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COMPARATIVE BROADCAST LICENSING PROCEDURES AND THE RULE OF LAW: A FULLER INVESTIGATION

*Michael Botein**

Professor Botein examines the validity of Professor Fuller's widely read but seldom criticized theory that traditional administrative adjudication is unsuited to resolve certain kinds of social tasks, which Fuller has labeled "polycentric problems." Professor Botein focuses upon Professor Fuller's example of the FCC's comparative licensing procedure as a problem unsuited to adjudication. Taking as his starting point Professor Fuller's criticism of the FCC— a criticism Fuller never tested against the Commission's actual operations—Professor Botein examines Fuller's theory of polycentricity by analyzing its contents, applying it to concrete situations, and exploring whether there exists any alternatives better than the Commission's present adjudicatory procedure.

I. PROFESSOR FULLER AND THE RULE OF LAW

Fuller starts from the proposition—with which no one would quarrel —that "limits of adjudication" exist.[1] Since Fuller sees justice in procedural terms and his "inner morality of the law" is essentially procedural,[2] his concern with process rather than product is hardly surprising. In measuring the metes and bounds of adjudication, Fuller uses the "polycentric problem"[3] as one of his surveying rods[4] and cites the FCC's

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1 Fuller, *Adjudication and the Rule of Law*, 54 PROCEEDINGS, AM. SOC'Y INT'L L. 1 (1960) [hereinafter cited as Fuller 1960]. Given the nature of Fuller's argument, his paper might have been titled more accurately "The Limits of Adjudication and the Rule of Law."

2 L. FULLER, THE MORALITY OF LAW 33-94 (1964) [hereinafter cited as FULLER 1964]. In fact, Fuller labels his inner morality "procedural natural law." *Id.* at 96.

3 Fuller 1960 at 3.

4 He also says that "adjudication must take place within a framework of accepted or imposed standards of decision before the litigant's participation in the decision can be meaningful." *Id.* at 5. He thinks that two major conditions must exist before principles of decision can emerge as a by-product of adjudication:

> The first is that there must be an extra-legal community from which principles of decision may be derived . . . . The second condition is that the adjudicative process must not, in attempting to maintain and develop extra-legal community, assume tasks for which it is radically unsuited. . . . Adjudication may profitably nurture extra-legal community . . . ; it cannot create it.

Id. at 7.

allocation of broadcast licenses as a polycentric problem unsuited to administrative adjudication.[5] Although Fuller provides a graphic example of polycentricity to illustrate clearly the unsuitability of adjudicative remedies, his definition of the polycentric problem dwells on what it is not, and not on what it is.[6] Thus his five "clarifications and qualifications" just indicate that polycentricity is not defined by "complexity of issues," "multiplicity of affected parties," lack of a "rational solution," presence of an "adjunctive decision," or "degree" of polycentricity.[7] Although these concepts contribute to an understanding of the negative aspects of polycentricity, they do not constitute positive

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5 *Id.* at 7-8; FULLER 1964 at 171-73. The Civil Aeronautics Board's procedure for allocating air routes is Fuller's other prime target. According to Fuller:

> Both of these agencies have attempted to operate as adjudicative tribunals with only the guidance of very general legislative mandates. Both have failed to build up any coherent body of doctrine that can be called a system of law. Both have failed, not because there was nothing in the way of extra-legal community they could help to develop, but because they were compelled, or thought they were compelled, to create and shape that community through adjudicative procedures. The inadequacies of the community thus built, as well as the too frequent lapses from the judicial proprieties that have characterized both agencies, are alike attributable to an attempt to use adjudicative forms for the accomplishment of tasks for which they are not suited.

Fuller 1960 at 7-8.

6 While Fuller's explanation of polycentricity seems somewhat reminiscent of Justice Stewart's "I know it when I see it" approach to the definition of hard-core pornography in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), nevertheless Fuller's example is very useful.

> What is a polycentric problem? Fortunately I am in a position to borrow a recent illustration from the newspapers. Some months ago a wealthy lady by the name of Timken died in New York leaving a valuable, but somewhat miscellaneous, collection of paintings to the Metropolitan Museum and the National Gallery "in equal shares," her will indicating no particular apportionment. When the will was probated the judge remarked something to the effect that the parties seemed to be confronted with a real problem. The attorney for one of the museums spoke up and said, "We are good friends. We will work it out somehow or other." What makes this problem of effecting an equal division of the paintings a polycentric task? It lies in the fact that the disposition of any single painting has implications for the proper disposition of every other painting. If it gets the Renoir, the Gallery may be less eager for the Cezanne, but all the more eager for the Bellows, *et cetera*. If the proper apportionment were set for argument, there would be no clear issue to which either side could direct its proofs and contentions. Any judge assigned to hear such an argument would be tempted to assume the role of mediator, or to adopt the classical solution: Let the older brother (here the Metropolitan) divide the estate into what he regards as equal shares, let the younger brother (the National Gallery) take his pick.

Fuller 1960 at 3.

7 Fuller 1960 at 4-5. Fuller does not offer these five considerations as definitions of, or even factors in a polycentric problem, but rather just as a series of observations.

criteria which would be useful for identifying polycentric problems and deciding whether to adjudicate or not.

Moreover, Fuller views adjudication of certain polycentric problems as not merely inefficient in procedural terms, but positively harmful to society. This harm stems from not preserving Fuller's conception of the "rule of law"—*i.e.*, formally defined and meaningful participation in the decision-making process by the affected parties. According to Fuller, the misapplication of adjudication to polycentric tasks warps the judicial process, creates illusory rather than meaningful participation, and thus ultimately degrades the rule of law.[8] While Fuller's notion of polycentricity apparently stems mainly from his normative judgments concerning adjudication's proper function, at first blush his theory is an attractive explanation of the many defects in the administrative process—and especially the FCC's process. Unfortunately, however, his theory is unrealistic in some respects and unusably vague in others.

Realistically, Fuller's notion of polycentricity seems to consist of several different analytical and normative factors. First, he views a polycentric problem as one which must be solved not by piecemeal adjudication, but rather by broad planning. He uses the illustration of a spider web. "Pull a strand here, and a complex pattern of adjustment runs through the whole web. Pull another strand from a different angle, and another complex pattern results."[9] Second, he feels that polycentric problems do not lend themselves to resolution by conventional legal "rules" and that arbiters therefore must operate in an area of reasonably free decision subject to certain institutional safeguards.[10] To this extent, Fuller's notion of polycentricity may be somewhat similar to what Professor Davis and Judge Friendly view as discretion.[11] Third, Fuller disapproves of almost any governmental

8 Fuller 1960 at 5. Ironically enough, Fuller indicts lawyers for destroying meaningful participation in decision making by duly processing it to death—precisely the opposite, of course, of the aims of expanded procedural safeguards. *See also* Gellhorn, *Administrative Procedure Reform: Hardy Perennial*, 48 A.B.A.J. 244 (1962).

9 Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 33; *see* FULLER 1964 at 171-73.

10 FULLER 1964 at 171-73; *cf.* Fuller, *supra* note 9, at 3.

11 K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 23 (1969); H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS viii (1962). Professor Gellhorn seems to have similar thoughts, though without any particular label. Gellhorn, *supra* note 8, at 243. As will be noted later, unreviewable discretion can deal—albeit unsatisfactorily—with polycentric problems simply by sweeping them under the carpet.

interference with private enterprise.[12] Of course, most complex governmental decision-making also effects economic interests, and thus acquires polycentric overtones. Finally, and perhaps most importantly, Fuller is quite concerned with governmental "economic allocation" of scarce resources—or the "government as provider."[13] In fact, Fuller seems to have dropped the term "polycentricity" but retained the concept under the less amorphous and more descriptive title of "economic allocation." Having earlier criticized the Civil Aeronautics Board and the Federal Communications Commission for attempting to adjudicate polycentric problems,[14] Fuller resurrects his criticism of these agencies—this time for attempting "to accomplish through adjudicative forms what are essentially tasks of economic allocation."[15] Realistically, Fuller probably views polycentricity mainly in terms of governmental allocation; practically all his illustrations of polycentricity involve allocative issues.[16]

The most conspicuous problem with Fuller's theory is that he never defines polycentricity in positive terms;[17] thus seriously impairing the theory's usefulness as one of the limits of adjudication. Limits of adjudication obviously do exist, but an analysis of the four factors which appear to compose Fuller's notion of polycentricity demonstrates that they do not adequately reflect or delineate these limits.

First, the vision of a polycentric problem as a sort of intricate spider web helps little, since any decision's impact, as noted below, extends beyond the facts in front of the decision-maker. Although practically all problems thus may be polycentric, some are obviously more polycentric than others. Fuller does not attempt to draw such admittedly difficult distinctions, however, and instead rejects any definition based

12 FULLER 1964 at 171.

13 FULLER 1964 at 175-76. The phrase "government as provider" comes from W. FRIEDMANN, THE STATE AND THE RULE OF LAW IN A MIXED ECONOMY 3, 24-30 (1971).

14 Fuller 1960 at 7.

15 FULLER 1964 at 171.

16 Fuller 1960 at 3-4 gives as examples of polycentricity:

> Setting prices and wages within a managed economy to produce a proper flow of goods; redrawing the lines of election districts to make them correspond to shifts in population; assigning the players of a football team to their respective positions; designing a system of throughways into a metropolitan area; allocating scarce funds for projects of scientific research; allocating air rights among our respective cities; drawing an international boundary across terrain that is complicated in terms of geography, natural resources, and ethnology; allocating radio and television channels to make balanced programs as accessible to the population as possible.

17 *See* text accompanying note 7, *supra*.

on "degree" of polycentricity.[18] Second, the inability to formulate and follow precise rules is hardly peculiar to polycentric problems; even the hoary acorns of contract law often conflict and can be reconciled only on an ad hoc basis.[19] Third, Fuller's emphasis on governmental non-intervention with private enterprise is unrealistic. As Fuller recognizes, contemporary government inevitably becomes involved with nominally "private" enterprise such as the multi-billion dollar defense industry.[20] Fourth, Fuller's concentration on governmental allocation of scarce resources is highly artificial. The line between abundant and scarce resources becomes increasingly tenuous in a highly organized economy. For example, conventional wisdom has it that broadcast licenses are scarce, while printing presses are not.[21] But at a certain point—perhaps not so far in the future—metal and paper may become as limited as broadcast frequencies. Some arbiter then may have to decide the allocation of resources, thus raising the same problem with newspapers as with broadcast licenses. In a sense these policy decisions are already being made.[22] Moreover, the real entry restrictions today—particularly in broadcasting—are often economic, not technological.[23] Thus in a highly controlled and interdependent society, almost any regulatory problem may be what Fuller would term polycentric.

The real problem may be simply that polycentricity is in the eye of the beholder—*i.e.*, that it represents a subjective perception rather than an objective conception. As such, polycentricity may be a valuable statement of an individual's visceral reactions and a useful semantic device for labelling unarticulated feelings of disquiet. It does not repre-

18 *See* Fuller 1960 at 4-5.

19 As Fuller recognized, of course, the development of the common law of contracts depended upon the existence and concomitant development of the institution of exchange —a type of extra-legal community of interest. *See* notes 4 and 16, *supra*.

20 FULLER 1964 at 176.

21 National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). But one lower federal court recently made the correct observation that there are far more radio and television stations than newspapers in any given community today. Radio Television News Directors Ass'n v. United States, 400 F.2d 1002, 1019 (7th Cir. 1968), *rev'd sub nom.* Red Lion Broadcasting Co. v. United States, 395 U.S. 367 (1969).

22 For example, the Newspaper Preservation Act, 15 U.S.C.A. §§ 1801-04 (Supp. 1972), exempts "joint operating arrangements" among competing newspapers from the antitrust laws. To this extent it thus represents a conscious—albeit highly political—decision to preserve a medium at the cost of competition.

23 W. FRIEDMANN, *supra* note 13, at 61-62. In Red Lion Broadcasting Co. v. United States, 395 U.S. 367 (1969), the Court recognized that the real reason for the scarcity of broadcast stations was the entrenched and quasi-monopolistic position of broadcasters in a community. *Id.* at 400.

sent, however, a meaningful analytical tool for determining when problems are not suited to solutions through adjudication.

In addition, the parade of horribles[24] which Fuller attributes to adjudication of polycentric problems seems somewhat overworked. For example, in recent years the Supreme Court has heavily involved itself in the business of solving polycentric problems—despite the anguished cries of dissenters who thought like Fuller. Thus, the Court has undertaken to regulate multi-state taxation and to reapportion electoral districts.[25] Both of these problems would appear to meet Fuller's test of polycentricity. Changing one part of an economic or electoral system inevitably changes others, and the Court has never purported to consider and regulate all aspects of these issues at once; indeed, Fuller himself warned against the danger of protecting voting rights.[26] Nevertheless, the Court's movement into both these areas has been not just competent, but perhaps essential to preserve the nation's financial and ideological marketplaces. Moreover, Fuller is caught up in the Pound-Cardozo conception of the judiciary[27] and thus ignores the fact that courts have been dealing with polycentric problems for centuries. For example, even the classic decision in *Hadley v. Baxendale*[28]—which Fuller favors with a prominent spot in his contracts casebook[29]—radically affected a whole course of commercial conduct which was not before the court at all.[30]

The final and greatest difficulty with Fuller's theory is its total failure to propose specific alternatives to adjudication of polycentric problems. Thus Fuller asks somewhat rhetorically "[w]hat measures, then, are

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24 *See* text accompanying note 8, *supra*.

25 *See, e.g.*, Braniff Airways, Inc. v. Nebraska Bd. of Equalization, 347 U.S. 590, 606-07 (1964) (Frankfurter, J., dissenting); Baker v. Carr, 369 U.S. 186, 269-70 (1963) (Frankfurter and Harlan, J.J., dissenting).

26 FULLER 1964 at 178. Fuller questioned specifically the *Baker* decision, terming it "a gamble that extracurial processes of political adjustment and compromise will produce an issue digestible, as it were, by the Court." *Id.* That gamble appears to have paid off.

27 *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51-71 (1921).

28 156 Eng. Rep. 145 (Ex. 1854).

29 L. FULLER & B. BRAUCHER, BASIC CONTRACT LAW 12-14 (rev. ed. 1964).

30 The fact that the defendant express company suddenly found itself liable for damages resulting from its delay in delivery presumably made it reexamine its relations not only with the plaintiff, but also with other customers and its own employees. In theory the court may have just been adopting a new rule of law, but in practice it was "writing a contract" by telling the defendant's counsel what boilerplate to include in all future agreements. Fuller would probably assert that this adjudication only nurtured the extra-legal community, Fuller 1960 at 7, but in reality the decision would seem to have shaped, not merely nurtured, the commercial community.

open for the solution of polycentric problems," and answers in two short sentences:

> I can see only two: *contract* and *managerial authority*. The first is illustrated by an economic market; the second by a football coach who assigns his players to their appropriate positions.[31]

Neither of these alternatives seems very satisfactory. Even if feasible, as discussed later,[32] regulation by contract seems inappropriate in what Fuller admits to be a mixed economy; despite its prior sanctity, contract is today a dying notion.[33] And managerial authority—a solution borrowed from Chairman Hector[34]—is unsuited for government action in the sensitive area of expression. Though warmly embracing the "management axiom,"[35] even the Ash Commission felt it inappropriate for the FCC.[36]

Fuller's conception of the polycentric problem is thus unclear, unrealistic, and undeveloped. At worst, it may be totally useless; at best, it may warn when adjudication is about to "quit the frying pan for the fire."[37] Thus, the theory may have some marginal utility, but testing

31 Fuller 1960 at 5. Fuller's example of polycentricity, *supra* note 6, offers the "divide and choose" solution. Although appealingly simple, this solution is unfortunately not adaptable to most of Fuller's examples of polycentricity, *supra* note 16. Fuller also mentions mediation, Fuller 1960 at 3, but as much as a decision-maker might wish to assume the limited role of a mediator, such an alternative would seem to offer little hope of resolving most polycentric problems.

32 Pp. 754-61 *infra*.

33 W. FRIEDMANN, *supra* note 13, at 33-35.

34 Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931, 932-33 (1960). Former CAB Chairman Hector's ruminations came originally in the form of the "Hector Letter" which he sent to President Eisenhower upon quitting his post.

35 PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 36 (1971). Ash's recommendations are perhaps somewhat suspect, since he was president of one of the larger corporate interests regulated by those agencies which he was charged to study. As a result, it is not surprising to see him note that "[t]he assumption . . . is that the interest of the industries and of the public are in fundamental conflict. But today, those interests are closely related, for the success of an industry will have a marked impact on the extent, quality, and price of available goods and services." *Id.* at 17. His position is thus basically that what is good for Litton Industries is good for the country.

36 *Id.* at 117-18. Although the Council recommended that all other agencies be placed under a single administrator, it decided that the Commission's sensitive tasks required retention of the multi-member board.

37 Fuller 1960 at 5. Interestingly enough, while Fuller and others have been bemoaning the overjudicialization of the public sector, some commentators have been calling for increased due process safeguards in the private sector. Berle, *Constitutional Limitations*

it requires precisely the examination which Fuller never made. This is not to suggest that Fuller has raised a false issue in polycentricity. To the contrary, the problem is quite real; the difficulty is simply that Fuller's analysis is incomplete. In other words a problem may well be polycentric in every sense of the term, but the mere act of categorization is not enough. A problem's unsuitability for adjudication is a relative notion; it is entirely dependent upon the further inquiry as to whether alternative decisional processes would be any better, if indeed not worse, than adjudication. Thus, labeling the FCC's license allocation procedure a polycentric problem is rather meaningless without an examination of the relative merits of other decisional processes. Such an investigation probably would have been altogether too time-consuming and inappropriate in the illustrative contexts in which Fuller criticized the FCC's procedure. Nevertheless, the validity of Fuller's criticism is absolutely dependent upon an exploration of alternative decisional processes.

II. THE FCC AND THE RULE OF LAW

The FCC's comparative licensing procedure has been a frequent target of Fuller's criticism.[38] He thinks that this procedure flouts the rule of law because it pretends to resolve polycentric problems by adjudication. Therefore, a fair examination of Fuller's polycentricity theory must focus on the FCC's procedure and determine: first, whether it is actually polycentric, and second, whether viable or acceptable alternatives to it exist.

The Commission's license allocation process has two main stages. First, the Commission creates by rule a table of assignments which allocates licenses to each community.[39] This procedure might be acceptable to Fuller, since in theory it resolves nationwide license distribution in one proceeding. In practice, however, the Commission reallocates frequencies on individual request by changing the tables of assignments,[40] thus resolving a polycentric problem on an ad hoc basis.

Second, the Commission then chooses a licensee for each frequency assigned. It is, of course, this second phase of the allocation process

on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power, 100 U. PA. L. REV. 933 (1952).

38 FULLER 1964 at 171-72; Fuller 1960 at 7-8.

39 Thus the Commission initially slapped a "freeze" on the granting of all television licenses in 1948 and lifted it only after it had taken four years to work out its national television table of assignments in the Sixth Report and Order, 17 Fed. Reg. 3905 (1952).

40 W. JONES, LICENSING OF MAJOR BROADCAST FACILITIES BY THE FEDERAL COMMUNICATIONS COMMISSION 23-24 (1962).

which has created all the sound and fury. Radio and television stations are extremely profitable and thus extremely valuable.[41] As a result, the Commission is in the inevitable and unenviable position of a parent dividing up candy among a horde of greedy children. The very size of the economic stakes makes for inherently strong competition. An uncontested license application usually is granted summarily by the Commission or—as an even lower-visibility form of regulation—by the Commission's staff.[42] But applications are unopposed about as often as Attila the Hun passed up villages to sack; any license worth applying for is generally worth fighting for. As a result, competing applicants and comparative hearings are inevitable.

The Commission starts out with the Communications Act's clear and unequivocal mandate that it protect the "public interest, convenience, and necessity."[43] Congress deliberately weasel-worded the Act because it had absolutely no idea how to regulate radio's then novel technology; in fact, at one point it had attempted to set up a general table of assignments, only to give up in utter frustration.[44] As a result, the determination of the "public interest, convenience, and necessity" is left to the Commissioners on the FCC and the judges on the District of Columbia Circuit.

In the early sixties the spectacle of rigged quiz shows played before a shocked nation and an ineffectual Commission; the spectre of corruption on the Commission surfaced in a number of cases,[45] climaxing with the Commissioner Mack fiasco.[46] In response to the general public uproar over FCC corruption, the Commission tried to put some rules into its adjudication. Although it had been in the business of granting licenses for thirty-one years, the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*[47] was its first attempt to define

41 *See, e.g.*, Frazier, Gross & Company, *Valuation of Newspaper Owned Television and Radio Stations Affected by the FCC's Proposed Divestiture Rule*, in 2 PROFESSIONAL STUDIES IN SUPPORT OF COMMENTS OF AMERICAN NEWSPAPER PUBLISHERS ASS'N in FCC Docket No. 18810. A powerful, network-affiliated station in a large city like New York would probably sell for well in excess of fifty million dollars.

42 The Commission has subdelegated to the Chief of the Broadcast Bureau the power to grant unopposed applications. 47 C.F.R. § 0.281(a)(1) (1972).

43 47 U.S.C. § 307 (1970).

44 W. JONES, *supra* note 40, at 4.

45 Professor Schwartz asks the seemingly naive question: "In the comparative television decisions, is the moral to be found in political considerations?" Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 693 (1959).

46 *See, e.g.*, WKAT, Inc., 29 F.C.C. 216 (1960).

47 FCC, POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS (1965), 5 P & F Radio Reg. 2d 1901 (1965).

decisional criteria[48] for comparative hearings. At least two members of the Commission, however, thought it futile. Chairman Hyde noted that "even this illusion of facility is certain to disappear,"[49] while Commissioner Robert Lee commented—in words which must have warmed the cockles of Fuller's heart—that "I am not so naive as to believe that granting the 'right application' could not, in some cases, be one of several applications."[50]

Hyde and Lee were basically correct. The Commission's seven comparative criteria have proven vague and contradictory. The first criterion—"diversification of ownership"—not only is unclear,[51] but also conflicts with the fourth and fifth criteria—"past broadcast record"[52] and "efficient use of frequency."[53] Moreover, the second and third criteria—"full-time participation in station operation by owners" and "proposed program service"—are also highly vague.[54] And to cap off

48 The Commission adopted seven criteria: (1) diversification of ownership, (2) full-time participation in station operation by owners, (3) proposed program service, (4) past broadcast record, (5) efficient use of frequency, (6) character, and (7) other factors. *Id.* at 1908-13.

49 *Id.* at 1915. Commissioner Bartley joined the Chairman in dissenting. *Id.* at 1918.

50 *Id.* at 1919. Though Commissioner Lee had some harsh words for the Policy Statement, he concurred in its issuance.

51 The diversification criterion is unclear because it makes relevant both the size and proximity of other media owned by the applicant, without defining the relationship between the two. *Id.* at 1908-09. Thus the Commission noted, perhaps by way of understatement, that "[i]t is not possible, of course, to spell out in advance the relationships between any significant number of the various factual situations which may be presented in actual hearings." *Id.* at 1909.

In addition, the first criterion is inconsistent with the fourth criterion, for the obvious reason that a strong past broadcast record can be built up only by prior media ownership. W. JONES, *supra* note 40, at 54. And in many cases the first criterion may conflict with the fifth criterion, since the applicant with the best technical expertise may tend to be one with broadcast experience.

52 The Commission attempted to lessen the conflict between criteria one and four by making past broadcast record relevant only if unusually good or bad. 5 P & F Radio Reg. 2d 1901, 1911-12 (1965).

53 *Id.* at 1913. In theory, technical proposals need not be a comparative criterion at all, since the Commission itself could specify minimum operating conditions for each station. In practice, however, the Commission has neither the time nor the expertise for such an undertaking, and thus essentially leaves it to the parties.

54 The second criterion emphasizes actual operation of the station by its owners. *Id.* at 1909. It allows credit to be given, however, for past broadcast experience and for proposed residence within the community to be served, thus negating goals of local ownership. *Id.* at 1910-11.

The third criterion is perhaps the vaguest of all. Whether out of fear or first amendment considerations, the Commission indicated that it would not judge the merits of proposed programming, but rather just look to whether it was appropriate for the local community. *Id.* at 1911-12. Moreover, the Commission compounded the confusion by a reference to its Commission Policy on Programming, 20 P & F Radio Reg. 1901 (1960). *Id.* at 1911. There

this confusion, the seventh criterion opens the door to chaos by including "other factors."[55]

The vagueness and inconsistency of the comparative criteria thus make the decisional process inherently subjective, as Professor Anthony has pointed out so well.[56] First, the hearing examiner knows the meaning of each criterion no better than the parties.[57] Second, and more importantly, the hearing examiner has absolutely no idea how much weight each criterion carries in the final decision[58]—a problem which has led examiners to use evasive terms in ranking applicants within each criterion.[59]

Other problems arise along the chain of command, thus compounding the difficulties in the decisional process. The Commission feels free to consider a case de novo and overturn the hearing examiner's decision.[60] Moreover, the Commission couches its opinions in deliberately vague language in order to survive judicial review.[61] The rare case of a reversal is usually accompanied by a remand to the Commission—thus permitting the Commission to reshuffle the cards which it alone holds.[62] And Congress added the final touch of indignity by amending the Communications Act to provide that a licensee may sell his station to any

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the Commission had set "indicia of the types and areas of service which, on the basis of experience, have usually been accepted *by broadcasters* as more or less included in the practical definition of community needs and interests." *Id.* at 1912 (emphasis added). These "indicia" were, however, less than a model of clarity. First, the Commission said that they were only guidelines, and not "a rigid mold" or "a Commission formula." Moreover, the indicia were themselves vague and inconsistent. Number nine, "Agricultural Programs," would hardly be appropriate in an urban area, while numbers one, two, and thirteen—"Opportunity for Local Self-Expression," "The Development and Use of Local Talent," and "Service to Minority Groups"—are overlapping. *Id.* at 1913. As a result, the proposed program service criterion consists of one vagueness piled upon another.

55 *Id.* at 1912.

56 Anthony, *Toward Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 39-45 (1971).

57 *Id.* at 39-40.

58 *Id.* at 40-41.

59 *Id.* at 45. For example, a hearing examiner might find that one applicant's past broadcast record included superlative minority programming. He would not know, however, whether the applicant should "win" criterion five and, if so, whether this "victory" should excuse the applicant's deficiencies in technical proposals.

60 W. JONES, *supra* note 40, at 134-36.

61 *Id.* at 137.

62 In Sunbeam Television Corp. v. FCC, 243 F.2d 26 (D.C. Cir. 1957), for example, the District of Columbia Circuit reversed the Commission on the ground that the Commission had failed to consider as a demerit one applicant's position with a network. On remand, the Commission responded simply by treating this factor adversely but then reweighting all the other criteria—thus preserving the original result.

minimally qualified buyer, even if a better applicant exists.[63] As a result, owners incapable of winning a comparative hearing have bought in through the "back door"[64]—a situation which one Commissioner aptly dubbed a "helluva way to run a railroad."[65]

Observers have been unanimous in condemning the comparative licensing procedure as a federal disaster area.[66] It may be a far more perfect example of polycentricity than even Fuller realized.[67] A comparative hearing has a domino effect, since one license grant precludes another; it involves government in an allocative function; and most importantly, it operates in a decisional vacuum void of rules or even customs.

This does not, however, end the analysis either of the procedure or of Fuller's theory. Recognizing the unsuitability of adjudication for solving a polycentric problem only raises further relevant issues which Fuller never really examined: whether or not there exist effective alternatives for solving polycentric problems; and whether or not there are viable alternatives to the present comparative licensing procedure.

III. Alternatives to the Comparative Licensing Procedure

The general and long-standing dissatisfaction with comparative hearings has given rise to a number of proposals for either improving

63 47 U.S.C. § 310(b) (1970).

64 Levin, *Regulatory Efficiency, Reform, and the FCC*, 50 Geo. L.J. 1, 11-12 (1961). *See also* W. Jones, *supra* note 40, at 71-72.

65 Policy Statement on Comparative Broadcast Hearings, *supra* note 47, at 1920 (Commissioner Lee concurring).

66 Professor Jones noted that "[f]or inefficient and highly questionable use of the adjudicatory process, it is difficult to find a rival to the comparative hearing in a radio or television case." W. Jones, *supra* note 40, at 198-99. *See also* K. Davis, *supra* note 11, at 122.

67 As Judge Friendly has remarked of the frustrating nature of the task assigned by Congress to the Federal Communications Commission:

> The job that Congress gave the Commission was somewhat comparable to asking the Board of the Metropolitan Opera Association to decide, after public hearing and with a reasoned opinion, whether the public convenience, interest, or necessity would be served by having the prima donna role on the opening night sung by . . . Tebaldi, Sutherland, or one of the several winners of high American awards. Multiply this many hundred fold; add the seemingly capricious element that whoever was selected for the role could assign it to any of the other qualified applicants; prohibit the board from getting the advice of many best able to help; assume further that the decision-makers know their action is likely to please or displease persons responsible for their continuance in office, who occasionally communicate attitudes while the decision is in progress—and you will have a more sympathetic understanding of the Commission's problem.

H. Friendly, *supra* note 11, at 55-56.

or abolishing them. Although the proposals have a number of variations, they fall into four basic categories—reforming the present procedure, transferring jurisdiction to the executive branch, granting licenses by lottery, and selling licenses by auction. All these approaches have a certain attraction; none of them, however, is a viable alternative to the present system.

A. Reform of the Procedure

Ever since the comparative hearing scandals of the late 1950's, many observers have suggested different methods of improving the procedure. The most complete and recent proposal is Professor Anthony's.[68] Like Professor Jones and Judge Friendly before him,[69] Anthony attempts to remove some of the procedure's inherent subjectivity by simplifying the comparative criteria and quantifying decisions within each criterion. He proposes reducing the number of criteria to just two—"diversification" and "past broadcast record"—and establishing only a few grades within each criterion.[70] He thus attempts to reach Friendly's goal of "a fair degree of predictability of decision in the great majority of cases and of intelligibility in all."[71] This approach also dovetails, of course, with Davis' emphasis on "structuring" and "confining" discretion;[72] Davis has great faith in rule making,[73] but even his beloved Internal Revenue Service regulations would presumably be too rigid for a comparative hearing.[74]

Although the best to date, Anthony's proposal buys simplification at the cost of flexibility. First, his two criteria are—as he admits—just as contradictory as the current criteria.[75] Second, the limited number of grades may be simplistic rather than simple, since sensitive issues involving expression do not lend themselves to such categorization.

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68 Anthony, *supra* note 56.

69 H. FRIENDLY, *supra* note 11, at 58; W. JONES, *supra* note 40, at 204-05. Both Jones and Friendly would reduce the number of comparative criteria to two and impose relatively mechanical methods of grading an applicant's performance on each criterion.

70 Anthony, *supra* note 56, at 65. Anthony admits, however, that both of his criteria contain a number of intangible and subjective factors.

71 H. FRIENDLY, *supra* note 11, at 14.

72 K. DAVIS, *supra* note 11, at 97.

73 *Id.* at 142-61.

74 *Id.* at 60-61. Davis concedes, though, that some situations are too complex for codification. *Id.* at 43-44.

75 Anthony, *supra* note 56, at 69. Anthony seems to feel that a certain amount of inconsistency is inevitable. A conflict is the product, however, only of the choice of criteria. Thus, if proposed programming were substituted for past broadcast record, the inconsistency would be lessened greatly and new entrants would be given more of an advantage.

Finally, the very narrowness of the criteria and grades may invite distortion by hearing examiners in order to accommodate complex decisions.

Moreover, Anthony's proposed system would not necessarily dispense speedier justice or even injustice. Uncontested applications are not processed markedly faster than contested applications, and the length of a hearing has little relation to the speed of a final decision.[76] A limitation on issues, therefore, may not reduce the present procedure's delay substantially. Thus Fuller's "rule of law" would be flouted just as badly under Anthony's proposal as under the present system. In fact, Anthony's mechanism might even be worse, because it would create only a superficial appearance of objectivity and adherence to principles of decision.

B. Executive Control

Though Fuller does not expressly suggest transferring licensing power to the executive branch, he may have had such a solution in mind by his invocation of managerial authority. He cites with approval Hector's recommendation that "planning jobs" be handled by executive mandate[77] and Professor Redford's proposal that policy be made by the executive branch.[78] Fuller, Hector, and Redford, however, all fail to specify exactly how their conceptions of executive control would function.

Political exigencies probably would require that an executive as well as an administrative body grant licenses only after notice and a hearing. Although a relatively minor statutory overhaul, of course, could transfer licensing powers from the Commission to an executive department, it could not fundamentally change the necessity for some form of hearing; due process[79]—let alone notions of fairness[80]—seems

76 W. JONES, *supra* note 40, at 144-54.

77 Hector, *supra* note 34, at 934.

78 E. REDFORD, THE PRESIDENT AND THE REGULATORY COMMISSIONS (1960). Fuller refers favorably to both Redford and Hector. FULLER 1964 at 174.

79 The courts have generally required notice and hearing before denial of a license. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Goldsmith v. Bd. of Tax Appeals, 270 U.S. 117 (1926). In Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948), the Court did, to be sure, hold that the President's modification of a CAB order was not subject to judicial review. That case concerned only the reviewability of administrative action, however, since full due process safeguards had already been accorded on the agency level. Thus Professor Davis notes that "[t]he Court evidently was assuming that any secret information the President may have relied upon was in the nature of legislative facts and not adjudicative facts. . . . If this was a correct assumption, the case is sound and combines with Goldsmith to round out the basic principle."

to require that an executive as well as an administrative body grant licenses only upon notice and hearing. Although perhaps a misuse of adjudication, the current procedure may be preferable to the already manifest deficiencies of executive decisions made behind closed doors. Thus in spite of its illusory aspects, the openness of the present procedure appears a necessary evil, if not the lesser of two evils. It is not apparent how executive control could foster open decision making without adopting the same adjudicative forms which Fuller criticizes. Decision-makers probably would like to sweep sticky decisions under the carpet.[81] While concealment of embarrassing results might please the decision-makers, it would not improve the decisional process—at least not for Fuller, who stresses the importance of "participation" in decisions.[82] Star Chamber tactics certainly would degrade participation far faster than inept procedures. Fuller presumably would accept a decrease in, but not a total destruction of participation.

It may be argued that executive control of the licensing procedure would speed up the allocation process and would develop more coherent policy. But placing licensing power under executive control would not speed up the decisional process very much, since as noted before, uncontested applications are not processed significantly faster than contested applications.[83] Also an executive department which honors concepts of fairness and due process would not be more likely to develop policy than the Commission, unless Ash's absolute faith in the "accountability" of individual administrators turns out to be justified.[84] And even policy formulation in a Star Chamber system might be less than satisfactory; the present administration, for example, has a less than admirable track record in its treatment of blue ribbon study commissions.[85] In fact, vesting licensing jurisdiction in the already powerful executive arm might even unleash new evils.[86]

K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.18, at 495 (1959). Gellhorn suggests that administrative investigation with notice to affected parties would suffice. Gellhorn, *supra* note 8, at 245.

80 Davis stresses the need for "open" procedures. K. DAVIS, *supra* note 11, at 98 *et. seq.*; W. FRIEDMANN, *supra* note 13, at 83-84.

81 Hector maintains, probably quite accurately, that if the real reasons behind allocative decisions were given they would never withstand public scrutiny. Hector, *supra* note 34, at 943.

82 Fuller 1960 at 2.

83 *Supra* note 76. Redford apparently would just transfer to the executive branch responsibility for formulating general policy. E. REDFORD, *supra* note 78, at 1-5.

84 PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE REORGANIZATION, *supra* note 35, at 16.

85 For example, it took quite a struggle to pry loose from the Nixon Administration the

C. Lottery

The lottery idea has been kicked around academic circles for quite awhile, but its time has definitely not yet come. Nevertheless, it raises some interesting theoretical considerations. Under a lottery, a licensee would be chosen by chance from among all applicants meeting threshold qualifications.[87] Adoption of a lottery would presumably require a statutory amendment, since it would not meet even the most liberal test of the "public interest, convenience, and necessity."[88] Although the courts have never ruled on the issue, no constitutional bar seems to exist; chance has been used traditionally as a means of allocating public lands,[89] and the Court has passed upon such procedures without a whisper of constitutional discontent.[90]

Somewhat cynically, a lottery might produce results no more irrational than the Commission. More realistically, a lottery might re-

PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT: FUTURE OPPORTUNITIES FOR TELEVISION (1968), which had been commissioned by the Johnson Administration. And when the report was finally released after several months, the Director of the executive branch's Office of Telecommunications Policy took care to note that the Administration "in no way endorses the recommendations of the Task Force or its analysis of the issues." *Hearings Before the Subcomm. on Communications and Power of the House Interstate and Foreign Commerce Comm.*, 91st Cong., 1st Sess. 204 (1969).

86 Friendly notes that a division of regulatory responsibilities between the executive branch and an independent agency might weaken Congressional control, encourage undue influence, result in even less competent staff members, and promote executive-agency tensions. H. FRIENDLY, *supra* note 11, at 152-57.

87 Anthony, *supra* note 56, at 102.

88 Congress can presumably choose any method it wishes for the allocation of licenses. As Mr. Justice Frankfurter noted, "Congress could have retained for itself the granting or denial of the use of the air for broadcasting purposes, and it could have granted individual licenses by individual enactments as in the past it gave river and harbor rights to individuals." Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 335 (1940) (Frankfurter, J., dissenting).

Although the lottery may be a perfectly rational system of license allocation, the Communications Act apparently contemplates at least some attempt to reach a principled decision. 47 U.S.C. §§ 307,309 (1970) ("public interest, convenience, and necessity"). Thus in Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), the court invalidated the Commission's somewhat lenient license renewal standard on the ground that it was inconsistent with the statute.

89 For a description of the use of lotteries in choosing lessees of oil and gas lands, see R. TRELEASE, H. BLOOMENTHAL & R. GERAUD, CASES ON NATURAL RESOURCES 632-33 (1965). Fuller would presumably classify the award of leases as a polycentric problem, since it involves an allocative function and one lease obviously precludes another.

90 In Udall v. Tallman, 380 U.S. 1, 4 (1965), the Court noted the lottery method of granting oil and gas leases with apparent approval. And in Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968), the court actually suggested that a lottery might be one means of fulfilling due process requirements in allocating apartments in low-income housing.

duce entry restrictions, thus encouraging diversity of media ownership and content. First, at least theoretically it would give small and large entrepreneurs the same chance of getting a license and thus prevent multiple owners from buying their way in through the "back door." Second, it presumably would reduce the administrative costs of seeking and granting a license.

Pragmatically, however, present entry restrictions are unlikely to crumble under the pressure of a lottery. Public policy—let alone public opinion—presumably would require fairly stringent threshold qualifications; the value of licenses presumably would encourage applicants to contest each others' qualifications; and the promise of large fees would lead the communications bar to turn minimum qualifications into major issues. The result would be analogous to questions of who is "responsible" under a lowest responsible bidder statute.[91] Thus, by concentrating on threshold qualifications rather than on the actual license award, a lottery would just shift the procedural locus of the comparative hearing's deficiencies.

D. Auction

The auction is somewhat similar to the lottery, since it would not award licenses on the basis of any standard of the public interest. Instead, licenses simply would go to the highest bidder among applicants meeting threshold qualifications.[92] Though the auction, like the lottery, has a long and noble history of being ignored, it has received serious consideration at times.[93] And as with the lottery, no legal bar to the auction appears to exist.[94]

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91 *E.g.*, GA. CODE ANN. § 32-646 (1969).

92 The two best general treatments of the auction system are Levin, *supra* note 64, and Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959). Under Levin's plan, threshold qualifications would be set rather high in order to insure good public service by licensees. Levin, *supra* note 64, at 31. This technique is a double-edged sword, however, since it would also invite the procedural infighting discussed *supra*, and p. 761 *infra*.

93 Levin, *supra* note 64, at 29. Coase notes that "[i]t is not easy to understand the feeling of hostility to the idea that people should pay for the facilities they use." Coase, *supra* note 92, at 24. Coase's approach is noteworthy, however, for its view of broadcasting as just another business enterprise. *See* note 107 *infra*.

In addition, the auction concept has come somewhat closer to reality recently in the Commission's imposition of licensing fees to support its own regulatory expenses. 47 C.F.R. § 1.1101-20 (1972).

94 As with the lottery, a statutory amendment would presumably be necessary. *See* note 88 *supra*. The result of an auction might arguably not be subject to judicial review under Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), in which the Court held that unsuccessful competitive bidders for government work lacked standing to sue. That de-

The auction is a more attractive alternative than the lottery for a number of reasons. Indeed, Professor Coase, an economist and one of the prime boosters of the auction,[95] argues that proprietary ownership of frequencies is the only rational method of spectrum management.[96] But even though his position may be too extreme, a number of factors recommend the auction. First, it would share the potentially lower administrative costs of the lottery.[97] Second, the public would recoup the value of licenses now lost to the private marketplace.[98] Third, the auction in theory might ease entry by allowing small entrepreneurs selectively to outbid larger investors.[99] And though the whole idea of hawking forums of expression seems positively immoral at first blush, the practice has become firmly—though perhaps unfortunately—established with cable television.[100]

In purely economic terms, arguments against the auction are weak. First, the initial investment in a license might, of course, strain a station's resources to the point of providing poor service.[101] The ad-

cision not only is of questionable validity today, *e.g.*, Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), but also was based on the theory that bidding for government contracts was a privilege. Thus the Court noted that the statute in question was "a self-imposed restraint for violation of which the Government—but not private litigants—can complain." 310 U.S. at 127. Auctioning broadcast licenses, however, affects the public very significantly.

95 It is interesting that economists find little difficulty with unprincipled methods of decision while lawyers do. If nothing else, it may support Fuller's notion that the contemporary bar is obsessed with due process. *See* note 8 *supra*.

96 Coase, *supra* note 92, at 14-16. He also notes that marketplace regulation might be no worse than Commission regulation. *Id.* at 16.

97 Coase, *supra* note 92, at 16; Levin, *supra* note 64, at 23. Levin also argues that the auction would reduce undue influence, on the theory that it would remove the ability and thus the temptation. Levin, *supra* note 64, at 24-25. Realistically, this seems rather unlikely, since competitive bids can be rigged in a number of ways—*i.e.*, disqualification of an applicant, disclosure of the highest bid, etc. Corruption is presumably an ineradicable human trait.

98 Levin, *supra* note 64, at 11-12; Coase, *supra* note 92, at 16.

99 Coase, *supra* note 92, at 19, argues that small entrepreneurs might be more willing to concentrate their investments and thus might be able to outbid more affluent concerns. This seems altogether unlikely, however. If broadcasting were a high-risk business—which it certainly is not—only large investors would be able to hazard the necessary venture capital; if it were a low-risk business—which it certainly is—large concerns would have an incentive to make safe investments in it.

100 Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U.L. REV. 816, 817 (1970). Competition for cable television franchises usually has centered around an applicant's proposed franchise fee for a local government.

101 Anthony, *supra* note 56, at 74; Levin, *supra* note 64, at 30. There does appear to be at least a marginal relationship between a station's revenues and the quality of its programming. Levin, *Competition, Diversity, and the Television Group Ownership Rule*, 70 COLUM. L. REV. 791 (1970).

ditional costs, however, would presumably be reflected in higher advertising rates—thus levying an indirect, albeit regressive tax on the public.[102] Moreover, a comparative hearing is hardly without its expenses; in effect, a broadcaster today "buys" his license in legal fees of up to several million dollars. Second, selling licenses might arguably legitimize broadcasters' financial interests in their licenses and thus de facto guarantee them renewals.[103] Realistically, however, broadcasters view their licenses as vested rights even now[104]—an impression which the Commission has done virtually nothing to change.[105] Finally, in situations without competing applications a complicated system of administrative valuation would be necessary.[106] Given the value of most licenses, however, these cases are likely to be few and far between. In fact, the auction's greatest defect is precisely the same as the lottery's—*i.e.*, that lawyers will, in the name of due process, recreate miniature comparative hearings at the threshold qualification stage.

The auction is thus administratively feasible and economically valid. This raises only the core issue, however, of whether broadcasting should be regulated according to some vague public interest standard at all. Coase's answer would be an unqualified "no."[107] Fuller's probably would be a highly qualified "maybe." Despite his faith in the principles of contract and his doubts about the limits of adjudication, Fuller presumably would have difficulty with either a lottery or an auction. They not only prevent participation by affected individuals, but also abandon any attempt at reaching a reasoned decision.

IV. Conclusion

Fuller's theory of polycentricity thus recognizes but inadequately copes with the very important problem of what is the best decisional process for resolving particular kinds of problems. His dissatisfaction

102 Despite the claims of theatre owners, broadcast television is, of course, not "free" in any meaningful economic sense, since viewers indirectly pay for it through the increased cost of goods attributable to advertising expenses. Coase, *The Economics of Broadcasting and Government Policy*, 56 Amer. Econ. Rev. Papers & Proceedings 440, 446 (1966).

103 Anthony, *supra* note 56, at 74; Levin, *supra* note 64, at 30.

104 N. Johnson, How To Talk Back To Your Television Set 20 (1970).

105 So far, the Commission has refused to renew a grand total of one television license for other than technical reasons. WHDH, Inc., 16 F.C.C.2d 1 (1969). And that decision was the product of thirteen years of litigation and an understrength Commission.

106 Anthony, *supra* note 56, at 102-03.

107 Coase would treat broadcasting just like any other business. He draws the somewhat startling analogy that "[i]t is no doubt desirable to regulate monopolistic practices in the oil industry, but to do this it is not necessary that oil companies be presented with oil fields for nothing." Coase, *supra* note 92, at 17.

with the FCC's allocation of broadcast licenses apparently derives from what he perceives as the system's destructive impact upon the rule of law—an effect traceable to the comparative licensing procedure's vague and inconsistent criteria and a resultant lack of meaningful participation in the adjudicative process. But Fuller has failed to present any viable alternatives for solving polycentric problems in general, or for solving the FCC's license allocation problem in particular. All the alternatives —including those advanced by Fuller—lead to either invisible or unreasoned decisions which are hardly the product of meaningful participation. Although superficially attractive, these alternatives are fundamentally inconsistent with political realities or meaningful participation. As a result, the only alternative is to grin and bear with the existing administrative process, flawed as it is.

Fuller's difficulty lies not so much in ignoring reality as in setting his sights higher than the human condition—and thus the decisional process—can go. Davis' comment that "[t]he Franks Committee-Dickinson-Dicey-Hayek versions of the rule of law express an emotion, an aspiration, an ideal"[108] applies to Fuller, who sees the highest morality in terms of "aspiration."[109] Fuller's failing thus lies in refusing to accept that hard cases—or, as he would have it, problems—sometimes make not just bad law, but rather no law at all.

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108 K. DAVIS, *supra* note 11, at 33.

109 FULLER 1964 at 5-13.

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