷ His desiderata are specifically relevant to law’s function of guiding human conduct.⁶⁸ A “legal system,” or a “law,” that violates substantive morality—but that does not undermine the conduct-guiding function of law (“non-ROL morality”)⁶⁹—can be

63. FULLER, *supra* note 8, at 162.

64. *Id.*

65. *Id.* Fuller’s statement could be made more modestly. He has recognized that some departures from the internal morality of law might be acceptable and might even be unavoidable, such as the creation of case law. See FULLER, *supra* note 55, and accompanying text.

66. FULLER, *supra* note 8, at 162.

67. *Id.*

68. See *id.* at 106, where Fuller gives his well-known statement that “law is the enterprise of subjecting human conduct to the governance of rules.”

69. I have avoided using the term “external morality” here because Fuller has his own specialized use for this term. See generally RUNDLE, *supra* note 40, at 63–65. Non-ROL morality is meant in this Article to encompass all of morality that is not a formal condition for the validity of law.

critiqued on moral grounds. However, such violations would not result in a failure to perform law's conduct-guiding function. For example, a "law" that has the purpose or effect of segregating neighborhoods racially, while subject to rebuke on non-ROL moral and political grounds, as well as possibly other grounds in the positive law that may be inspired by the substance of moral conceptions, does not fail to perform the conduct-guiding function of law as long as the "law" is consistent with Fuller's eight desiderata. Such a "law" would not raise the specific concerns about legal validity that come from the rule of law. Thus, Fuller's view identifies a limited set of moral norms as internal functional conditions for the essence of law.⁷⁰

The pushback that Fuller receives on his moral thesis concerns whether his desiderata are truly moral conditions or simply functional conditions.⁷¹ Entering that debate over Fuller's moral thesis would take this Article far afield. The purpose of discussing Fuller's functionalist thesis here is to identify a weak point in the Midas Theory. The weak point relates to Poscher's strong descriptive view of the degree of independence that law, or any field of knowledge, can have from other fields of knowledge. Identifying this vulnerability does not depend on Fuller's moral thesis; the functionalist step in Fuller's theory is what opens a vulnerability in the Midas Theory to this Article's critique. It is the full articulation of a Fullerian critique of Poscher's weak point that requires a deeper discussion of Fuller's moral thesis. The latter of those two projects is a bigger task than can be undertaken here. Accordingly, the remainder of this Article will focus on functional analysis, rather than on analysis of Fuller's moral thesis about the rule of law.

B. A Prerequisite for Jurisprudential Alchemy

Part I.B described Poscher's idea that, because of law's Midas touch, the relationship structure between law and other domains of knowledge is

70. Suggesting the reverse of the narrowly defined influence of law's internal morality on the overall moral goodness or badness of law, Fuller is perhaps overconfident about the extent to which "legal systems" that abide by the rule of law will be consistent with non-ROL morality. See FULLER, *supra* note 8, at 153–55; Fuller, *Positivism & Fidelity*, *supra* note 45, at 636–38. See also Stotland, *supra* note 49, at 384–85, discussing Fuller's claims about the rule of law and broader moral concerns. Even here, though, Fuller is at most overstating the effects of law's formal functional conditions. The conditions themselves remain narrowly focused on formal function, even as the effect of obeying the conditions is said to be broader.

71. See RAZ, *supra* note 6 (sharp knife example, discussed *supra* note 47 and accompanying text); H.L.A. Hart, *Book Review*, 78 HARV. L. REV. 1281 (1965) (reviewing FULLER, *supra* note 8). See generally Waldron, *supra* note 43, for Waldron's discussion of the range of responses that Hart gave to Fuller's idea of the internal morality of law.

such that law does not become ontologically dependent on those domains when it interacts with those domains. According to this theory, law's relationship to morality is structurally no different from law's relationship to any other domain. While Poscher's explanation provides significant insights about law's relationships with other domains, the argument misses that the ontological structure of the relationship between law and morality is fundamentally different from law's relationships to other fields. Law has essential ontological dependence⁷² on morality because of the internal morality of law. Fuller explains how lawmakers must act in accordance with the rule of law to be able to create law. Midas's royal prerogatives in this respect are no greater than Rex's are. The rule of law ontologically precedes law's Midas function of creating legal conceptions of shared concepts.⁷³ Thus, even lawmaking done in the name of law's Midas function must be done in abidance of the internal morality of law.

Specifically addressing the central insights of Poscher's articulation of the Midas Theory, I argue that although law may be free to tailor its own conceptions to its own exigencies (and is not bound to accept the conceptions of another field of knowledge), the process of tailoring legal conceptions to meet the exigencies of law happens under the auspices of the rule of law. Exercising *law's* Midas touch to pursue ontologically legal exigencies cannot happen if there is no law to guide conduct. The gilding work of creating ontologically legal conceptions of shared concepts happens within "legal systems" and particular "laws" that are ontologically legal. These legal containers (valid "legal systems" and valid particular "laws")⁷⁴ must themselves be functionally compliant with the ontology of law (i.e., must abide by the rule of law, which sets requirements for law's function of guiding human conduct).

Moreover, the conceptions found within "legal containers" (i.e. purported "legal conceptions") must also meet the conditions that the rule of law sets for law's ontological essence. Law may attempt to create a legal conception of a shared concept as law pursues its own exigencies when interacting with other domains of knowledge. However, if the "legal

72. See generally Correia, *supra* note 7.

73. The foundational importance of the internal morality of law gives it priority over the philosophical issues addressed by the Midas Theory. Also appreciating the foundational importance of Fuller's theory, Kristen Rundle has argued separately that Raz's theory of the authority of law presupposes that law has a formal structure that recognizes the agency of the legal subject who adheres to law's authority. See Kristen Rundle, *Form and Agency in Raz's Legal Positivism*, 32 *LAW & PHIL.* 767 (2013). My thanks to her for drawing my attention to this piece.

74. One should not mistakenly conclude from the foregoing that legal systems and particular laws are *merely* containers for conceptions. I am simply describing them as containers for this specific point about the ontology of legal conceptions.

conception” itself fails to meet the conditions of the rule of law, thereby losing the essence of law because it fails to guide conduct, then the conception does not belong to the ontological category of law and may be a conception of a different ontological kind.⁷⁵ The ontological classification of the “legal containers” and the “legal conception” depends upon the satisfaction of the rule of law, a necessary functional condition for membership in the ontological category of law. A failure at any of these levels—i.e., a failure by the “legal system,” particular “law,” or “legal conception” to meet the conditions for the ontological essence of law—interrupts the Midas touch through which law would alchemize non-law.

This is an issue that exists at a more basic level than Poscher discusses as he explains the way in which law gains informational/epistemic and functional benefits from taking aboard conceptions from other fields of knowledge. To illuminate this difference, this Article distinguishes between “substantive function” and “formal function.” Substantive function refers to the achievement of the substantive aims of a system (a legal system in this Article), or of the elements of a system (laws and conceptions in this Article). The substantive functions of a legal system might be contained in a legal system’s constitution or pervade legislation and case law. Substantive functions (i.e., a legal system’s substantive aims) might be limited only by the imaginations of lawmakers and real-world possibilities. Formal function refers to the ability of a thing to perform its own function (to function as the ontological thing that it is) or, taken down a level, for the elements of a system to function as the things that they are (i.e., parts of a specific ontological type of functioning system). In the case of law’s formal function, this Article refers both to the ability of a system to function as a legal system and to the way in which particular “laws” must function in order to contribute to the ability of a system to function as a legal system.⁷⁶

75. There may be instances in which a “legal system” can fail to even create a valid conception of any ontological kind. The specific desiderata of clarity and consistency could be necessary conditions for being a conception and may be a necessary condition for any sort of prescriptive conception.

76. My response to the Midas Theory proceeds on the basis of law’s dependence on the rule of law. I use only the formal Fullerian conception of the rule of law, explained above in Part II.A. One could add complexity to the considerations that I am raising about the Midas Theory in light of the rule of law (including types of function and ontological dependence) by discussing different accounts of the rule of law. See generally Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 LAW & PHIL. 137 (2002), which contains Waldron’s discussion of the contestation over conceptions of the rule of law and rule of law as an essentially contested concept. Waldron cites Gallie, *supra* note 22. On a related note, my thanks to Dan Priel for raising the possibility of applying the Midas Theory to the values (i.e., respect for individual autonomy) that underlie the formal conception of rule of law, or perhaps to the values that underlie other conceptions of the rule of law.

When discussing the substantive and formal functions of systems or elements in different ontological categories, a distinction can be made between types of dependence on, and independence from, systems or elements of another category. The substantive functions of systems or elements in one category may be dependent on, or independent of, their abidance by systems or elements of another category. Similarly, the formal functions of systems or elements in one category may be dependent on, or independent of, their abidance by the systems or elements of another category. Crucially, the definition of formal function given herein means that anything (especially any discipline, for present purposes) that has formal functional dependence on another thing has its functional dependence built into its essence. It has essential ontological dependence on the other thing (on the other domain). It would cease to be the thing that it is if it did not perform certain formal functions. Poscher, explaining the example of laws that regulate driving in fog (thereby seeking to improve road safety), raises questions related to substantive functional dependence on, and independence from, another domain of knowledge (i.e., law's substantive functional dependence on meteorology). The definition of substantive function given in this Article does not necessarily make substantive function the dependee in essential or existential ontological dependence relationships. Rather, Fuller's thesis about the internal morality of law raises questions about formal functional dependence and independence (i.e., law's formal functional dependence on morality via the rule of law). Fuller's theory thus pertains to essential ontological dependence/independence.

Substantive functions and formal functions are separate capacities that may not always accompany one another. Systems or elements may fail to achieve their substantive function while achieving their formal function. An example of a failure in substantive function accompanied by a success in formal function might be found in some legal regulatory regimes, like government price controls that seek to make a certain good more affordable. Such strategies could fail to achieve their aims (not keeping the

Such a possibility might allow the Midas Theory to define a conception of the rule of law (which I have used to critique the Midas Theory). These complications, developed from the debates raised by Waldron and posed to me by Priel, depend on questions related to when, or even if, law's adoption of a conception can affect the underlying extensions of terms. See *supra* note 22, defining extension, intension, concept, and conception. I am largely favorable to the claims that the Midas Theory makes about law's freedoms to develop its own intensions in the legal realm. Moreover, law may be able to affect extensions by adopting its own intensions in the legal realm. Such possibilities require argumentation that falls beyond the scope of this Article. However, I am doubtful that law can affect extensions that are the ontological conditions of law's own essence; such powers would be something of a bootstrapping Midas touch.

price of goods below a certain ceiling) or could result in unintentional adverse effects (e.g., shortages or even price increases by distorting the signals and incentives given to producers and consumers).⁷⁷ In these cases, such “laws” fail to achieve their substantive goals in that they fail to make the product more affordable. However, the “laws” do not fail to belong to the category of law or fail to attempt to achieve their substantive goal by *functioning as law*.

Dealing with the same fact scenario, examples of failure to achieve formal function would involve extensive departures from the rule of law in attempting to create “laws” that try to keep prices down. Akin to the efforts of King Rex,⁷⁸ such departures might include: creating a vague rule that prices should not be “too high” (lacking clarity), retroactively creating a rule that imposes a penalty for having produced less of a good, during a time in the past, than is needed for a new supply management or quota system (lacking prospectivity), or creating a rule that names the companies in an industry and prohibits them from setting prices for the good above a certain level (lacking generality). Economists might be able to furnish more economically savvy examples of ways in which regimes that fail at the formal function of law might attempt to achieve economic goals.⁷⁹

My present purpose is to highlight the point that there is a difference between pursuing a certain substantive goal *by way of functioning as law* and pursuing a substantive goal by other means—i.e., by the creation of something that belongs to a category other than law. There may be other forms of social organization besides law that can be used (effectively or ineffectively) to pursue desired substantive goals. The conditions of formal function set by the rule of law for the ontological essence of law

77. There are other aspects of price controls (complicating factors) that are not relevant to this Article, but the general dynamics that I have outlined are well known in economics and serve well to illustrate a possible failure of substantive function while formal function is achieved. For explanations and illustrations of this economic phenomenon, see generally David Schmidtz, *Are Price Controls Fair?*, 23 SUP. CT. ECON. REV. 221 (2015); Anindya Sen, Anthony Clemente & Linda Jonker, *Retail Gasoline Price Ceilings and Regulatory Capture: Evidence from Canada*, 13 AM. L. & ECON. REV. 532 (2011); Christopher R. Knittel & Victor Stango, *Price Ceilings as Focal Points for Tacit Collusion: Evidence from Credit Cards*, 93 AM. ECON. REV. 1703 (2003).

78. It will also be interesting to examine the functional role that human actors play in the formal function and substantive function of a system. This calls for a deeper philosophical analysis of the roles of lawyers, judges, juries, etc.

79. Substantive knowledge about the phenomena that law attempts to regulate may indicate that failures of formal function could also imply a failure of substantive function. In the current example, an economist may be able to inform a lawmaker that the types of failures of formal function just described would imply a failure to achieve the substantive economic goals. Crucially, for the purpose of the current discussion about the ontological relationship between domains of knowledge, considering such relationships requires additional information beyond the mere fact that the form of law has not been achieved.

determine whether an effort at social organization belongs to the ontological category of law or to another ontological category.

C. Alloying the Midas Theory of Law

Much like a metallurgist can take a metal that is insufficiently strong for its purpose and make it stronger by alloying it with another metal, so too I will strengthen the Midas Theory by adjusting it to my Fullerian critique. Rather than refuting or dissolving the Midas Theory, Fullerian legal theory—due to its carefully identified elements—can blend with a wide range of natural law and positivist legal theories, including the Midas Theory. This section explores the way in which the Fullerian arguments introduced thus far in Part II can be combined with the Midas Theory to achieve a better explanation of the relationships between domains of knowledge. The internal morality of law is a necessary condition for the performance of law’s formal function, for law’s interaction with other domains of knowledge, and even for *law’s* pursuit of its substantive function⁸⁰ in accordance with the Midas Theory.

I. Melting the Metals

Having the distinction between types of function (substantive vs. formal), and their respective types of dependence, sheds light on arguments that Poscher uses to support the Midas Theory and on the Fullerian critiques brought forward in this Article. This distinction between types of functions and types of dependence/independence can be even more deeply understood through the re-examination of one of the analogies that Poscher uses to support his position. Recall that, in arguing for the independence of domains of knowledge, Poscher analogizes the relationship between law and morality to the relationship between architecture and religion in the construction of a mosque.⁸¹ Poscher’s use of this analogy illustrates *some* aspects of substantive functional relationships between domains of knowledge but elides crucial nuances about the ways in which some domains of knowledge can relate to one another. His account misses out on formal functional relationships and the essential ontological dependence that can exist therein.

80. That is, the pursuit, *by the ontological category of law*, of its substantive function.

81. Fuller himself also analogized law and architecture. He gave this analogy in pieces that were part of his unfinished work on law and social theory. *See generally* FULLER, *supra* note 43, at 61–78 (law under the broader topic of “social architecture”), 285–291 (lawyers as “architects of social structure”).

In his architecture example, Poscher rightly argues that even if a building cannot serve what I have described as substantive functions (in this case, the religious purposes for which it was built), the building can achieve what I have described as formal functions (in this case, the formal functions of the domain of architecture). If the design of the building merely does not meet religious requirements for the building's usage, that building may be socially/religiously/substantively dysfunctional, and the intended users of the building may refuse to perform their religious services in it. However, such a building can still stand and otherwise achieve the formal aims that architecture has for structures. The building will still be fit for occupation and usage outside of the religious context because the building can still perform the formal architectural function of a building. To work with one historically influential theory of architecture, the building can still fulfill aspects of the Vitruvian Triad: being durable (the key formal functional standard), being useful (generally fit as an architectural product for various substantive functional uses that people have for buildings), and having architectural beauty.⁸² Moreover, the architect who designs this building still engages in an activity that belongs to the domain of architecture and fulfills formal functional aims of the domain of architecture.⁸³

Though there is substantive functional dependence between architecture and religion when religious buildings are designed, neither religion nor architecture depend on the other domain to perform their respective formal function(s); the domains do not have formal functional dependence on one another. In Poscher's example of a religious building that does not meet religious requirements—such as not being properly oriented towards Mecca—the building fails to perform a religious

82. See generally Saul Fisher, *Philosophy and the Tradition of Architectural Theory*, *Supplement to Philosophy of Architecture*, STAN. ENCYCLOPEDIA PHIL. (Dec. 2, 2016), <https://plato.stanford.edu/entries/architecture/tradition.html> [<https://perma.cc/294P-SRAU>]; HANNO-WALTER KRUFF, A HISTORY OF ARCHITECTURAL THEORY: FROM VITRUVIUS TO THE PRESENT 24–25 (Ronald Taylor, Elsie Callander, & Antony Wood trans., Princeton Architectural Press 1994) (1985); Mark Wilson Jones, *Greek and Roman Architectural Theory*, in THE OXFORD HANDBOOK OF GREEK & ROMAN ART & ARCHITECTURE 41, 45–46 (Clemente Marconi ed., 2015).

83. In the reverse direction, religious practitioners who build no structures, who do not mix religion and architecture through designs and elements such as the cruciform church or the mihrab (a niche in mosques indicating the direction of Mecca), can still do things such as address questions about the divine, the big questions of life, and the meaning of life, as well as pursue other aims of particular religions, or aims that are shared across religions. A religious practitioner who does not concern himself/herself with structures has still engaged in activities that belong to the domain of religion and that fulfill formal functional aims of the domain of religion. Practitioners of both the domains of architecture and religion can do things in a way that falls within their domain without satisfying the other domain. This illustrates, from a different direction, Poscher's point about the separation of fields of knowledge and the freedom of fields to develop in relation to their own exigencies.

substantive function (the building is not fit for a religious purpose). However, the building can function as an architectural product since the failure of substantive function does not mean that the building fails to perform its architectural formal function. The substantive function of architecture applied to religious buildings relies upon the creation of an architectural design that is in coherence with religious norms, but the formal function of architecture does not depend on the design's abidance of religious norms. Architecture's formal function is defined by standards that classify products and practices within the domain of architecture—i.e., the essential ontological standards of architecture. The substantive religious function of a building is not such a standard for architecture.

With respect to the parts of morality on which law has substantive functional dependence but not formal functional dependence, Poscher's analogy is illuminating. Just as a building that is unfit for a religious purpose (or any other substantive purpose) can still stand, so too a law that achieves poor substantive results (whether immoral or otherwise substantively wrong/ineffective) is still a law and regulates conduct in the way that the category of law does. In these cases, the building and the architect's work belong to the category of architecture, as do the positive law and the lawmaker's work. However, as I argued above, law has formal functional dependence upon the rule of law, which embeds a narrow slice of morality into the formal functional conditions of law.

Formal functional dependence upon an otherwise external domain requires one field to abide by at least some knowledge from another field—knowledge that is contained in the conceptions of that other field. Poscher's consideration of religion and architecture misses this type of dependence. The relationship between architecture and religion is analogous to law's substantive functional dependence on, and formal functional independence from, non-ROL morality. However, the relationship between architecture and religion is not analogous to law's formal functional dependence (and thus essential ontological dependence) on the rule of law. A different analogy is needed for this relationship and can be given by continuing with Poscher's discussion of the architectural design of a religious building while also considering another discipline with which architecture has a relationship.

2. *Casting the Metals*

In addition to religion, engineering—in particular structural engineering—is a crucial domain with which architecture interacts.⁸⁴ Considering architecture’s relationship with engineering is helpful in illustrating the formal functional dependence that law has on morality through the rule of law and the way in which the Midas Theory operates under the aegis of the rule of law. Architecture’s formal function is dependent on engineering, meaning that engineering provides the necessary conditions for the accomplishment of the formal functions of architecture. Engineering provides standards (functional and related to ontological essence) that architects cannot completely ignore while still engaging in architecture. This is especially so for the aspects of engineering that are focused on the structural integrity of buildings. To adapt Fuller’s famous phrasing, structural engineering is an “internal engineering of architecture,” which persists in all contexts in which architecture is involved.⁸⁵

Structural engineering applies scientifically informed knowledge to the construction of structures and buildings, thereby identifying which building designs can be constructed (with current technology or even at all, given the laws of physics). Engineering identifies the requirements for constructing a durable building, which is, at the very least, a building that is not structurally undermined by its own flawed design. To satisfy architecture’s formal functional dependence on engineering, the architectural design of a building must abide by engineering conceptions

84. My thanks to Amy Salyzyn for highlighting the extent to which designing and constructing a building involves the collaboration of a team of professionals from multiple disciplines working alongside one another. The way in which professionals interact in applying and pursuing the exigencies of their disciplines is a topic well worth studying both in fields that focus on philosophies of professionalism and in legal philosophy itself. Such discussions can greatly expand the insights and application of the Midas theory. Fuller himself considered the importance of philosophically studying the actual practitioners of law. See FULLER, *supra* note 43, at 285–291. David Luban has written rich works drawing on the spirit of Fuller’s early insights about having a philosophy of the professionals who work in the field of law. See DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007); David Luban, *Rediscovering Fuller’s Legal Ethics*, 11 *GEO. J. LEGAL ETHICS* 801 (1998).

85. This analogy runs in parallel in many ways to the analogy that Fuller makes between the rule of law and “the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it,” FULLER, *supra* note 8, at 96. Fuller describes these types of laws as “lower laws” that “do not exhaust the whole of man’s moral life.” *Id.* The aspects of morality that might be described as the “higher laws” are not as foundational to the ontology of law, though they deal with broader aspects of the moral life of an individual. This higher aspect of morality is what Fuller describes as “the external morality of law,” and which I would classify as relating to the substantive function of law. I would like to thank Kristen Rundle for drawing my attention to the carpentry analogy used by Fuller.

of concepts such as strength and stress (e.g., tensile strength and tensile stress), which are informed by scientific knowledge and conceptions.

A “building” that is not designed and constructed in abidance with engineering requirements (especially a “building” that completely departs from engineering requirements) is not suited to be occupied because it lacks durability, or may have never been a standing structure at all. This failure to meet the requirements of another domain of knowledge undermines the “building’s” ability to perform its own formal function as an architectural product (i.e., to work as the thing that it is, and in the way that architectural products must function in order to belong to the field of architecture).⁸⁶ Many, if not all, substantive functions fulfilled by architecture cannot be served by this “building,” depending on the extent of its departure from engineering requirements. A building must be capable of standing before it can be used as a mosque, school, museum, or for any other substantive purpose. There is knowledge—contained in conceptions in engineering—that provides internal formal standards of architecture that determine membership in the ontological category of architecture.

Fuller’s account of the relationship between law and the rule of law is analogous to the relationship between architecture and the basic structural engineering requirements for buildings. The rule of law (a slice of morality that centers on respect for individual autonomy) is a precondition for law, as standards in engineering are preconditions for architecture. Thus, conditions that belong ontologically to another field of knowledge—morality—are required to achieve the formal functions of law and to have the essence of law. Purported “legal systems” or “laws” must abide by the rule of law to perform their own formal function (i.e., to work as the ontological type of thing that they purport to be).

“Legal systems” and “laws” that fail to abide by the moral norms of the rule of law (upon which law has formal functional dependence) are

86. Of course, this will be true to a greater or lesser degree depending on the extent of the departure from engineering standards. Design flaws in a building, for example, may not be noticed right away and may not impede the immediate use of the building, even if these hidden dangers later make the building unfit for use. Indeed, some people (or even many people) may be able to use the building until the danger is actualized. Even so, the danger caused by the unsafe conditions will be present. It is this danger that can be taken to make the building unfit to inhabit and unable to play its role in the formal function of architecture. A building that completely fails to meet engineering standards will fail even at standing, and thus at the formal function of architecture. Similarly, departures from the rule of law and the ontological implications of these departures, are understood as matters of degree by Fuller. A “legal system” or “law” that completely departs from the rule of law will completely fail to belong to the category of law. A “legal system” or “law” that departs to some lesser degree from the rule of law will lose some of its formal legal excellence, perhaps even coming to only “half exist.” See *supra* notes 45–47 and accompanying text.

comparable, in terms of formal function, to the architectural design of a “building” that fails to abide by basic engineering principles about structures. Just as a “building” that is not constructed in abidance of engineering principles will not stand (will not perform architecture’s formal function), a “legal system” that deviates so profoundly from the rule of law that it fails to meet essential conditions of legal ontology is not actually a legal system. A particular “law” that deviates sufficiently from the rule of law is not actually a law at all. Such purported “legal systems” and “laws” that do not abide by the internal morality of law are functionally unable to subject human conduct to the governance of rules (are unable to perform the formal function of law).

If lawmakers fail to follow non-ROL morality but do abide by the rule of law, the “laws” or “legal system” that they make may be morally, socially, religiously, and substantively dysfunctional and people may balk at following such “laws.” However, the “laws” will still be able to perform the formal function of subjecting human conduct to guidance by rules. The substantive function of law in any domain that law regulates benefits from, and sometimes depends on, lawmakers creating positive law that is in coherence with knowledge from other disciplines, including non-ROL morality, but the formal function of law does not depend on the lawmaker’s abidance of knowledge and conceptions from non-ROL morality or other domains. The lawmaker who departs from non-ROL morality but abides by the rule of law still produces something that properly belongs to the ontological domain of law, even if the particular “laws,” subject areas of law, or “legal systems” cannot serve their intended substantive function.

Applying this Article’s Fullerian analysis to Poscher’s example of religious architecture extends our understanding of the interactions between conceptions in different fields of knowledge beyond Poscher’s discussion of what I have called substantive function. Drawing together points from sections II.B and II.C, it can be seen that the relationship between engineering, architecture, and religion is analogous to the relationship between the rule of law, law, and other domains (or parts of domains) with which law interacts (including non-ROL morality). If an endeavor within a domain that has substantive functional dependence upon another domain fails to meet the substantive functional requirements that are determined by that other domain (whether in non-ROL morality, sacred architecture, or elsewhere) the endeavor can fail in the achievement of its substantive aims. This substantive failure can take place even as the endeavor meets the formal functional requirements of its own domain,

thereby continuing to retain membership in its own ontological category.⁸⁷ In contrast, formal function sets a specific kind of ontological standard that determines the essence (the kind) of an endeavor. A thing cannot fail in the formal function of a category and still belong to that category.

The question of whether a conception even belongs to the category of law, a categorization for which the rule of law is a necessary condition, is ontologically prior to law's substantive functional independence from morality, or from any other field of knowledge. If this is the case, then the Midas Theory cannot stand alone. Indeed, no theory of law that depends on law's ability to perform its formal function can overcome the ontological priority of the rule of law. The Midas Theory must be alloyed to recognize law's internal morality.

D. Quenching, and Assaying the Composition of, the Alloy

The implications that alloying the Midas Theory has for law's interaction with other domains of knowledge, and for the pursuit of its own substantive function (especially via the development of legal conceptions of shared concepts), are both broad and narrow in different respects. The narrowness and breadth can be taken as different strengths of the alloyed theory. The implications are broad because "legal systems" and "laws" must always abide by the internal morality of law, including in performing the Midas function of law. No Midas function can be performed by "legal systems" and "laws" without membership in the ontological category of law (for which the internal morality of law provides necessary conditions). However, the implications are narrow in that Fuller's functionalist legal theory allows law wide latitude in determining and pursuing law's substantive functions once the necessary formal functional conditions for membership in the ontological category of law have been met.

Addressing breadth, the internal morality of law is ontologically prior to law's Midas function. The internal morality of law comes into play when law interacts with non-ROL morality and when law interacts with

87. A failure to achieve the formal function(s) of a domain may also have implications for the achievement of the substantive functions of that same domain. Failing to abide by the requirements of one field of knowledge, such as engineering, may undermine the ability of an architect to achieve the formal and substantive functions of his/her own domain of knowledge—architecture—and the substantive function of another field of knowledge—religion—with which architecture is interacting. Consider the case of a building that is so structurally unsafe that it cannot perform its formal function; unsafe buildings should not, or cannot, be occupied at all. This failure to perform the formal function of architecture also implies a failure to perform the substantive functions of providing architectural products and services in a way that meets the substantive goal of designing a religious building or for accomplishing any structure-related substantive function of architecture.

any other field. This includes fields that have well-recognized, and much debated, relationships with law (e.g., religion and politics) as well as fields that have less studied relationships with law (e.g., biology, mathematics, meteorology, etc.). This breadth exists not because the internal morality of law is particularly concerned with the substance of any field, but because the internal morality of law is concerned with all of law's movements, and therefore also has a formal concern about the way that law interacts with fields other than non-ROL morality. The rule of law requires that "legal systems" and "laws" interact with other domains of knowledge, and pursue law's substantive functions, in ways that abide by the ontological requirements of the category of law. The Midas Theory is thus always bound by law's internal morality.

Respecting narrowness, only portions of morality that are relevant to law's ability to guide conduct are part of the rule of law. Law's internal morality identifies a limited set of moral conditions that are prior to law's Midas function, determining what is proper to the ontological category of law. These *limited* conditions shape law's interactions with other domains of knowledge (or parts of other domains of knowledge, including non-ROL morality), and law's pursuit of its own substantive function. The rule of law is consistent with, and perhaps even aspirational towards, the pursuit of a broad range of substantive goals from various fields with which law interacts, including non-ROL moral goals such as the advancement of freedom, equality, and other substantive moral values/norms.⁸⁸ However, the rule of law does not itself contain those broad ranges of goals or have a necessary connection with the vast majority of these goals in most contexts.⁸⁹ "Legal systems" and "laws" do not necessarily have to pursue these broader aims in order to satisfy the formal functional conditions that the rule of law sets for belonging to the category of law. The rule of law is thus far from being a functional straitjacket or set of handcuffs for law's Midas touch.

Consider the following illustration of the statements just made. The internal morality of law is relevant to law's interaction with meteorology and law's Midas function as law develops a legal conception of the shared concept of fog. The central concern that the internal morality of law raises about the way in which law interacts with meteorology when it comes to the concept of fog is limited to ensuring that law does not deviate from the

88. See generally FULLER, *supra* note 8, for Fuller's exploration of the substantive aims of law, many of which are moral.

89. Recall the observation give above that, in some instances, Fuller has overconfidently discussed the extent to which legal systems that abide by the rule of law will be consistent with non-ROL morality. See note 70 and accompanying text.

moral conditions that allow law to perform its formal function as it regulates human behavior in relation to fog. Accordingly, a “law” about driving in fog that fails to meet some minimal standard of clarity, or that requires drivers to perform an impossible task, will raise rule of law issues and perhaps fall outside of the ontological category of law.

Conversely, a “law” about driving in fog that meets Fuller’s eight desiderata but imposes a minimal standard of care for driving in fog, allowing drivers to easily avoid tort liability—or even a law about driving in fog that meets Fuller’s desiderata but that is based on a faulty understanding of meteorology—does not violate the internal morality of law. These “laws” would likely fail, or perform poorly, at pursuing law’s substantive function of coordinating safe driving. By failing to coordinate safe driving, such “laws” may pose problems for non-ROL moral substantive functions or substantive functions outside of morality (e.g., in healthcare and the economics of roadways). Even so, these substantively flawed “laws” can be consistent with law’s formal function, and belong to the ontological category of law, if they abide by the rule of law.⁹⁰ The rule of law is not engaged by the question of whether the “law” helps drivers safely navigate through fog. Rather, the rule of law is concerned with the question of whether drivers⁹¹ can *navigate the “laws”* about driving through fog.

As noted earlier in this section, this narrowly tailored dynamic applies to law’s relationship with non-ROL morality as well, and to law’s pursuit of its substantive function in its interaction with non-ROL morality. The rule of law requires that law abide by Fuller’s desiderata when interacting with non-ROL morality, but not that law ensure: that society is more just and more equal (as determined by moral conceptions); that any other moral conceptions are advanced that do not have the rule of law’s specific formal functional implications for law; or that the substance of law is based on prevailing viewpoints about non-ROL morality. Law is left free in its formal functional requirements to create conceptions that deviate from the conceptions of non-ROL morality. Even as the rule of law has functional and ontological priority over law’s Midas capacities, it leaves substantial leeway for the Midas Theory to operate because the aspect of the rule of law that gives it ontological priority over the Midas Theory (i.e., the essential ontological dependence of law on the rule of law) does not address law’s substantive aims. The rule of law is a foundational but narrow formal functional condition for the essence of law. Law’s internal

90. Recall also the illustration that I explored earlier, but in less detail, about the possibility of failing to achieve substantive function using price controls, *supra* note 77 and accompanying text.

91. And anyone else who interacts with laws that govern driving through fog.

morality thus leaves a wide terrain for the Midas Theory to operate with respect to law's substantive function.

The Fullerian analysis offered here in response to the Midas Theory—a response largely given from a favorable reading of Poscher's articulation of the theory—allows law to engage with other domains of knowledge (even with non-ROL morality) mostly in line with the way that Poscher describes. The internal morality of law would do little, if anything, to prevent the Midas Theory from dissolving the debate between inclusive legal positivism and exclusive legal positivism because law's internal morality is concerned with law's formal function and thus not with law's Midas effect when law interacts with non-ROL morality (non-ROL morality pertaining to law's substantive function). Fullerian legal theory allows for law to deviate in its substantive function from non-ROL moral conceptions, and from conceptions in any other domain of knowledge. However, a Midas Theory of Law that is alloyed with Fullerian procedural naturalism would spotlight the rule of law requirements (which are both formal and moral) that govern the ontology of law, the way in which law functions, and law's engagement with morality, or any other field of knowledge.

CONCLUSION

The Midas Theory provides a sophisticated and parsimonious account of law's relationship with other domains of knowledge. Without relying on arguments from political and moral philosophy, Poscher's account of the Midas Theory shows the ability of law to take stock of conceptions from other domains without law depending ontologically (even contingently) on another domain of knowledge. The extent to which Poscher deals with questions about the relationship between law and morality through a merely descriptive approach is exceptional even among positivists.

Despite these strengths, the Midas Theory misses a key aspect of the relationship between law and morality: the necessary functional connection between these two domains via the rule of law (i.e., via law's formal function of guiding conduct using rules). This connection precludes the ontological independence of law from morality that Midas theorists like Poscher propose. The Fullerian theory of law is prior to, and thus shapes, the way in which law can aurify conceptions from other domains of knowledge. The Midas Theory and Fullerian functionalism are not natural allies but the theories can make room for one another. They can thereby achieve a richer theoretical description of law, due to their conceptual frugality and explanations of law's function.