The Quotidian Rule of Law

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I. Introduction

The rule of law is often linked, at least in the minds of its most fervent advocates, with a desire or nostalgia for "normal" life. Norman Manea, writing of life in Nicolae Ceauşescu's Romania, lamented "the destruction of the last enclaves of quotidian normality";[1] the "deterioration and degradation of everyday life".[2] "In a totalitarian state," he observed, "every detail of everyday life, every word and gesture acquires a distorted and hidden meaning that reveals itself only to the indigenous dwellers. Only those who live in more or less normal societies can find this code lunar and fascinating."[3] Likewise, Václav Havel aimed much of his critique at the many ways, small and large, in which the Czech government distorted and warped daily life.[4] More generally, there is a tendency to associate adherence to the rule of law with acting like a "normal country".[5]

As Krastev and Holmes have observed, there is a real ambiguity in such invocations of "normality" — in particular, whether the term is intended to be descriptive, purely normative, or a little of both (and, if the latter, in what proportions).[6] But there is no denying that the rule of law is closely associated with routine; with procedural *regularity*, with constitutional *conventions* and *norms*.[7]

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1 Norman Manea, *On Clowns: The Dictator and the Artist* (New York: Grove Weidenfeld, 1992), at 49.

2 Norman Manea, *On Clowns: The Dictator and the Artist* (New York: Grove Weidenfeld, 1992), at 46.

3 Norman Manea, *On Clowns: The Dictator and the Artist* (New York: Grove Weidenfeld, 1992), at 46.

4 See, *e.g.*, Václav Havel, "The Power of the Powerless" in Paul Wilson, ed., *Open Letters: Selected Writings 1965-1990* (New York: Knopf, 1991).

5 See, *e.g.*, Boris Yeltsin, *The Struggle for Russia* (New York: Crown, 1994); Mary Dejevsky, "The Prophets of Doom Were Wrong About Russia", *The Independent*, December 26, 2001; Andrei Shleifer & Daniel Treisman, "A Normal Country: Russia After Communism" (2005) 19 J. Econ. Perspectives 151. For discussion of the ambiguity in this language, see Ivan Krastev & Stephen Holmes, *The Light that Failed: A Reckoning* (Northwood, U.K.: Allen Lane, 2019), at 47-51.

6 Ivan Krastev & Stephen Holmes, *The Light that Failed: A Reckoning* (Northwood, U.K.: Allen Lane, 2019), at 47-51.

7 See, *e.g.*, Daphna Renan, "Presidential Norms and Article II" (2018) 131 Harv. L. Rev.

Typically, the focus is on regularity or norm-following in the context of executive or administrative decision-making. Writers like Manea, Havel and Solzhenitsyn were, it seems, dwelling on something else — the strangeness of everyday life, in countries that lacked a commitment to the rule of law, *as it was lived by ordinary citizens*. It was thought that, by insisting upon adherence to rule-of-law values, to legality, dissidents could carve out a space within which "normal" life and human relations could be restored. The procedures thus mattered a great deal, but it was the lived experience of people on the ground — the sense of upheaval, of being unable to know precisely where one stood when engaging in what ought to be ordinary tasks — that showed why they mattered, and made them seem worth having.

Some of this is captured by the often-repeated point that the rule of law makes it possible for citizens to make plans.[8] And I certainly don't want to underestimate the impact of discretionary decision-making by state actors — for example, by the police — on daily life in neighbourhoods and communities.[9] In this paper, though, I want to focus on a somewhat different dimension of the rule of law and its relationship to everyday life; *i.e.*, the ways in which *legislation* can offend or be in tension with rule-of-law values, not by virtue of its authorization of vast discretionary powers or its incompatibility with individual rights (however understood), but simply by virtue of its potential disruptiveness to established social norms, customs, practices, *etc.* Though the law undoubtedly can and sometimes should be used to change social norms and practices, and not merely to reinforce them, it does not follow that lawmakers should treat the existence of norms, customs, institutions, *etc.* as irrelevant or unimportant. On the contrary, as the work of Lon Fuller shows, the latter may have a profound effect on what legislators, practically speaking, can do, and how they can use the law effectively. Fuller, as we will see, took the view that unwritten customs can function as law just as surely as legislation, and that the interplay between the two must be taken into account when assessing the capacity of legislation to guide members of the public. Several of his principles of effective law-making, set out in *The Morality of Law*, underscore this point.

My focus in this paper will be on criminal and (to a lesser extent) public welfare offences in Canada. In section II, I will suggest that Fuller's insights about the relationship between the unwritten norms, customs and practices of day-to-day life and the guidance function of legislation are reflected in what I have called the "presumption of restraint" — though, as I will indicate towards the end, they

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2187; Benjamin Wittes & Susan Hennessey, *Unmaking the Presidency* (New York: Farrar, Straus & Giroux, 2020).

[8] F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 2007 [1944]), at 75-76; F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), at 222; Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969). For a discussion of this rationale, see Vincent Chiao, "Hyperlexis and the Rule of Law" (2021) 27 Legal Theory 126, esp. at 127-30.

[9] See Kenneth Davis, *Police Discretion* (St. Paul, Minnesota: West Publishing, 1975).

arguably find expression in other doctrines as well. In section III, I make some tentative observations about the significance of public welfare offences for everyday life, taking the pandemic regulations as my springboard.

II. LON FULLER, LEGALITY AND THE PRESUMPTION OF RESTRAINT

In a series of cases, Canadian appellate courts have interpreted criminal offences in light of what I have described as the "presumption of restraint" — the presumption that Parliament did not intend to criminalize practices that are widely regarded as laudable or benign.[10] Thus, courts have hesitated to construe criminal offences in such a way that they encompass, for example, window-shopping,[11] or buying a friend a cup of coffee,[12] or the giving of handshakes under "false pretences".[13] In principle, the relevant statutory language was, in each instance, capacious enough to capture such conduct. Moreover, there was no suggestion that the respective court was using the so-called doctrine of "strict construction" — which has been moribund for the past 40 years.[14] Rather, the claim was that it would be "absurd" to give such expansive interpretations of the offences in issue in the absence of clear statutory language to the contrary. The very fact that, on the more expansive reading, the respective offences would encompass "this" sort of ordinary, banal — in some instances even praiseworthy — behaviour was treated as a reason to reject it.

We can make sense of this presumption, I have argued, by looking to Lon Fuller's work on the rule of law.[15] Fuller, of course, claimed that any putative law-maker must, necessarily, adhere to eight principles of legal "craftsmanship".[16] Fundamen-

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[10] Michael Plaxton, "The Presumption of Restraint and Implicit Law" (2020) 65 McGill L.J. 467; Michael Plaxton, *Sovereignty, Restraint, & Guidance: Canadian Criminal Law in the 21st Century* (Toronto: Irwin Law, 2019), at ch. 4.

[11] *R. v. Munroe*, [1983] O.J. No. 3034, 41 O.R. (2d) 754, at 761 (Ont. C.A.).

[12] *R. v. Hinchey*, [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at 1178-79 (S.C.C.).

[13] *R. v. Cuerrier*, [1988] S.C.J. No. 64, [1998] 2 S.C.R. 371 (S.C.C.).

[14] Michael Plaxton, "The Presumption of Restraint and Implicit Law" (2020) 65 McGill L.J. 467, at 477-81. Unlike the canon of strict construction, the presumption of restraint appears to operate at the "front end" of the interpretive process, rather than as a back-end tie-breaker for resolving otherwise intractable ambiguities.

[15] I pursue this point at much greater length in Michael Plaxton, "The Presumption of Restraint and Implicit Law" (2020) 65 McGill L.J. 467.

[16] Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969). First, there may be a failure to make rules at all. Second, there may be a failure to publicize conduct rules. Third, rules may be retroactive. Fourth, rules may be incomprehensible. Fifth, rules may conflict with one another. Sixth, rules may require people to do the impossible. Seventh, rules may be changed so frequently and suddenly that subjects cannot orient their actions by them. Finally, there may be a lack of congruence between the rules and their administration.

tally, this claim was grounded in the proposition that, first and foremost, the point of law is to *guide*; that legal rules are principally directed at citizens who are expected to apply them by and to themselves. Fuller's principles of law-making — *e.g.*, non-retroactivity, comprehensibility, publicity — reflect the conditions under which a legal rule is capable of providing that sort of guidance.

In *The Morality of Law*, Fuller noted that the guidance function of law could be impaired where enacted law changes with such dizzying frequency that citizens are unable to orient their actions by them.[17] Though the putatively legal directive would be, taken on its own, perfectly capable of guiding people, the very fact that it was one of many directives — each one replacing the last in quick succession — undermined its capacity to do so. Quite simply, citizens may be so disoriented and confused by the sheer amount of legal activity on a day-to-day basis, that they cannot be sure what the applicable legal rule *is*. Even if an individual knows what the rule is, she cannot reliably structure her interactions with others according to it because she cannot assume that *they* know what it is. Indeed, they may well expect her to proceed on the basis of a very different preceding rule — or, conceivably, on the basis of a rule that the putative law-maker is expected to make but hasn't yet. We arguably see something like this phenomenon at work, as well, in a putatively legal order in which there are many law-makers, each with its own subject-matter jurisdiction, all issuing rules that are capable of providing coherent guidance within their respective spheres but which, taken together, indicate no single, over-arching moral vision or purpose.[18] Under such conditions, too, the normative universe may come to seem kaleidoscopic to the ordinary citizen, who cannot anticipate how others will behave, not in spite of the law-makers' directives but because of them.

In drawing attention to this (in my view, under-appreciated) principle of law-making, my point is that, when trying to promulgate one norm, a would-be law-maker cannot (as a prudential matter) be indifferent to the norms she seeks to displace and to the broader normative ecosystem in which the guidance is intended to be applied. This has implications for law-making beyond circumstances in which the problem is too much *legislation*. Human beings, after all, are guided by far more than legislation. Their interactions with each other are structured according to a gamut of unwritten customs, norms, and practices — the *lex non scripta* of a community.[19] Such "implicit rules" may emerge over time among the actors themselves in a given social context, in the absence of any sort of authoritative

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[17] Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969), at 79-81.

[18] I have in mind, here, something like Bartolus' description of "monstrous government". See Bartolo de Sasseferato, *On the Government of a City*, discussed in Adrian Vermeule, "Monstrous Government" (January 28, 2021), online (blog): *Ius & Iustitium* <https://iusetiustitium.com/monstrous-government/>.

[19] See Lon Fuller, "Human Interaction and the Law" (1969) 14 Am. J. Juris. 1, at 1-5; Lon Fuller, *The Anatomy of Law* (Westport, Connecticut: Greenwood Press, 1968), at 57.

law-giver, acquiring normative force simply by virtue of the fact that their sheer existence contributes to a "stable set of interactional expectancies" or "intermeshing anticipations".[20] As Gerald Postema has said: "[I]mplicit rules emerge as focal points around which persons who must coordinate[21] their actions form reliable expectations of others knowing that their counterparts are doing the same thing."[22]

Here, two points are worth keeping in mind. First, Fuller — like most other jurists throughout human history — regarded unwritten law as just that: *law*.[23] The mere fact that it is unwritten has traditionally not been thought to make it less significant or less deserving of respect *as law* than legislation.[24] On the contrary, legislation has historically been approached with suspicion precisely because it may be enacted capriciously, without due regard to the *lex non scripta* of the realm.[25] Such ideas have become unfamiliar to us now.[26] But if we take seriously the role of unwritten customs and norms in guiding us every day, then we can appreciate that Fuller's observations about the effect of "too much law" apply just as surely when we look

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[20] Lon Fuller, "Human Interaction and the Law" (1969) 14 Am. J. Juris. 1, at 7. See also Gerald J. Postema, "Coordination and Convention at the Foundations of Law" (1982) 11 J. Legal Studies 165; Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986), at 117.

[21] Postema rightly points out that Fuller's emphasis is on "interaction" and not "coordination" in the narrow, game-theory sense: Gerald J. Postema, "Implicit Law" (1994) 13 L. & Phil. 361, at 365, n. 12.

[22] Gerald J. Postema, "Implicit Law" (1994) 13 L. & Phil. 361, at 364.

[23] See Lon Fuller, "Human Interaction and the Law" (1969) 14 Am. J. Juris. 1, at 1-5; Lon Fuller, *The Anatomy of Law* (Westport, Connecticut: Greenwood Press, 1968), at 57.

[24] H.L.A. Hart's attitude to the status of "primary rules" is notoriously vexed. On one hand, he recognized that a "primitive" legal order might contain nothing other than primary rules, though it would have an inflexible and brittle quality, and would likely be unsustainable in the absence of secondary rules of recognition, adjudication and change. Moreover, the ultimate rule of recognition — the content of which was a matter of social fact — arguably just is a kind of "super-custom" that determines the criteria of validity for the system as a whole. On the other hand, Hart's emphasis on legal *systems*, and acceptance among legal officials rather than the public at large, tends to give customary law a marginal place in his analysis. See Leslie Green's Introduction to H.L.A. Hart, *The Concept of Law*, 3d ed. (Oxford: Oxford University Press, 2012), at xvii-xviii, xxviii-xxix; Brian Tamanaha, "Insights About the Nature of Law from History" (2015) Archiv fur Rechts- und Sozialphilosophie, pemalink: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441256>.

[25] Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986); J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (New York: Norton, 1957); Donald Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge: Harvard University Press, 1990), at 180-83; David Lieberman, *The Province of Legislation Determined* (Cambridge: Cambridge University Press, 1989).

[26] See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), at 55-68.

beyond legislation.

Second, the range of norms that engage interactional expectancies — and, therefore, count as "implicit law" — is more expansive than we might imagine.[27] Fuller took the view that law can structure interactional expectancies, not just by telling people what they can do and expect others to do in discrete situations ("walk on the right-hand side of the sidewalk"; "speak at an appropriate distance when conversing with others"), but by guiding their *interpretation* of actions and relationships. Though we might have thought that offences against deities and spirits regulate purely "private" conduct, Fuller found that such norms engage interactional expectancies to the extent that they guide citizens as to the "significance" or meaning of certain conduct for the community.[28] Similarly, he recognized that public customs and rituals may reflect and reinforce a certain understanding among members of the community about their relationship to one another and, accordingly, also engage interactional expectancies.[29] Even the offence of murder (which, again, might not intuitively strike us as an "interaction") was regarded by Fuller as a legal rule implicating interactional expectancies insofar as it informs how we should respond to the wrongdoing of others, steering us away from, for example, blood feuds.[30]

In short, we can see implicit law at work in the unwritten norms and customs that help us make sense of our relationships to, among others, our families and friends, other citizens, and the community as a whole, and that guide us in determining what those relationships entail or permit on a day-to-day basis as well as in exceptional circumstances. Returning to my earlier discussion of the presumption of restraint, we can say that unwritten norms that allow people to window-shop or distribute leaflets structure how we make sense of our relationship to shared public spaces and, thus, to each other as citizens.[31] Unwritten norms allowing government employees to have coffee with their friends underscores that our identities are not exhausted by

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[27] In fairness, there is some ambiguity as to just *how* expansive. Fuller himself stated that "victimless crimes" like prostitution, consensual homosexual intercourse and narcotics trafficking do not facilitate human interaction, but instead prevent interaction: see Lon Fuller, *The Anatomy of Law* (Westport, Connecticut: Greenwood Press, 1968), at 25. But in light of remarks in subsequent work, it is difficult to take this suggestion at face value: see Michael Plaxton, "The Presumption of Restraint and Implicit Law" (2020) 65 McGill L.J. 467, at 494-95.

[28] Lon Fuller, "Human Interaction and the Law" (1969) 14 Am. J. Juris. 1, at 5. See also Charles Taylor, *A Secular Age* (Cambridge: Harvard University Press, 2007), at 42-43.

[29] Lon Fuller, "Human Interaction and the Law" (1969) 14 Am. J. Juris. 1, at 5; Charles Taylor, *A Secular Age* (Cambridge: Harvard University Press, 2007), at 42-43; E.P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York: New Press, 1993).

[30] Lon Fuller, "Human Interaction and the Law" (1969) 14 Am. J. Juris. 1, at 21-22.

[31] *R. v. Munroe*, [1983] O.J. No. 3034, 41 O.R. (2d) 754, at 761 (Ont. C.A.).

our work, even if we work for the government, and that our personal relationships have value.[32]

The notion that certain types of physical contact, even when not "authorized" or obtained under "false pretences", are permissible or at least not to be condemned — for example, handshakes and casual backslaps — signals that we are, for all our individuality and autonomy, parts of a social order in which spontaneous physical displays of bonhomie are to be expected.[33] To be sure, these norms help to resolve certain types of narrow coordination problems: they discourage shopkeepers and pedestrians from shooing away window-shoppers; they discourage recipients of unwanted handshakes from responding with disproportionate force, and embolden government employees to accept that invitation to coffee. But they do much more than that. They help us make sense of ourselves, each other, and our community.

To be clear, legislated norms can *also* serve this sort of function. As Sarat and Kearns observed, there is an important sense in which the law does not merely act *upon* social practices and ways of life, but *constitutes* them.[34] People make sense of what they experience and do — indeed, make sense of themselves and their relationships with others — by drawing upon legal rights, duties, concepts and roles. The law's recognition of marriage, the landlord-tenant relationship, the employer-employee relationship, all affect in different contexts how we think it appropriate to act and interact. The various doctrines of contract law arguably convey the message that, when we enter into bargains, we do so as "free and equal agents".[35] The criminal law draws fine lines between a wide variety of different wrongs, sending messages about their relative gravity and what counts as morally relevant distinctions.[36] More than that, its doctrines concerning voluntariness, intoxication and excusatory defences all convey the message that we (and others) are "choosing beings"[37] — and that we (and they) are appropriate objects of blame when and if we place ourselves in a position in which we will be unable to exercise control over ourselves at some future point in time.[38]

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[32] *R. v. Hinchey*, [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at 1178-79 (S.C.C.).

[33] *R. v. Cuerrier*, [1988] S.C.J. No. 64, [1998] 2 S.C.R. 371, at para. 52 (S.C.C.).

[34] Austin Sarat & Thomas R Kearns, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life" in Sarat & Kearns, eds., *Law in Everyday Life* (Michigan: University of Michigan Press, 1993), at 25.

[35] Peter Gabel & Jay M. Feinman, "Contract Law as Ideology" in David Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982), at 172-84.

[36] Michael Plaxton, *Sovereignty, Restraint, & Guidance: Canadian Criminal Law in the 21st Century* (Toronto: Irwin Law, 2019), at ch. 9.

[37] H.L.A. Hart, *Punishment and Responsibility*, 2d ed. (Oxford: Oxford University Press, 2009).

[38] Michael Plaxton & Carissima Mathen, "What's Right with Section 33.1" (2021) 25 Can. Crim. L. Rev. 255.

Moreover, it is reasonably clear that we sometimes *want* legislatures to use their authority to displace or repudiate unwritten customs and practices, perhaps for the very reason that they reflect views widely held by the public that are morally suspect. Thus, to take one obvious example, the sexual assault reforms of the 1980s and 1990s were undertaken in part to address a web of pernicious and widespread social norms that collectively constitute and buttress "rape culture".[39] The point of these legislative changes is, of course, to deter people from acts of sexual violence, but also to transform what ordinary citizens regard *as* "violence" in the first place, as well as how they conceive and prioritize gender equality in their day-to-day lives.[40]

So implicit laws are not necessarily more foundational or sacrosanct than legislated norms just by virtue of being unwritten. Once we appreciate just how important and ubiquitous they are, though, we begin to get a sense of why they can be so difficult to displace. Insofar as unwritten customs structure citizens' interactions with each other, people will anticipate that others will form expectations and judgments based on those norms, and indeed will regard themselves as under an obligation to judge others by those norms. They may be reluctant to assume that these norms — by which they expect to be judged and which they believe they are expected to use in judging others — have simply been swept aside by statutory provisions that are ambiguous in their scope.

All this would be true (albeit in limited contexts) if implicit laws did nothing more than structure interactional expectancies in highly discrete situations and circumstances. It is all the more true, arguably by orders of magnitude, inasmuch as unwritten customs and norms have a more general "coordinating" function, namely, to determine the social significance of acts, actors, relationships, practices, institutions and events that take place in the community. For citizens can hardly be expected to assume that law-makers intended to legislate contrary to (what will be regarded as) "common sense and experience", or that others in the community will proceed on that basis. A legislature that seeks to dislodge such norms — to rewrite or revise the moral grammar of the community — would thus be well advised to give a clear indication to that effect, or else take the chance that its legislation will fail to provide the intended guidance.[41] Postema remarks:

> [W]e expect that citizens' understanding of what the law requires of them will determine at least in part their decisions and actions. But that understanding

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[39] Michael Plaxton, *Implied Consent & Sexual Assault: Intimate Relationships, Autonomy, & Voice* (Montreal-Kingston: Montreal-Queen's University Press, 2015), at ch. 2.

[40] Michael Plaxton, *Implied Consent & Sexual Assault: Intimate Relationships, Autonomy, & Voice* (Montreal-Kingston: Montreal-Queen's University Press, 2015), at ch. 2.

[41] Gerald J. Postema, "Implicit Law" (1994) 13 L. & Phil. 361, at 370, 371: Noting that, for the law to influence deliberation, citizens must be "able to grasp the practical import of the norm" and "be reasonably confident that the practical import of the norms he or she finds will correspond with that found by other agents".

> depends on their expectation of how lawmaking . . . officials are likely to understand it. Similarly, officials authorized to enact . . . the laws must anticipate how citizens will take up the laws they make ..., that is, how the rules are likely to figure in the practical reasoning of citizens. Otherwise, they will not be able to direct or guide actions in such a way as to achieve the substantive aims of the law.[42]

With these observations in mind, consider another of Fuller's principles of law-making: that of *comprehensibility*.[43] The law-maker intent upon guiding citizens must (naturally) communicate in a language they can understand.[44] A directive that, to its recipients, strikes the eye and ear as pure gibberish is incapable of providing any sort of guidance. More importantly, a statutory provision seemingly written in the language of its recipients, but which uses certain ordinary, non-technical words in an altogether novel and unfamiliar way, may fail to provide the *desired* guidance. It is for this reason that the plain meaning rule, for all its practical limitations as a canon of interpretation,[45] makes a great deal of intuitive sense: it proceeds on the sensible basis that legislators intend to craft legal rules in such a way that they are capable of guiding the people at whom they are directed; they do not intend to actively misdirect their own citizens.[46]

I want to draw, here, a rough analogy between a directive that fails as an instrument of guidance because its use of words and phrases is inconsistent with public expectations concerning how they may properly be employed in day-to-day life, and one that fails because it confounds expectations concerning what a legislator — in particular, one that seeks to articulate and punish wrongful behaviour — could rationally set out to criminalize. Just as members of the public will assume that a statutory provision uses non-technical language in a non-idiosyncratic fashion, so they may proceed on the basis that Parliament's intention was not to criminalize conduct that is widely understood as banal or benign or laudable, at least in the absence of some clear signal to that effect. The reasonable working assumption, after all, is that Parliament intends to craft its guidance for the people it actually seeks to guide, and not for some other real or imagined community with

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[42] Gerald J. Postema, "Implicit Law" (1994) 13 L. & Phil. 361, at 368.

[43] Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969), at 63-65.

[44] Lon Fuller, *The Morality of Law*, 2d. ed (New Haven: Yale University Press, 1969), at 227-28. See also Pavlos Eleftheriadis, "Legality and Reciprocity: A Discussion of Lon Fuller's *The Morality of Law*" (2014) 10 Jerusalem Rev. L. Studies 1, at 10.

[45] See William Baude & Ryan D. Doerfler, "The (Not So) Plain Meaning Rule" (2017) 84 U. Chicago L. Rev. 539. See also Ruth Sullivan, "The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation", online: *Legal Drafting* <http://aix1.uottawa.ca/~resulliv/legdr/pmr.html>.

[46] *R. v. Walsh*, [2021] O.J. No. 602, 2021 ONCA 43, at paras. 141-142 (Ont. C.A.) (Miller J.A., dissenting).

different moral values and priorities.[47] This goes to the reciprocal nature of the relationship between law-maker and legal subject that, Fuller claimed, is essential to what it means to rule by law.[48]

It is telling, too, that much of Fuller's discussion of the need for "convergence" between the law "on the books" and the law as it is administered and enforced — "law in action" — dwells on problems of interpretation.[49] In the absence of such convergence, Fuller tacitly suggests, members of the public cannot predict whether and how the black-letter law in question will affect interactional expectancies, thus muddling its capacity to guide. As Colleen Murphy observes: "Only if citizens and officials by and large apply general prescriptions in a similar manner to particular cases will shared rules govern conduct."[50] And, importantly, officials themselves, as they interpret offence provisions in good faith, can properly be expected to read them in light of "their knowledge of social practices and meanings".[51] Thus, to take a well-worn example used by Fuller, it would be widely regarded as bizarre — indeed, *arbitrary* — if officials enforced the prohibition against "vehicles in the park" in such a way that it forbade the use of baby carriages.[52]

Again, none of this is to deny that the law can be used to transform social practices and customs. It merely reinforces the point that, when we interpret the criminal law, we should not presume that every criminal offence provision was intended by Parliament to effect deep and pervasive alterations to the fabric of day-to-day social life. This is, not least, because members of the public may be reluctant to take seriously legislative attempts at changing social norms in the absence of clear signals that they will also be taken seriously by actors in the

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[47] Pavlos Eleftheriadis, "Legality and Reciprocity: A Discussion of Lon Fuller's *The Morality of Law*" (2014) 10 Jerusalem Rev. L. Studies 1, at 10.

[48] Pavlos Eleftheriadis, "Legality and Reciprocity: A Discussion of Lon Fuller's *The Morality of Law*" (2014) 10 Jerusalem Rev. L. Studies 1, at 10; Colleen Murphy, "Lon Fuller and the Moral Value of the Rule of Law" (2005) 24 L. & Phil. 239; Colleen Murphy, *A Moral Theory of Political Reconciliation* (Cambridge: Cambridge University Press, 2010), at 44; Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Oxford: Hart Publishing, 2012).

[49] See Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969), at 81-91; Maris Köpcke, *Legal Validity: The Fabric of Justice* (Oxford: Hart Publishing, 2019), at 105.

[50] Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge: Cambridge University Press, 2017), at 126.

[51] Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge: Cambridge University Press, 2017), at 126.

[52] Lon Fuller, *The Anatomy of Law* (Westport, Connecticut: Greenwood Press, 1968), at 92-95. For discussion of Fuller's approach to the "no vehicles in the park" problem, see Frederick Schauer, "A Critical Guide to Vehicles in the Park" (2008) 83 N.Y.U. L. Rev. 1109.

criminal justice system.[53] Whether attempts at legal reform succeed or fail depends in large part on the perceived legitimacy of the law-making authority and process, and on whether there is a perception that the law is *consistently* enforced.[54] Even if those conditions are satisfied, however, Christina Bicchieri has argued that it is also necessary for the desired reforms to remain broadly consistent with existing social norms, for the simple reason that ordinary citizens will otherwise be skeptical that officials will enforce them *at all*.[55]

Many criminal law theorists have argued that, for reasons grounded in democratic values, the substantive criminal law should broadly track popular moral intuitions.[56] For my purposes, I want to set such arguments aside and make this modest observation: when we unpack aspects of Lon Fuller's work, we can find good reasons grounded in the very idea of legality to interpret criminal offences in a manner that is consistent with established customs and practices in the absence of clear legislative signals to the contrary. Unsurprisingly, Fuller himself suggested that the extent to which legal directives track "extralegal morality" might affect the rigour with which law-makers need to adhere to his principles of legality — hinting at a deep connection between the rule of law and everyday life.[57]

The presumption of restraint, as we have seen, arguably reflects this proposition. We can, however, look elsewhere for support. Take, for example, the omissions doctrine. Courts have hesitated to read offences in such a way that they criminalize

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[53] Christina Bicchieri, *Norms in the Wild* (Oxford: Oxford University Press, 2017), at 144-45; Tom Tyler, *Why People Obey the Law*, rev. ed. (Princeton: Princeton University Press, 2006). See also William Stuntz, "Self-Defeating Crimes" (2000) 86 Virginia L. Rev. 1871.

[54] Christina Bicchieri, *Norms in the Wild* (Oxford: Oxford University Press, 2017), at 144-45; Tom Tyler, *Why People Obey the Law*, rev. ed. (Princeton: Princeton University Press, 2006), at 144-45; Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge: Cambridge University Press, 2017), at 126; William Stuntz, "Self-Defeating Crimes" (2000) 86 Virginia L. Rev. 1871.

[55] Christina Bicchieri, *Norms in the Wild* (Oxford: Oxford University Press, 2017), at 145-46. See also Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (Abingdon, U.K.: Routledge, 1995); Paul H. Robinson, "Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive versus Normative Crime Control" (2000) 86 Va. L. Rev. 1839; Paul H. Robinson & John M. Darley, "The Utility of Desert" (1997) 91 Nw. U. L. Rev. 453.

[56] See, *e.g.*, Paul H. Robinson, "Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change" (2017) 111 Nw. U. L. Rev. 1565, at 1566; Joshua Kleinfeld, "Manifesto of Democratic Criminal Justice" (2017) 111 Nw. U. L. Rev. 1367, at 1378; R.A. Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018), at 22; Vincent Chiao, "Hyperlexis and the Rule of Law" (2021) 27 Legal Theory 126, at 137. But see Christina Sommers, "Commonsense Consent" (2020) 129 Yale L.J. 2298.

[57] Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969), at 92-93; Vincent Chiao, "Hyperlexis and the Rule of Law" (2021) 27 Legal Theory 126, at 135.

the mere failure to rescue third parties from harm.[58] The offence must clearly contemplate guilt by omission. Even if the offence in issue does so, courts will presume that Parliament did not intend to impose broad or open-ended duties to rescue on the public at large.[59] This approach has been defended, by Tony Honoré, on the basis that recognizing positive legal duties to intervene would be unacceptably disruptive to the rhythms of social life. The distinction between acts and omissions, he argued, captures the intuition that "not-doings" are, all other things being equal, less likely to offend social norms than "doings".[60] The latter, Honoré claimed, are more likely to disrupt "homeostatic routines" and therefore seem more "menacing", even though the former may also contribute to harmful or sub-optimal states of affairs.[61] Likewise, we might detect, in the principle of fair labelling,[62] an implicit view that the substantive criminal law should, to the extent possible, work with the moral terminology generally already in use in the community and avoid needless innovation.

III. EVERYDAY MORAL REASONING IN A PANDEMIC

In a paper focusing on "true crimes", I could leave matters there. We are, however, emerging (knock on wood) out of a global pandemic in which everyday life has been thrown into turmoil. Citizens in countries — all ostensibly committed to the rule of law — have been ordered, at different times in different places, to wear masks; to socially distance, including in outdoor settings; to avoid gatherings, including with family and friends; to stay at home unless absolutely necessary. I noted earlier that the Supreme Court of Canada, in *R. v. Cuerrier*, refused to interpret the assault regime in the *Criminal Code*[63] in such a way that it criminalized handshakes.[64] After almost two years of pandemic life, that refusal may strike us

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[58] See Michael Plaxton, *Sovereignty, Restraint, & Guidance: Canadian Criminal Law in the 21st Century* (Toronto: Irwin Law, 2019), at 198-210.

[59] Michael Plaxton, *Sovereignty, Restraint, & Guidance: Canadian Criminal Law in the 21st Century* (Toronto: Irwin Law, 2019), at 198-210.

[60] A.M. Honoré, "Are Omissions Less Culpable?" in Peter Cane & Jane Stapleton, eds., *Essays for Patrick Atiyah* (Oxford: Oxford University Press, 1991), at 36.

[61] A.M. Honoré, "Are Omissions Less Culpable?" in Peter Cane & Jane Stapleton, eds., *Essays for Patrick Atiyah* (Oxford: Oxford University Press, 1991), at 51.

[62] The literature on fair labelling is vast, but the key formative pieces for the idea are: Glanville Williams, *The Mental Element in Crime* (Jerusalem: Magnes Press, 1965); Rupert Cross, "The Mental Element in Crime" (1967) 83 L.Q.R. 215; Andrew Ashworth, "The Elasticity of *Mens Rea*" in Colin Tapper, ed., *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) and Glanville Williams, "Convictions and Fair Labelling" (1983) 42 Cambridge L.J. 85. All were relied upon by a majority of the Supreme Court of Canada in *R v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

[63] R.S.C. 1985, c. C-46.

[64] *R. v. Cuerrier*, [1988] S.C.J. No. 64, [1998] 2 S.C.R. 371, at para 52 (S.C.C.).

now as laughably quaint. The everyday is not what it used to be. And this profound disruption has been made possible through the use of law. Here, I offer a few tentative observations.

It is significant that the legal instruments principally used to guide members of the public during the pandemic have not been *criminal* offences in the strict sense. They have been public welfare (or regulatory) offences. To the layperson, this may seem like a distinction without a difference. But the distinction matters.[65] Unlike true crimes, public welfare offences do not, in principle, purport to define and target intrinsically wrongful conduct. On the contrary, they set out courses of action that promote the public interest, as well as effective oversight and enforcement, in the context of licensed spheres of activity. These courses of action need not be dangerous or wrongful in and of themselves. Frequently, they are not. There is, for example, nothing intrinsically wrongful about inspecting factory machinery every 60 days rather than 61; or catching a lobster that is 3 1/8 inches rather than 3 3/16;[66] or driving 101 km/h rather than 100 km/h. Regulatory offences, by drawing bright lines for the factory owner, lobster fisher and motorist, ensure that the public interest does not depend on individual exercises of judgment. Likewise, there is no magic in distancing by 2 metres rather than 2.01 metres; or (with some possible exceptions) in having in-person gatherings limited to 10 people rather than 11; or in quarantining for 14 days rather than 15. Precisely because there is an element of *arbitrariness* in the placement of these lines,[67] regulatory offences do not carry the same stigma or severity of punishment as true crimes.[68]

We tend to think of the rule of law as inherently opposed to arbitrary decision-making.[69] Indeed, a central theme in this paper is that, from the point of view of the citizen, criminal offences that are treated as encompassing everyday practices and customs — at least in the absence of clear statutory language to that effect — will be perceived as instruments of arbitrary state action. Yet public welfare offences, almost by definition, purport to guide citizens in ways that are unnaturally stiff and regimented. In most aspects of our day-to-day lives, we apply our common

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[65] *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.). See also *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, [2015] S.C.J. No. 47, 2015 SCC 47, at paras. 32-35 (S.C.C.).

[66] See the offence in issue in *R. v. Pierce Fisheries*, [1970] S.C.J. No. 58, [1971] S.C.R. 5 (S.C.C.).

[67] The lines are not, of course, *completely* arbitrary. We don't by and large have speed limits on public highways of 5 km/h, nor require factory owners to have their machinery inspected every 10 minutes.

[68] *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R 154 (S.C.C.). It was ostensibly for this reason that a lesser standard of constitutional fault could be applied to regulatory offences.

[69] But see Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* (Oxford: Oxford University Press, 1999).

sense and judgment to moral questions, say, to the safeness of driving 110 km/h on a particular stretch of road, given prevailing conditions, or the safeness of operating machinery, in light of the conditions under which it has been used or stored. Objective-fault true crimes, using the flexible and capacious language of "reasonableness" or "carelessness", accommodate this sort of everyday moral reasoning.[70] Public welfare offences, by contrast, demand that we suspend our ordinary moral judgment in deference to the fixed lines drawn by the regulator.

All this enhances the sense of arbitrariness surrounding exercises of administrative power at the best of times. Typically, though, there are factors in mitigation. Public welfare offences, by and large, regulate behaviour in discrete contexts that pose some special danger or threat to the public interest.[71] In effect, one can opt out of these regulations by choosing not to partake in the regulated activity.[72] The very process by which one obtains a licence will itself tend to make the unfamiliar less so. Moreover, the regulations themselves tend not to change radically, unexpectedly or with absurd frequency.[73]

None of this is true in the context of pandemic regulations. One cannot opt out of public health orders limiting gatherings or requiring masks in public spaces. There is no licensing scheme for living life — for grocery shopping, having dinner with family over the holidays or walking in the park. And, as commentators around the world have pointed out, the regulations themselves have tended to change dramatically and suddenly, over and over again[74] — with the significance of these

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[70] Michael Plaxton, "Objective Fault, Strict Liability, and *Javanmardi*" (2020) 25 Can. Crim. L. Rev. 71, at 76-78. Though the presupposition is that what constitutes "unreasonable" conduct will at least broadly track widely held intuitions; that the "reasonable person" bears some loose resemblance to actual persons in the community. But see Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2004).

[71] But see Vincent Chiao, "Hyperlexis and the Rule of Law" (2021) 27 Legal Theory 126, at 130-34 (emphasizing the problem of "hyperlexis" in the modern administrative state).

[72] See *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.).

[73] On the Fullerian dimensions of American administrative law, see Cass R. Sunstein & Adrian Vermeule, *Law & Leviathan: Redeeming the Administrative State* (Cambridge: Harvard University Press, 2020).

[74] For a collection of provincial and federal public health orders in Canada since the beginning of the pandemic, see Trevor Lawson *et al.*, "COVID-19: Emergency Measures Tracker" (last updated October 28, 2021 at time of publication), online: McCarthy Tétrault <https://www.mccarthy.ca/en/insights/articles/covid-19-emergency-measures-tracker>. For commentary on the English context, see Rajeev Syal, "English Covid rules have changed 64 times since March, says barrister" (January 12, 2021), *The Guardian*, online: <https://www.theguardian.com/world/2021/jan/12/england-covid-lockdown-rules-have-changed-64-times-says-barrister>.

policy shifts sometimes blurred by governments' own warnings and "guidance" disseminated through the media.[75]

Members of the public undoubtedly have a civic duty to do their best to follow pandemic regulations. Under these circumstances, however, citizens cannot be faulted for feeling, with acute intensity, the burden of regulations that inject strangeness into every human interaction. The state cannot abdicate its responsibility to protect its most vulnerable citizens. But it must also proceed, so far as possible, with compassion for those whose lives have been thrown into chaos.

IV. CONCLUSION

Fuller's analysis of the conditions for legality sheds light on one aspect of the relationship between the substantive criminal law and everyday life. Law is distinct from other modes of governance largely because it is self-applying.[76] But there are many sources of law, and criminal legislation is just one. The latter's efficacy as a guide depends on how ordinary people and officials on the ground understand its impact on the wider normative ecosystem they inhabit. Legislators, then, must pay attention to the customs and practices that structure day-to-day life if they are to legislate effectively.

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[75] See, *e.g.*, Raphael Hogarth, "The government must draw a clear line between law and guidance during the coronavirus crisis" (April 1, 2020), online: *Institute for Government* <https://www.instituteforgovernment.org.uk/blog/government-law-and-guidance-coronavirus-crisis>; Tom Hickman, "The continuing misuse of guidance in response to the pandemic" (January 25, 2021), online (blog): *London School of Economics, School of Public Policy*, <https://blogs.lse.ac.uk/covid19/2021/01/25/the-continuing-misuse-of-guidance-in-response-to-the-pandemic/>.

[76] Jeremy Waldron, "Self-Application", NYU School of Law, Public Law Research Paper No. 16-46, permalink: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848578>.