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Legal Positivism and the Natural Law: The Controversy Between Professor Hart and Professor Fuller

George Breckenridge

Mister Breckenridge discusses the similarities and differences and reasons for the differences between the views of Professors Hart and Fuller on legal positivism and natural law. Since the argument of each professor depends ultimately on his definition of law and his view of the meaning of morality in relation to the nature of man and the world in which man lives, the author concludes that their philosophical differences appear irreconcilable.

I. Introduction

Professor Hart defends legal positivism and Professor Fuller sets out his view of the natural law. Perhaps it would be more accurate to say that Fuller is against positivism and Hart against natural law. Each is an untypical representative of the varied traditions that bear these names. Each is, at the same time, because of his radical restatement and defense of his positions, probably the most reasonable and least extreme antagonist. In this dialogue, if anywhere, we are likely to discover the true issues and the common ground, if any, between the two positions. In fact each concedes, frankly or by implication, several cardinal points of criticism raised by the other, but holds the points conceded to be of little importance or of little relevance to the fundamental issue as he sees it. Hart concedes much from the traditional position of legal positivism, but holds that this does not affect his main argument. Fuller makes no attempt to defend the traditional natural law positions, popularly associated with a higher law, or a "brooding omnipresence in the skies," and is most careful to establish his position on its own credentials. Ultimately, I shall suggest that the ouly real issues at stake between Hart and Fuller are the criteria of relevance and importance. The case each makes and the cogency of his case against the other depends ultimately on his definition of law and his view of the meaning of morality, so that, in the last analysis, the argument comes down, as all good philosophical arguments are supposed to, to the view of the nature of man and the universe in which he lives.

The form of the argument will follow, in the main, that of Professor Hart's article, "Positivism and the Separation of Law and Morals" in

the *Harvard Law Review* in 1958.[1] In that article Hart raises systematically and frankly what I take to be the principal points of controversy between legal positivists and natural lawyers (as distinct from those controversies *among* natural lawyers as to the meaning and content of the natural law). Hart's position will be expanded and illustrated, where appropriate, from the argument of his book, *The Concept of Law*, published three years later.[2] What, in effect, Professor Fuller does in reply, though not so systematically, is to take Hart's discussion of each of the points and use it to support his own formulation of the natural law position. Again, Fuller's argument in the *Harvard Law Review* article,[3] "Positivism and Fidelity to Law—A Reply to Professor Hart," is supplemented by his book, *The Morality of Law*, published in 1964.[4]

This paper will attempt to understand and set out separately the positions of Professors Hart and Fuller before attempting in the fourth section to evaluate the similarities and differences between them and the reasons for the differences which appear to be irreconcilable.

II. Hart's Position in Defense of Legal Positivism

The principle that Hart undertakes to defend and reassert is the familiar "separation of law and morality"; this in the interest of both "intellectual clarity and moral integrity," and in the fact of "contemporary voices [that] tell us . . . that there is a 'point of intersection between law and morals' or that what *is* and what *ought* to be are somehow indissolubly fused or inseparable."[5] Hart takes legal positivism "to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[6]

The founders of the modern school of legal positivists were the Utilitarians, in particular Benthem and Austin, and Hart lines himself up with "the concern of the great battle-cries of legal positivism."[7] He quotes Austin: "The existence of law is one thing; its merits or demerits is another." Gray: "The Law of a State . . . is not an ideal,

1. 71 Harv. L. Rev. 593 (1958).
2. Hart, The Concept of Law (1961).
3. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).
4. Fuller, The Morality of Law (1964). The book is an expansion of the Storrs Lectures on Jurisprudence at Yale University.
5. Quoting D'Entreves, The Natural Law 116 (2d ed. 1955) and Fuller, The Law in Quest of Itself 12 (1940), respectively.
6. Hart, *op. cit. supra* note 2, at 181-82.
7. *Id.* at 203.

but something which actually exists . . . it is not that which it ought to be, but that which is."; and Kelsen: "Legal norms may have any kind of content."[8] (As is suggested by the quotation, and as we shall discuss later, Kelsen's position is a significant departure from the Utilitarian position.)

Hart, first of all, wishes to make quite clear what doctrines concerning law the Utilitarians did in fact hold and to dismiss the positivist "straw men" bandied about in the Anglo-American literature on the subject.

He dismisses as indefensible and probably undefended the extreme formalist contention "that a legal system is a 'closed logical system' in which correct decisions can be deduced from pre-determined legal rules by logical means alone."[9]

He sets aside as likewise alien to the position of Bentham and Austin, though it was held by Kelsen, the fact-value dichotomy, the contention "that moral judgments cannot be established, as statements of fact can, by rational argument, evidence or proof."[10] Hart considers this controversy to be essentially irrelevant to the main issue.

> Proof that the principles by which we evaluate or condemn laws are rationally discoverable . . . leaves untouched the fact that there are laws which may have any degree of iniquity or stupidity and still be laws. And conversely there are rules that have every moral qualification to be laws and yet are not laws.[11]

Hart is also most willing to concede the "facts" of the influence of moral ideas upon law-making and even "that the stability of legal systems depends in part upon such types of correspondence with morals." Again, he feels it obvious that such a connection does not at all affect the necessary distinction between law and morality.

Having cleared the ground in this manner, Hart is left with three basic doctrines of legal positivism as held by Bentham and Austin. First, that there is no necessary connection between law and morals, or law as it is and law as it ought to be; second, that laws are commands of human beings; and third, "that the analysis or study of meanings of legal concepts is an important study to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, functions, etc."[12] Hart's cardinal aim is to uphold the first of

8. Quoting AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184-85 (Library of Ideas ed. 1954); GRAY, THE NATURE AND SOURCES OF THE LAW 213 (1909); KELSEN, GENERAL THEORY OF LAW AND STATE 113 (1949).

9. HART, *op. cit. supra* note 2, at 181.

10. *Id.* at 253.

11. Hart, *supra* note 1, at 626.

12. HART, *op. cit. supra* note 2, at 253.

these principles and, in order to do so he deals with four main lines of attack on the positivist position. These attacks are on the other two principles mentioned above and two further ones, namely, the argument from the experience of the Nazi government in Germany, and the argument which considers a legal system as a whole rather than particular laws.

In each case, Hart concedes considerable validity in the criticisms but, he denies that any of these concessions in any significant sense represents an "intersection" of law and morals which would affect his central thesis.

The first line of criticism Hart deals with is that centering on the imperative or command theory of law. The most concise statement is probably that of Austin, that law is the command of a superior habitually obeyed. Hart demonstrates "the inadequacy of orders backed by threats and habits of obedience for the understanding of the foundations of a legal system and the idea of legal validity."[13] Briefly, his argument contains the following points: Legal order cannot simply be identified with compulsion. While it is possible to think of the criminal law in terms of "obedience," "disobedience" and "sanction," "other legal rules are presented to society in quite different ways and have quite different functions."[14] Efforts to reduce all laws to terms of "sanction" are absurd. "One might as well urge that the rules of baseball were 'really' only complex conditional directions to the scorer and that this showed their real or 'essential' nature."[15] Likewise, Salmond's criticism of the command theory is valid, that it is impossible to derive individual rights and powers from a command.[16] Furthermore, a legislature of changing composition cannot be considered a "sovereign habitually obeyed" and, most importantly, "nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential lawmaking procedures."[17] Thus, law itself is ultimately based on public acceptance, just as "a necessary condition of the existence of coercive power is that some at least must voluntarily cooperate in the system and accept its rules."[18]

The key to the foundation of law and the inadequacies of the Utilitarian scheme clearly lies in the "fundamentally accepted rules" and "an analysis of what it is for a social group and its officials to accept such rules . . . . [I]t is apparent that the social acceptance of a rule or standard of authority . . . must be brought into the analysis

13. *Id.* at 198.
14. Hart, *supra* note 1, at 604.
15. *Id.* at 605.
16. SALMOND, THE FIRST PRINCIPLES OF JURISPRUDENCE 97-98 (1893).
17. Hart, *supra* note 1, at 603.
18. HART, *op. cit. supra* note 2, at 603.

and cannot itself be reduced to the two simple terms" [command and habit], yet there is no necessary connection here with morality. . . . "Rules that confer rights, though distinct from commands, need not be moral rules or coincide with them."[19]

In the *Concept of Law*, Hart develops as the foundation of the legal order a system of primary and secondary rules; primary rules of obligation, imposing duties; and secondary rules, conferring powers, in particular, rules of recognition, adjudication and change. "[M]ost of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rules and the interplay between them are understood."[20] Thus, the system of accepted rules replace crude command as the basis of law.

The second line of attack on the positivist position grew out of the study of the actual judicial process undertaken by the American "realist" school of jurisprudence. Judicial interpretation is necessarily involved in bringing particular cases under general rules. Thus, "the open texture of law leaves a vast field for a creative activity which some call legislative."[21] What has been called a "penumbra" of uncertainty necessarily surrounds the use of all legal rules "and it follows," so runs the criticism, "that if legal arguments and legal decisions of penumbral questions are to be rational, [and that is the agreed assumption] their rationality must lie in something other than a logical relation to its premises."[22] Thus, there must be some standard other than deductive reasoning to guide the process of interpretation, and "it seems true to say that the criterion which makes a decision sound in such cases is some concept of what law ought to be."[23] This much of the critics' position Hart in effect concedes. A formalist or literalist view of legal interpretation is, however, not an essential part of the positivist position, nor does the demonstration of the error have any implication at all for the distinction between law and morals. Automatic decisions may be bad law but they *are* law. "It does not follow that, because the opposite of a decision reached blindly in the formalist or literalist manner is a decision intelligently reached by reference to some conception of what ought to be, we have a junction of law and morals. . . . The word 'ought' merely reflects the presence of some standard of criticism . . . but not all standards are moral."[24]

19. Hart, *supra* note 1, at 606.
20. HART, *op. cit. supra* note 2, at 79.
21. *Id.* at 200.
22. Hart, *supra* note 1, at 608.
23. *Ibid.*
24. *Id.* at 612-13.

In any case, there is no need to inject moral considerations into the discussion. "[E]verything we have learned about the judicial process can be expressed in other less mysterious ways. We can say laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social aims."[25] The critics, on the other hand, tend to widen the conception of "law" to include within it the sense of purpose which will encompass all cases of the rule's application and to suggest that "the judges are only 'drawing out' of the rule what, if it is properly understood, is 'latent' within it."[26] Hart concludes that:

> to soften the distinction [between clear and penumbral cases], to assert mysteriously that there is some fused identity between law as it is and as it ought to be, is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have . . . .[27]

There is, however, an aspect of the judicial process in which Hart holds "morality" to be important, and that is in the administering of the law. He describes the "judicial virtues" as: "impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision."[28]

The third type of criticism of the separation of law and morals is drawn from the German experience under the Nazi regime. "It . . . is less an intellectual argument . . . than a passionate appeal supported not by detailed reasoning but by reminders of a terrible experience."[29] Here the question is not so much one of intellectual clarity as of the usefulness of different philosophies of law as a guide to practical conduct in the face of immoral state action. The challenge to Hart's position would seem to be particularly strong in view of the conversion to a natural law position of Gustav Radbruch, a prominent German legal philosopher who, like most of his contemporaries, had espoused the positivist position in the 1930's. Particularly serious was the charge by some, including Radbruch, that the very dominance of the positivist philosophy in Germany had at least seriously inhibited any reaction against the Nazi perversion of legal forms.

The argument centers around the dilemma of the German courts after the war when faced with the Nazi "informer" cases.[30] We need

25. *Id.* at 614.
26. *Id.* at 612.
27. *Id.* at 615.
28. Hart, *op. cit. supra* note 2, at 200.
29. Hart, *supra* note 1, at 615.
30. See discussion in Hart, *supra* note 1, at 618-20; Fuller, *supra* note 3, at

not go into the details, but the essence of the disagreement is whether an admittedly immoral "law" is in fact a "law" and thus, due the consideration of obedience. Hart cites Austin as being "emphatic in condemning those who said that if human laws conflicted with the fundamental principles of morality then they cease to be laws, as talking 'stark nonsense.'"[31] This emphatic rejection of natural law, however, "went along . . . with the conviction that if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience."[32]

Hart sees the positivist statement of the citizen's dilemma in the face of an immoral "law" as being much more realistic and straightforward than that of the critics. Instead of being faced with the decision as to whether a law was sufficiently immoral to no longer deserve the title and respect of law, the citizen is faced, as in so many areas of life, with a choice, a choice between the obligation to obey the law of the land and the obligation to act morally. Both of these obligations Hart assumes to exist.

Hart thus is concerned to vindicate the implications of the positivist position and "to show that, in spite of all that has been learned and experienced since the Utilitarians wrote, and in spite of the defects of other parts of their doctrine, their protest against the confusion of what is and what ought to be law has a moral as well as an intellectual value."[33]

In the fourth part of his argument, Hart deals with the question whether a legal system taken as a whole, rather than a particular law, has any "necessary properties." Here again Hart concedes much. He concedes,

> that no system which utterly failed in this respect [to measure up to some moral or other standard] has ever existed or could endure; that the normally fulfilled assumption that a legal system aims at some form of justice colours the whole way in which we interpret specific rules in particular cases, and if this normally fulfilled assumption were not fulfilled no one would have any reason to obey except fear . . . and still less, of course, any moral obligation to obey.[34]

Hart wishes, however, to make two further important points in this regard, one substantive and the other procedural.

First, certain basic rules such as those forbidding the free use of

648-57. For a most intriguing use of these cases to illustrate the practical problems of jurisprudence, see FULLER, *The Problem of the Grudge Informer*, in THE MORALITY OF THE LAW (App. 1964).

31. Hart, *supra* note 1, at 616.
32. *Id.* at 616-17.
33. *Id.* at 621.
34. *Id.* at 622.

violence and constituting a minimum form of property (possession of food) are dictated by man's present physical circumstances.

> At present, and until . . . radical changes supervene, such rules are so fundamental that if a legal system did not have them there would be no point in having any other rules at all. Such rules overlap with basic moral principles vetoing murder, violence, and theft; and so we can add to the factual statement that all legal systems in fact coincide with morality at such vital points, the statement that this is, in this sense, necessarily so. And why not call it a natural necessity?[35]

Even this much is dependent upon the existence of the minimum aim "of survival in close proximity to our fellows." "[I]t seems to me," writes Hart, "that above this minimum the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is 'necessary' in this sense."[36] According to Hart, the trouble with natural law theory, "in all its protean disguises," is that it attempts to push this whole argument much farther into areas where there is in fact no widespread agreement.

Next, the purpose of legal rules demands that they have a certain form. "If social control . . . is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be."[37] There are also the "judicial virtues," previously mentioned, of objectivity and impartiality in the administration of the law and the demand that like cases be treated alike. However, "this is justice in the administration of the law, and not justice of the law.[38] [A] legal system that satisfied these minimum requirements might apply . . . [impartially] laws which were hideously oppressive . . . ."[39] Thus, the existence of a minimum morality in the legal system does not at all vitiate his central distinction of the separation of law and morality. Apropos of Fuller's "inner morality of law," Hart writes: "If this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity."[40]

III. Fuller's Position Against Legal Positivism

Fuller's article is written in reply to that of Hart. Since, as I have

35. *Id.* at 623.
36. *Ibid.*
37. Hart, *op. cit. supra* note 2, at 202.
38. Hart, *supra* note 1, at 624.
39. *Ibid.*
40. *Id.* at 602.

endeavored to demonstrate, Hart clears away much of the debris from the argument and sheds much of the doctrinal rigidity from the Utilitarian position, Fuller is able to concentrate his attack on the four main points in Hart's defense of the separation of law and morality, which Hart sees as the true essence of legal positivism. Three of these points are points of philosophical principle, while the fourth, concerning the Nazi regime, is essentially practical.

One of the problems in a discussion of the moral utility[41] of the positivist or natural law positions is that in almost all cases in our experience in the Western democracies there has, fortunately, been no very obvious conflict between law and the demands of morality. Indeed, most of the claims of conflict, usually couched in natural-law terms, have been so dubious as to have tended to discredit the natural law argument. Thus, the cutting edge of the problem has had to be most often examined in hypothetical examples. The clearest exception to this has of course been Nazi Germany.[42]

What Fuller attempts to do in effect is to demonstrate a necessary relation between law and morals at the points at which Hart recognized the possibility of a nexus, but either denied a necessary relation or disparaged its importance for the purposes of the basic distinction he proposed.

First, as regards the foundation of the legal system, Fuller considers that Hart cannot so lightly abandon the command theory of law without damaging his central distinction. Both flow from what he considers a larger error:

> [Austin] teeters on the edge of an abandonment of the command theory in favor of what Professor Hart has described as a view that discerns the foundations of a legal order in "certain fundamental accepted rules specifying the essential law-making procedures." . . . [Yet] [h]e does not take it because he had a sure insight that it would forfeit the black-and-white distinction between law and morality that was the whole object of his Lectures . . . .[43]

The basic problem is that, in a philosophy that insists on setting apart "law as it is," law must be conceived entirely in terms of its formal source. Otherwise, "how are we to distinguish between those basic rules that owe their validity to acceptance, and those which are properly rules of law, valid even when men generally consider

41. In the sense of being conducive to the support of moral conduct.

42. The example of Nazi Germany has, of course, been used to castigate both sides, as demonstrating, on the one hand, the weakness of positivism effectively to criticize such practices, and, on the other, the ineffectiveness in practice of those who profess a belief in natural law.

43. Fuller, *supra* note 3, at 640.

them to be evil or ill-advised?"[44] Thus, a positivist view of law must have an anchor, such as a sovereign who commands.

Kelsen rejected the command theory as untenable, but was faced with the same problem.

> Kelsen realizes that before we can distinguish between what is law and what is not, there must be an acceptance of some basic procedure by which law is made. In any legal system there must be some fundamental rule that points unambiguously to the source from which the laws must come in order to be laws. This rule Kelsen called the "basic norm."[45]

However, "the notion of the basic norm is admittedly a symbol, not a fact. It is a symbol that embodies the positivist quest for some clear and unambignous test of law . . . ."[46] The basic norm is "a fiction which simplifies reality into a form which can be absorbed by positivism."[47]

In Fuller's view, it is impossible "to treat law simply as a manifested fact of social power . . . except through a falsification of the reality on which it purports to build."[48] Law cannot be purely the product of a procedure but must, in some sense be substantive, for any formal law-giving authority is possible only because of accepted rules which are more fundamental, and because of a fundamental acceptance or "moral attitudes that accord . . . to it [authority] the competency it claims."[49] Rules "are accepted and followed because they are seen to be right or necessary or both."[50] Hart even quotes Kelsen as in effect supporting this view that there must be a minimum "natural law" without which positive law is impossible. The basic norm is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, then, like a norm of natural law . . . ."[51]

Hart's primary and secondary rules are no solution to the problem, since they are an attempt to locate the formal source of law. The difficulties which, in Fuller's opinion, this attempt encounters, particularly in the matter of the persistence of law when "sovereigns" change or temporarily do not exist, arises from the basic positivist error of method. Hart is attempting to set up general juristic principles to determine questions of sociological fact, the location of the formal law-making authority, rather than basing law ultimately in some concept of a natural law.

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44. *Id.* at 641.
45. *Ibid.*
46. *Ibid.*
47. *Ibid.*
48. FULLER, *op. cit. supra* note 4, at 147.
49. Fuller, *supra* note 3, at 645.
50. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457, 461 (1954).
51. *Id.* at 461 n.2, quoting KELSEN, *op. cit. supra* note 8, at 401.

Fuller also attacks another point which he considers vital. Hart admits the central importance of the obligation of fidelity to law. However, a theory of law which is based on a formal source cannot possibly explain the existence of this obligation. The obligation in Hart's theory can only be taken as given.

On the question of the judicial interpretation of laws, Fuller first attacks Hart's division of the meaning of legal rules into a "core of central meaning" and a "penumbra" and for thus implying that the application of a law to particular cases is, in most cases, quite clear and only occasionally calls for a wider consideration of the purpose of the law in question. By the use of a piece of linguistic analysis (to which both of them resort in this matter of interpretation), Fuller endeavors to demonstrate that it is never really possible to interpret even a single word in a particular statute without knowing the aim of the statute. He suggests that given only the phrase "all improvements must be promptly reported to . . ." it is in fact impossible to assign any clear meaning to the word "improvement," for example.[52] Thus "we must . . . be sufficiently capable of putting ourselves in the position of those who drafted the rule to know what they thought 'ought to be.' It is in the light of this 'ought' that we must decide what the rule 'is.' "[53] The difference between Fuller and Hart on this point is more than a matter of degree, as might appear, in the light of Fuller's fundamental concept of law as purposeful human activity.

Hart had also accepted that "the open texture of law leaves a vast field for a creative activity"[54] and that a judge must sometimes interpret law in the light of his concept of what it "ought to be." Far from accepting this as favoring some concept of natural law in the general approach to interpretation, Hart points out that "ought" merely implies the existence of a standard and that the "morality" brought to interpretation could be "immoral." This touches one of the most fundamental parts of Fuller's position. "Hart seems to assume that evil aims may have as much coherence and inner logic as good ones. I, for one, refuse to accept that assumption."[55] Given the virtues of rationality, coherence, and generality—which are at least implicit in Hart's conception of a working legal system—and the judicial virtues he accepts as an essential part of such a system, it is impossible for Fuller to conceive of a legal system being operated systematically and smoothly towards an immoral end.

52. Fuller, *Positivism and Fidelity to Law—Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-45 (1958).
53. *Id.* at 666.
54. HART, THE CONCEPT OF LAW 200 (1961).
55. Fuller, *supra* note 52, at 636.

This reveals an underlying and radical difference in the conceptions of morality held by the two men which will be discussed more fully below, but meantime Fuller's last point is obviously crucial for his discussion of the Nazi experience.

For Fuller, Hart's formulation of the citizen's dilemma in Nazi Germany, between the obligation to obey the law and the obligation to act morally, makes no sense. Throughout his discussion, Hart seems to assume that the ouly difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman. This assumption is, I think, seriously mistaken . . . .[56] While it is true that "more than any other in history, the Nazi dictatorship came to power through the calculated exploitation of legal forms,"[57] Fuller cites the Nazi use of retroactive curative laws to cover official action, the use of secret laws and unpublished instructions to those administering the laws, and the use of mob violence and disregard of even their own statutes, to demonstrate that there did not exist latterly in Germany anything that, by any conceivable criterion, could be called a legal order. By the use of such procedures, the Nazis totally undermined what Fuller calls "the inner morality of the law." In such circumstances, the obligation of fidelity to law on the part of the citizen is not merely outweighed by his obligation to act morally, it has been totally dissolved.

In Fuller's opinion,

> a positivistic philosophy . . . never gives any coherent meaning to the moral obligation of fidelity to law. This obligation seems to be conceived as sui generis, wholly unrelated to any of the ordinary, extralegal ends of human life. The fundamental postulate of positivism—that law must be strictly severed from morality—seems to deny the possibility of any bridge between the obligation to obey law and other moral obligations. No mediating principle can measure their respective demands on conscience, for they exist in wholly separate worlds.[58]

The crux of the disagreement between Fuller and Hart on the fourth point, concerning the necessary content of law, lies in Hart's statement that the "inner morality of law" is "unfortunately compatible with very great iniquity."[59]

The central part of Fuller's development of a natural law position lies in this concept of the "inner morality of law," which he develops at length in *The Morality of Law.* A legal system has an inherent logic that must be respected if the purpose of a legal system is to be

56. *Id.* at 650.
57. Fuller, *supra* note 50, at 465.
58. HART, *op. cit. supra* note 54, at 200.
59. *Id.* at 202.

achieved. The demands of this internal morality are classified and discussed by Fuller under the following heads: The generality of law (laws must consist of general rules); promulgation (citizens must know what is expected before they can obey); retroactive laws (a system which is made up solely or largely of retroactive laws could not function); clarity in the law (necessary for obedience); contradictions in the law (these produce chaos); laws cannot require the impossible; laws must maintain some degree of constancy through time; and there must be some congruence between official action and the declared rule if chaos is to be avoided. These are the "natural" elements of law in the sense in which one may speak of the "natural laws of carpentry." They form a procedural natural law distinct from a "substantive" natural law or the "external morality of law."

Now Hart concedes much of this, although he does not seem to attach much significance to it. For his case against Hart to stick on this point, therefore, Fuller must obviously establish an intimate connection between the internal and external moralities of law.

Fuller's argument is based, first of all, on the connection between order and good order, or between law and good law. He argues that "the internal morality of the law is not something added to, or imposed on, the power of law, but is an essential condition of that power itself. If this conclusion is accepted, then the first observation . . . is that law is a precondition of good law."[60]

The principles of the inner morality are principles of morality and it is clear that "a proper respect for the internal morality of law limits the kind of substantive aims that may be achieved through legal rules."[61] Fuller answers Hart's casual dismissal of the inner morality of law as being "compatible with great iniquity" by asking, rather impatiently one imagines, "Does Hart mean merely that it is possible, by stretching the imagination, to conceive the case of an evil monarch who pursues the most iniquitous ends but at all times preserves a genuine respect for the principles of legality [*i.e.* legal morality]?"[62]

Before going any farther, it is necessary to consider Fuller's basic conception of what law is. Fuller takes a "process" view of law. Law is a purposive human undertaking. A legal system is "the product of sustained purposive effort," but it is the product of human effort and thus, its attainment is always a matter of degree. The purpose of law as an institution is "that of subjecting human conduct to the guidance and control of general rules."[63] This "modest indulgence in

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60. FULLER, THE MORALITY OF LAW 155 (1964).
61. *Id.* at 4.
62. *Id.* at 154.
63. *Id.* at 146.

teleology," therefore, provides us with a standard for judging the degree of legality of a legal system. There are also, in Fuller's view, important implications for substantive morality, implicit in this concept of the law and in the principles of the inner morality of the law.

> [L]egal morality can be said to be neutral over a wide range of ethical issues [law may be bad law]. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules and answerable for his defaults.
>
> Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent.[64]

Fuller continues:

> I have attempted to show that the internal morality of law does indeed deserve to be called a 'morality.' . . . [A]n acceptance of this morality is a necessary, though not a sufficient condition for the realization of justice . . . this morality is itself violated when an attempt is made to express blind hatreds through legal rules, and . . . the specific morality of law articulates and holds before us a view of man's nature that is indispensible to law and morality alike.[65]

Fuller also disagrees with Hart's "minimum content of natural law" as dictated by man's desire to survive. Hart "seems to be saying that it [survival] furnishes the core and central element of all human striving. This, I think, cannot be accepted. As Thomas Aquinas remarked long ago, if the highest aim of a captain were to preserve his ship, he would keep it in port forever.[66] Fuller would not add more specific content to Hart's minimum, but rather a sense of direction.

III. Specific Points of Difference

Before we turn to the specific points of difference between Hart and Fuller, it may be useful to sketch in some of the philosophical background, as I see it, in order better to emphasize the divergent positions each is really concerned to cstablish.

Hart places himself in the Utilitarian tradition. The Utilitarian philosophers, particularly Bentham, were first of all legal reformers, motivated by strong liberal convictions and moral indignation. They rejected the existing archaic and iniquitous legal system and, at the same time, the philosophical traditions by which it was presumably

64. *Id.* at 162.
65. *Id.* at 168.
66. *Id.* at 185.

supported, whether the absolute, self-evident principles in the name of which much injustice would in fact be condoned, or the older natural-law tradition based on Christian morality and the teleological view of the world. The Utilitarians were, therefore, concerned with building a legal structure without such a base. They wished to separate law from fuzzy and reactionary moral ideas and to establish jurisprudence as the science concerned with what the law is, in order to preserve the integrity, as they saw it, of the concept of law as the basis of social order, and to bring about reform of the existing legal system on the basis of social utility. Law for the legal positivists was defined as the command of the sovereign, one or many. The inadequacy of the command theory of law (dealt with at length by Hart) was the first element of the positivist system to cause trouble. Kelsen, in effect, substitutes for it the "basic norm" as the positive source of law, an arbitrarily defined rock on which the legal system can be built, though, as Fuller points out, the basic norm is a convenient legal fiction rather than an identifiable entity.

Hart is, I think, motivated by much the same attitudes as the early Utilitarians. He is concerned with maintaining a clear distinction between what the law actually is and the various ideas of what it ought or ought not to be. For him the positivist approach is that dictated by common sense and clear thinking and it is also a necessary preliminary for any attempt to judge the law. In contrast, the general approach of the natural law is confusing, multivariate and based on assumptions "unacceptable to the modern mind." Hart concedes a great deal of the Utilitarian position and agrees that there are necessary aspects of the legal system in which it might be said that moral elements were contained in the law, but he denies that these affect his basic distinction.

In the face of the positivist claim that one can maintain a legal system separated from morality, Fuller seeks to demonstrate, by using the points raised by Hart, that it simply cannot be done. Fuller defines natural law, in sharp contradistinction to legal positivism, as "the view which denies the possibility of a rigid separation of the *is* and the *ought*, and which tolerates a confusion of them in legal discussion."[67]

The course of the argument between Hart and Fuller depends on three vital "points of contact" between "law" and "morality." Fuller maintains that at these three points, three basic aspects of the phenomenon of law are so inseparable from morality, that it is impossible to maintain that law as a whole can be clearly distinguished from morality. Hart, at least in two of the cases, does not deny the "contact" between an aspect of law and an idea of morality, but in

67. FULLER, THE LAW IN QUEST OF ITSELF 5 (1940).

each case he does deny that the significance of this is such as to vitiate his general distinction between law and morality. The three points concern the foundations of the legal order; the minimum necessary content of the law; and what Fuller calls the inner morality of law.

First, concerning the foundations of the legal order, Fuller maintains that law is ultimately dependent on something which is not law. A law and a law-making body are essentially substantive moral concepts since they are entirely dependent for their existence and proper functioning upon acceptance and the general obligation to be faithful to the law. Thus, law and obligation are ultimately of the same substance. In contrast to this, Hart wishes to base the legal order upon a system of primary and secondary rules, obligation stemming from the primary rules and law-making authority from the secondary rules. These Hart maintains are merely neutral, since the rules are procedural rather than substantive; however, this really does not remove Fuller's objection but merely sets it back a stage. More fundamental than any rule must be the acceptance of the rule, and it is difficult to see how the idea of acceptance can be entirely divorced from substantive moral content. Thus, the statement, "Parliament makes laws," can never be purely a statement of procedure.

Second, it is Hart who elaborates the minimum content of law which is demanded by "the setting of natural facts and aims."[68] The natural facts or "simple truisms" about man he enumerates and discusses as: human vulnerability; approximate equality; limited altruism; limited resources; and limited understanding and strength of will.[69] The only aim upon which men agree, according to Hart, is the minimum aim of survival. These "natural facts and aims" give to "the minimum forms of protection for persons, property, and promises which are . . . indispensible features of municipal law," the status of "natural necessities."[70] Thus, there is a "core of good sense in the doctrine of Natural Law" which obviously refutes "the positivist thesis that 'law may have any content.'"[71] Hart, however, evidently feels himself able to avoid any implication this might have for his separation of law and morals by a rather extraordinary hypothesis. Hart states:

> [I]t is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for a third category of

68. HART, *op. cit. supra* note 54, at 195.
69. *Id.* at 190-94.
70. *Id.* at 195.
71. *Id.* at 194-95.

> statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have.[72]

Hart has earlier spelled out what he means when he discusses the natural facts about man. On "human vulnerability," he writes (and it is worth quoting in full to savor the exotic flavor):

> Yet though this is a truism it is not a necessary truth; for things might have been, and might one day be, otherwise. There are species of animals whose physical structure . . . renders them virtually immune from attack by other members of their species . . . . If men were to lose their vulnerability to each other there would vanish one obvious reason for the most characteristic provision of law and morals: *Thou shalt not kill.*[73]

In a similar vein on "limited resources" he writes:

> Again, in this respect, things might have been otherwise than they are. The human organism might have been constructed like plants, capable of extracting food from air, or what it needs might have grown without cultivation in limitless abundance.[74]

Certainly, it might be said that Fuller's position, based on man's nature, does not take these possibilities into account. However, to quote Fuller in a slightly different context, "[t]here are some outcomes in human relations too absurd to rise to the level of conscious exclusion."[75]

The third issue between Hart and Fuller concerns the "inner morality of the law." Here again, as in the first case, the difference is reducible to different conceptions of law. For Fuller, the inner morality of law is certainly procedural, but it is also natural law. With Fuller's view of law as a purposive enterprise, even a procedural aspect could not be devoid of substantive moral content, and indeed he demonstrates persuasively and at length the connections between the internal and external moralities of the law. In his view,

> the internal morality of law does indeed deserve to be called a 'morality. . . .' [A]n acceptance of this morality is a necessary, though not a sufficient condition for the realization of justice . . . this morality is itself violated when an attempt is made to express blind hatreds through legal rules . . . .[76]

For Hart, from his positivist position, it is not only possible but necessary to see the inner morality of law as purely a procedural concept and thus capable of being subordinated to any end, not

72. *Id.* at 195.
73. *Id.* at 190.
74. *Id.* at 192.
75. FULLER, *op. cit. supra* note 60, at 139.
76. *Id.* at 168.

necessarily a moral one. It may be noted, however, that because Fuller's *Morality of Law* was not published until 1964, Hart does not have to answer his full treatment of the internal morality of law.

It should be apparent that the fundamental divergence between Hart's and Fuller's positions lies in their underlying concepts of the nature of "law" and the nature of "morality." These ideas will now be considered separately.

The whole purpose of Hart's endeavor is to maintain the validity of the concept of law as a morally neutral entity, formally defined in terms of its source, which is itself an entity located according to a set of generally accepted secondary rules from which it derives its power and authority. Thus, a legal rule once made remains a legal rule until it is repealed, even if it is not enforced and no longer finds acceptance.[77] Also, a law will still be a law even if it is "morally outrageous."[78] Hart upholds this "wider" concept of law, defined as "all rules which are valid by the formal tests of a system of primary and secondary rules,"[79] as of more practical and moral value than the "narrower" concept that would exclude "morally outrageous" laws as, by definition, non-laws. The wider concept of law "allows the invalidity of law to be distinguished from its immorality."[80] However, if the question is that of moral usefulness, one might suggest that the formal validity of law is not much of an obstacle to immoral action. The real question jurisprudence is concerned with is the possible immorality of "law," and formal validity is a minor issue. The test of legality, or legal morality, in Fuller's "procedural" sense is, however, another matter.

We have already noticed something of Fuller's concept of law. Law is not "a datum projecting itself into human experience,"[81] but an achievement of human experience. Law is order in human social life and "the notion of order itself contains . . . a moral element."[82] The basis of human morality, for Fuller, lies in human purpose; thus "law as something deserving loyalty must represent a human achievement." Law and obligation are of the same substance and hence the idea of law cannot be separated from the idea of substantive moral content. Fuller is, however, far from asserting the identity of law and morality, a danger which Hart rightly fears. Legal order is a prerequisite for good order, but it is not the same thing. Once the

77. HART, *op. cit. supra* note 54, at 170.
78. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 600 (1958).
79. HART, *op. cit. supra* note 54, at 205.
80. *Id.* at 207.
81. Fuller, *supra* note 52, at 646.
82. *Id.* at 644.

question of "law" is decided, there is always the further question of good or bad law. Fuller's main point is, however, that

> a recognition that the internal morality of law may support and give efficacy to a wide variety of substantive aims should not mislead us into believing that *any* substantive aim may be adopted without compromise of legality [or legal morality].

(This is the manner in which the internal and external moralities of the law interact.)[83]

Hart deals mostly in terms of "conventional" morality, "the fundamental moral outlook of a given person or society."[84] He treats morality or moral rules in the same formal way that he treats law. His "broader view" of morality "include[s] in it all social rules and standards which, in the actual practice of a society, exhibit the four features . . . ."[85] These four formal features, neutral as to content, are: importance; immunity from deliberate change; voluntary character of moral offenses; and forms of moral pressure. There is great diversity among moral codes, which vary according to the character and needs of a given society and such factors as ignorance and superstition. These different social moralities may, of course, include principles which are repugnant to our particular viewpoint, however, going back to the "simple truisms" about man, "the social morality of societies . . . always includes certain obligations and duties, requiring the sacrifice of private inclination or interest which is essential to the survival of any society, so long as men and the world in which they live retain some of their most familiar and obvious characteristics."[86] Apparently, not only morality but man himself is relative.

Perhaps the best way to convey Fuller's concept of morality is to quote the following passage:

> A purpose is, as it were, a segment of a man. The whole man, taken in the round, is an enormously complicated set of interrelated and interacting purposes. This system of purposes constitutes his nature, and it is to this nature that natural law looks in seeking a standard for passing ethical judgments. That is good which advances man's nature; that is bad which keeps him from realizing it. Just as the dichotomy of *is* and *ought* does not apply to the act of reaching toward the realization of a simple purpose, so it is equally inapplicable to a whole purposive system. From the reaching that is embedded in that system, we can learn in what directions it should reach.[87]

In *The Morality of Law*, Fuller develops his "morality of aspira-

83. FULLER, *op. cit. supra* note 60, at 153.
84. HART, *op. cit. supra* note 54, at 158.
85. *Id.* at 177.
86. *Id.* at 167.
87. Fuller, *supra* note 50, at 472.

tion" and places himself in the classical tradition.

> The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers. . . . [I]nstead of ideas of right and wrong, of moral claim and moral duty, we have rather the conception of proper and fitting conduct, conduct such as be seems human being functioning at his best.[88]

Sin, for Fuller, is "a failure in the effort to achieve a realization of the human quality itself."[89]

Fuller rejects absolutes as finally unknowable but does not agree that a system such as his depends on such knowledge.

> I can . . . know the bad on the basis of very imperfect notions of what would be good to perfection. . . .
>
> We know enough to create the conditions that will permit a man to lift himself upward. It is certainly better to do this than to try to pin him to the wall with a final articulation of his highest good.[90]

In conclusion, it is my belief that Fuller has made good his case against legal positivism and has established the basic usefulness and unavoidability of some concept of the natural law. This is all he does and it is all he really sets out to do. From the base which he has provided, and perhaps only from a base such as this, the argument can now profitably be shifted to the nature and content of the natural law. Fuller's position on man and morality is no more than is necessary to tie his whole system together in a rational and comprehensible manner. While there is no time to assay Fuller's compatibility with the classical or Christian traditions of natural law, the very basic nature of his system and the modest claims he makes for it would suggest that such further investigation might prove profitable. Fuller's system is based on man, but not in an exclusive or ultimate sense. Thus, it might prove a useful framework for those who are more confident about the nature of ultimate reality than is Fuller.

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88. FULLER, *op. cit. supra* note 60, at 5.
89. *Id.* at 3 n.1.
90. *Id.* at 12.