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AMERICA, IN THE FIRST HALF of the twentieth century, heard little debate on the question, "Need the law be moral?" Many who might have taken the negative in such a debate said nothing because they thought the question meaningless or at least unprofitable.[1] Not imagining that the law could need conscience, they discounted the power of conscience to make demands upon the law, and so put aside the problem of relating morals and the law. It was enough to know that in the distant past Blackstone had maintained that an immoral law had no validity,[2] while Austin asserted that a law which actually exists is a law though it contravene morals.[3]

The debate could be revived only by the occurrence of some event in which might appear the unimagined horrors that could be produced by laws which neither relied upon conscience nor answered to conscience. Such an event began to unfold in the thirties, but it fully evolved in the forties, and it has since had the effect of reviving debate upon the most uneasy question of jurisprudence.

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1 See Pound, *Natural Natural Law and Positive Natural Law*, 68 L. Q. REV. 330, 335 (1952).

2 1 BLACKSTONE, COMMENTARIES *41.

3 AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 185 (1954).

The Event that Provoked Debate

The event made its crucial impact after the war, when the German courts faced the task of restoring respect for law and justice after the collapse of a regime that had respected neither. One phase of that task was the resolution of a practical legal problem. Atrociously inhuman acts perpetrated during the Nazi regime were claimed to be immune from legal sanction because those acts had served the purposes of statutes enacted by the regime and repealed after its collapse.

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The first "denazified" German courts had to resolve this problem under decrees of the occupation government.[4] The decrees declared that some of the acts described were now punishable as crimes against humanity. The judge sitting in such a case could find that the occupation decrees were existing law, to be applied regardless of any moral issues which might seem to be involved. A few judges did boggle at applying the decrees as ex post facto criminal laws. Most of them, however, fulfilled the expectations of observers who said that "the German judge worships the written law and slavishly follows its letter."[5]

Later, when the decrees were withdrawn, the German judges startled the legal world. They disallowed the defenses, by declaring void the Nazi statutes relied upon. The phenomenon is most consistently evident in a series of "informer" cases. The most famous of these, rather late in the series, was tried in 1949.[6]

In 1944, a German soldier, in transit between assignments, visited briefly with his wife. He said to her that he disapproved of Hitler and other leading Nazis, and that he regretted the failure of the then most recent attempt to assassinate the Leader. The conversation was private; the wife was not in military service or engaged in war production. She reported the remarks and the soldier was condemned to death. Because of the military crisis, his sentence was commuted and he was sent to the front. He survived the war and charged his wife with having unlawfully deprived him of freedom – a crime under the German Criminal Code of 1871.

At the woman's trial, it appeared that she had informed against her husband because she was interested in other men. Her defense was that her act was lawful, as the denunciation of a criminal.

A statute enacted in 1934 made imprisonment the penalty for public statements disparaging the Party or its leaders and calculated to undermine the people's confidence in their political leadership. A 1938 statute provided the death penalty for persons guilty of impairing or destroying the national power of resistance. This law specified the offenses of publicly soliciting or inviting refusal to fulfill obligations of military service and of publicly seeking to injure the will of the German people to resist their enemies. It was part of a com-

[4] Loewenstein, *Reconstruction of the Administration of Justice in American-Occupied Germany*, 61 HARV. L. REV. 419 (1948).

[5] *Id.* at 432.

[6] 64 HARV. L. REV. 1005 (1951).

prehensive enactment punishing such acts as harboring deserters and evading military obligations by self-inflicted injuries. Upon the basis of his conversation with his wife, the soldier was convicted under one or both of these statutes. Both statutes were repealed at the end of the war.[7]

The postwar court found the wife guilty under the Code of 1871. Her defensive reliance upon the Nazi statutes postulated, of course, that the statutes were valid and that her husband's conversation with her was an act criminal within the intent of the statutes. A finding that the Nazi court had condemned her husband contrary to the intendment of the statutes would not exculpate the wife. In convicting her, the court found the statutes, at least in so far as they purported to warrant her husband's conviction and to justify her denunciation of him, were void because they were "contrary to the sound conscience and sense of justice of all decent human beings."[8] In similar decisions, the Nazi statutes upon which the defendants relied were found invalid because contrary to a "higher law."[9] From the embers of the Nazi statutes' funeral pyre, the flame of debate was rekindled by Gustav Radbruch.[10]

A Positivist Converted

Before the war, Radbruch's legal positivism had been unexceptionably orthodox.[11] He had preserved the insistence of Austin[12] and Kelsen[13] upon the proposition that men have a moral duty to make good laws and to administer the law morally. Austin had acknowledged that every developed legal system contains certain necessary elements "bottomed in the common nature of man."[14] Kelsen,[15] and Radbruch after him, saw a place for moral factors in the acceptance of the state, the personification of the law. Again following in the steps of Austin[16] and Kelsen,[17] the prewar Radbruch had declared that there is no necessary moral element in the law itself: "the view of values and the view of existence lie side by side, like distinct closed circles"[18] and "statements concerning the Ought may be established or proved only by other statements concerning the Ought."[19]

Austin[20] himself, and his American disciple Gray,[21] had rejoiced in the prompt and thorough acceptance accorded by the German jurists to the great "truth" of legal positivism: "the Law of a State . . . is not an ideal, but something which actually exists. . . ."[22] As recently as 1951, an American student of the German courts operating

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7 Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 653, 654 (1958).

8 Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 619 (1958).

9 Fuller, *supra* note 7, at 659.

10 Hart, *supra* note 8, at 616.

11 THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN 52, 53, 55, 57 (Wilk transl. 1950).

12 AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 231 (1954).

13 Kelsen, *The Pure Theory of Law, Part I*, 50 L. Q. REV. 474, 481 (1934).

14 AUSTIN, *op. cit. supra* note 12, at 373. See *id.* at 367-69.

15 Kelsen, *The Pure Theory of Law, Part II*, 51 L. Q. REV. 517, 535 (1935).

16 AUSTIN, *op. cit. supra* note 12.

17 Kelsen, *supra* note 15, at 517.

18 THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN 52, 53 (Wilk transl. 1950).

19 *Id.* at 55.

20 AUSTIN, *op. cit. supra* note 12, at 187.

21 GRAY, THE NATURE AND SOURCES OF THE LAW 96 (1921).

22 *Id.* at 94.

under the occupation directives thought the German judge was ". . . unaffected by intellectual doubts as to the intrinsic justice of the legal rule he has to apply, provided it is enacted by the authority of the state, and he does not question whether the authority is legitimate or not."[23]

Radbruch,[24] in 1946, declared his renunciation of the central positivist doctrine on the relation of law and morals, that the law as law has no necessary moral content. He had become convinced that the thorough commitment of the German lawyers to that doctrine and its slogan "law as law" had helped the Nazis to obtain power and to use it through their lawless statutes.

It should be remarked that some of the Nazi statutes were lawless to a degree far beyond the iniquity of the statutes relied upon by the soldier's wife. The regime had enacted a number of statutes which purported to make lawful, ex post facto, killings which had occurred in Party purges and in the concentration camps. The killings were crimes under the laws in effect when they occurred, but the "curative" statutes, which were often secret, declared them lawful.[25]

Convinced that these evil laws had gained and held their sway by grace of the positivistic dogma on the law's immunity to moral requirements, Radbruch announced his new doctrine of the law above the statute. The *Recht,* as he called it, is a legalizing norm, which gives or denies legality to the statute. The *Recht* is not Kelsen's higher norm which determines merely the necessary form of enactment, without reference to the content thereof. The *Recht* contains, among its necessary elements, the fundamental principles of humanitarian morality. These moral elements of the *Recht* test the formally enacted statute; the statute has legality or legal validity only if it meets this test.[26]

A Positivist Concerned but Not Converted

H. L. A. Hart, the Oxford professor of jurisprudence who has for several years been visiting at Harvard, finds *naïveté* both in Radbruch's indictment of positivism as an aid to Nazi power and in Radbruch's doctrine of the legalizing *Recht.*[27] Professor Hart thinks that there was no connection between the positivisitic separation of law from morals and the Germans' acceptance of a regime of statutory lawlessness.[28] He considers that Radbruch's new doctrine sacrifices the integrity of morals[29] and brings back into the law a bit of "stark nonsense" which Austin had happily eliminated.[30]

To Professor Hart, the problem of the unjust law is not a legal problem. It poses, he thinks, a purely moral dilemma; the citizen who faces the dilemma is simultaneously

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[23] Loewenstein, *Reconstruction of the Administration of Justice in American-Occupied Germany*, 61 HARV. L. REV. 419, 432 (1948).

[24] Radbruch, *Gesetzliches Unrecht und Ubergesetzliches Recht,* 1 SUEDDEUTSCHE JURISTEN-ZEITUNG 105 (1946), reprinted in RADBRUCH, RECHTSPHILOSOPHIE 347 (1950). Some students of Radbruch feel that his humanism had led him much earlier to a recognition of the existence of "supra-positive" norms. See Wolf, *Revolution or Evolution in Gustav Radbruch's Legal Philosophy*, 3 NATURAL L. F. 1, 5 (1958).

[25] Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 651-52 (1958), citing Radbruch, *Die Erneuerung des Rechts*, 2 DIE WANDLUNG 8 (1947) and GIESE, *Verkindung und Gesetzeskraft,* 76 ARCHIV DES OFFENTLICHEN RECHTS 464 (1951).

[26] Radbruch; *supra* note 24.

[27] Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617-18 (1958).

[28] *Ibid.*

[29] *Id.* at 620.

[30] *Id.* at 616.

subject to two contradictory moral duties – to resist the law and to obey the law. He is obliged to obey the law by the moral ideal of fidelity to law, which requires obedience to any law, simply because it is law.[31] On the other hand, he is morally bound to resist the law if obedience to it involves an act which is contrary to other moral ideals.[32] Therefore, the positivistic assertion that the iniquitous law is still law does not solve, or purport to solve, the question, "Should the citizen submit or resist?" That can be answered only by a moral choice between the dilemmatic moral obligations.[33]

It seems that Professor Hart has added a complicating factor to the problem of choice which Austin described. Austin said that the citizen who disobeyed a law which was contrary to the law of God would be "hanged up," and his hanging would prove that the unjust law was valid.[34] The validity which Austin claimed for the law was, as Holmes perceived,[35] a simple physical validity. The law is an accurate prediction that its violators will hang. But that is not enough for Hart – he postulates an obligatory character in the legal norm, as Kelsen did,[36] but, unlike Kelsen,[37] identifies or at least reinforces the legal obligatoriness of the law by the moral ideal of fidelity to law. This ideal imposes a moral duty to obey the law which exists, whatever the content of that law.[38]

It is here, of course, that Professor Hart involves himself in what his colleague Lon Fuller describes as Alice-in-Wonderland nonsense.[39] His moral dilemma postulates a moral duty to do what is (in the case supposed) immoral, and it purports to offer a morally face choice between two immoralities.

That kind of nonsense is not imposed by any ethical system, not even by Benthamite utilitarianism from which Professor Hart takes his formula for the ideal of fidelity to law, "to obey punctually; to censure freely."[40] In Bentham's book, resistance to law was moral when resistance contributed more to the common utility than obedience did.[41] In the converse situation, resistance was immoral. Professor Hart would have it that both obedience and resistance are, in the same situation, both moral and immoral.

Bentham limited his thesis on the morality of resisting the law not by principle, but by what he took to be an observed fact. Not having seen or imagined the Nazi regime, Bentham said there is no common sign, except an explicit convention, by which the greater utility of resistance might be known.[42] Yet Bentham insisted upon the morality of resistance in principle.

> The discontented party would then take this resolution to resist or to submit, upon just grounds . . . according to what should ap-

[31] *Id.* at 597, 622.

[32] *Id.* at 620.

[33] *Id.* at 618, 620.

[34] AUSTIN, *op. cit. supra* note 3, at 185.

[35] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

[36] Kelsen, *The Pure Theory of Law, Part I*, 50 L. Q. REV. 474, 489-90 (1934).

[37] *Id.* at 485.

[38] Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618-20 (1958).

[39] Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 656 (1958).

[40] Hart, *supra* note 38, at 597, citing BENTHAM, *A Fragment on Government* (preface, 16th para.), in 1 WORKS 230 (Bowring ed. 1843).

[41] BENTHAM, *A Fragment on Government* (ch. IV, para. 21), in 1 WORKS 287 (Bowring ed. 1843).

[42] *Id.* at 287, 288 (ch. IV, paras. 22 and 26).

> pear to them the importance of the . . . dispute . . . [and] the probability . . . of success – according, in short, as the mischiefs of submission should appear to bear a less, or a greater ratio to the mischiefs of resistance.[43]

Austin does not tell us how he would apply the Benthamite doctrine to the case of the citizen hanged up to demonstrate the validity of the law. But neither does Austin suggest that the law's validity creates a moral duty to obey it or that the citizen's choice is a moral dilemma in which the alternatives of resistance and submission are both morally evil and, at the same time, morally good.

The rationale of Kelsen's insistence upon the amorality of law seems quite clear. For him, morality exists as a fact of subjective human experience and that experience motivates some of man's external acts,[44] even those "natural acts" by which a legal system is established and those by which men make laws and apply them.[45] Yet, because morality is utterly irrational, it cannot communicate itself to the content of the general or specific norms of law which are evolved rationally from the basic formal norm.[46]

Holmes' rationale is not so clear – one does not know whether he insists absolutely upon the amorality of law,[47] as Kelsen does, or whether his postulate of the law's lack of moral content is only tentative. Certainly he had no confidence in the morality relied upon by the traditional common-law judges.[48] Yet Holmes cherished a faith in the man of the future – the master of statistics and economics.[49] It is possible that this faith founded a hope that Holmes' messiah should someday validate a morality which would rationally modify the bad-man view of law.

Professor Hart is not content to leave the positivistic doctrine where Austin, Holmes and Kelsen left it. He is so moved by the Nazi statutes and by their effect upon Radbruch and the German judges that he attempts to link the amoral law and the moral ideal of fidelity to law. Professor Fuller finds Hart's attempt impossible because there is, in the system of legal positivism, no mediating principle between law and morality[50] – neither can generate or be generated by the other.

Law and Morality: Mediated or Differentiated

For Radbruch, the mediating principle is the fundamental of humanitarian morality. Professor Fuller proposes human purpose as the mediating principle which tests the morality of all human conduct and which tests the law itself as a product of human conduct.[51] "What law *is* cannot be separated from what it is *for,* and what it is *for* can not be separated from what it *ought to be*"[52] seems a fair, if concise, statement of Fuller's view. He asserts that law

[43] *Id.* at 291 (ch. IV, para. 39).

[44] Kelsen, *The Pure Theory of Law, Part I,* 50 L. Q. REV. 474, 481 (1934).

[45] Kelsen, *The Pure Theory of Law, Part II,* 51 L. Q. REV. 517, 534-35 (1935).

[46] Kelsen, *supra* note 44, at 484.

[47] Hart, *Holmes' Positivism – An Addendum,* 64 HARV. L. REV. 929, 930, 932 (1951).

[48] Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 460 (1897).

[49] *Id.* at 470.

[50] Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart,* 71 HARV. L. REV. 630, 656 (1958). Compare Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 624-26 (1958).

[51] Fuller, *supra* note 50 at 644, 645, 661, 665-69, 670.

[52] Witherspoon, *The Relation of Philosophy to Jurisprudence,* 3 NATURAL L. F. 105, 108 (1958).

is tested by "those principles of social order which will enable men to attain a satisfactory life in common." He conceives that the one central aim common to all the schools of natural law is the discovery of those principles. All theories of natural law, he says, accept the possibility of "discovery" of the purposes for which men act in social concert.[53]

To explain the relation of law and morals in terms of a "mediating principle," as Professor Fuller does, seems to me an undue concession to the positivistic position. The explanation seems to accept as its point of departure the positivistic view that the legal order and moral order have not the same foundation, thus the "mediating principle" appears to be less than fundamental.

The Thomistic philosophy of law and morals postulates a common foundation of both orders. The orders are then differentiated — rather than mediated — by principles derived from the concept of rational coercibility.

Both law and morals are orders of conduct — the conduct to be ordered is conduct which can be performed consciously and voluntarily, so the order to be imposed upon such conduct and the norms of order must be rational. Though non-rational concomitants can aid the effectiveness of conduct consciously determined, no norm can have basic effectiveness in ordering such conduct unless the norm rationally erects rational purposes to guide human choice.

Professor Fuller's phrase "purposes for which men act" seems to limit the area of reality in which reason can discover purposes for human conduct, to be imposed by legal norms. The area he contemplates seems to be that which includes the purposes to which the men of a given community have given positive, *de facto* recognition. This looks to me like an exchange of legal positivism for moral positivism.

For a Thomistic Aristotelian,[54] the area into which reason pushes its search for purposes to be imposed by law has a dimension beyond that which Professor Fuller describes. Reason can and does discover such purposes by recognizing that some purposes are proposed to man by the constitution of his nature. Reason perceives that unless a man adopts these purposes, he cannot be fully a man. The ultimate reach of reason's voyage of discovery into nature achieves the recognition of God as nature's intelligent Creator. Here reason grasps the conclusion that the purposes which nature, through reason, tells man to make his own in order to be a perfect man are the purposes of God. Thus it appears that by embracing these purposes man achieves and perfects his personal relation with God, reciprocating God's love for him expressed in the acts by which God creates and conserves him.

The moral order regulates human conduct by holding up to man purposes to be rationally understood and voluntarily embraced. The moral norm touches immediately the internal elements of human conduct, understanding and voluntary determination, which are beyond the reach of direct coercion, and whose essential character is destroyed if coercion reaches them indirectly. An act which is done without understanding that it is moral, or which is done with that understanding but involuntarily, is not a morally virtuous act. On the other hand, much human conduct

[53] Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L. F. 83, 84 (1958).

[54] See text *infra* at notes 71-76.

has an external element, which is within the reach of coercive force. Holmes correctly perceived that there is no positive law which does not threaten force to coerce this external element of human conduct, but he did not adequately distinguish between society's rational use of force or the threat of force which makes law, and society's irrational use of force which is simple violence. Human conduct is rationally and therefore justly coercible only when (1) the conduct's external element is separable from its internal element, and (2) the external element, so separated, serves an objectively just need of other men. An enactment in legal form which coerces or attempts to coerce conduct that does not meet this dual test is not law but violence.[55]

Differentiation Implies Limitation

Though Professor Fuller rejects the positivistic doctrine as inherently incapable of reconciling law and morals, he is in sympathy with what he conceives to be the real reason for the positivists' fear of the natural law schools' interpretation of law.[56] He feels that, though the positivists' fear is "morbid," its object is quite real. He shares their apprehension that an excess in the purposive interpretation of law may issue in affronts to human freedom and dignity.[57] Fuller thinks it is this excess, and not the commonly alleged and never realized anarchy, which the positivists fear may result from an acceptance and application of the purposive view of natural law. He agrees that there is reason to fear that if the purposive interpretation of law is carried to excess it may issue in one of the worst vices of totalitarianism, requiring by force of law conduct which is meaningless or grotesque when it is not spontaneous.[58]

This anomaly, a purposive law requiring external conduct which is meaningless when it lacks the internal disposition that it purports to express, is impossible when the legal order meets the Thomistic test of coercibility. We can illustrate with an instance Professor Fuller suggests, the act of hanging out flags. The janitor of the city hall might be properly coerced by law to put out the flag at city hall on the occasion of the visit of a personage who stands for political and moral ideas abhorrent to the janitor – the flag at city hall does not speak for the janitor and the reception may have no reference to the ideas of the personage. But a law coercing the janitor to put out a flag at his own home on the same occasion might well be, upon the Thomistic principle, a law without legal character. It certainly would be if: *either* the janitor's act of hanging out a flag at his home could in the circumstances signify nothing but approval of principles immoral because contrary to the law of God expressed in human nature, *or* that act contributed nothing to the social welfare which was not a derivative of the janitor's profession of approval of principles he did not, in his own mind, approve.

A Moral Application of an Immoral Law

Professor Fuller, in his reply to Professor Hart, is careful to dissociate his view of natural law from what he conceives to

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[55] See GRANERIS, 1 PHILOSOPHIA IURIS, DE NOTIONE IURIS 100-12, 122 (1943).

[56] Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 660, 669 (1958).

[57] *Id.* at 671.

[58] *Ibid.*

be the Roman Catholic position.[59] He feels that Catholics' acceptance of the Pope's power to make an authoritative pronouncement on natural law identifies natural law with "a law that is above human laws"[60] and reduces the Catholic position on the subject matter of such pronouncement to another form of positivism.[61] Such pronouncements, in Professor Fuller's opinion, make it impossible for Catholics to discuss the relation of enacted law to "generally shared views of right conduct that have grown spontaneously through experience and discussion."[62]

He instances the pronouncement of Pope Pius XII on the duties of Catholic judges in divorce actions.[63] The Pope, addressing the national convention of Catholic Italian lawyers in 1949, made two points.[64] Catholics serving as judges in jurisdictions where the existing law sanctions divorce should not, "except for reasons of serious import," grant decrees touching marriages "valid before God and the Church." Catholic judges should not, when granting divorce decrees, induce practically "the erroneous view that the existing bond of a valid marriage is broken and that a subsequent union is valid and binding." The Pope said no more, but from the background of the question in the Roman decrees and in the writings of moralists and canonists, it is clearly supposed that the sense of the community supports the divorce law. And it is equally clear that the most cogent of the reasons which warrant Catholic judges to issue a decree are reasons which relate to their duty to perform their office in the manner prescribed by the law which creates that office, and to their duty to preserve peace and order within the community. Neither Pope Pius XII nor any of the authorities[65] who have made decision or doctrine on these matters suggest that a judge, in applying such a law, morally should or might alter the sense given it by constitutional process. If the judge would not be morally warranted in granting the decree according to the requirements of the existing law, and upon the facts proved, his moral duty is to disqualify himself from sitting in the case or, if necessary, to resign his office.[66]

It is beyond question that Professor Fuller does not reject either the right of any judge to profess publicly his moral convic-

[59] *Id.* at 638, 660.

[60] *Id.* at 660.

[61] *Ibid.*

[62] *Ibid.*

[63] *Ibid.*

[64] Allocution to the members of the Catholic Lawyers' Union of Italy meeting in Rome for their National Convention, delivered 6 Nov. 1949, 41 ACTA APOSTOLICAE SEDIS 597, 603 (1949). The official text is Italian; I am responsible for the translation. The two sentences of the text which refer to divorce decrees represent one illustration of the general proposition that not every application of an unjust law involves the judge's approval of the law.

[65] See, *e.g.*, the decree of the Holy Office, 27 May 1886, addressed to questions proposed by certain Bishops in France with reference to the propriety of the conduct of a Catholic judge who, it was postulated, in no way manifested externally his moral convictions. The questions were answered in the negative. DENZINGER-BANNWART, ENCHIRIDION SYMBOLORUM, No. 1865 (1928), citing 22 ACTA SANCTAE SEDIS 635 (1889-90).
For a summary treatment of the problem see PRUMMER, MORAL THEOLOGY, No. 129, 130, 286 (Nolan ed. 1957).
I have seen an excellent detailed study of the history of this problem by Rev. Louis J. Hiegel, S.J., J.C.D., of Loyola University, New Orleans; I believe Father Hiegel's study has not yet been published.

[66] This conclusion is clearly indicated when one refers the doctrine of the theologians on divorce to their doctrine on the basic duties of the judge. See, *e.g.*, II NOLDIN, *SUMMA THEOLOGIAE MORALIS*, No. 727 (1951); III *id.* No. 669.

tions, or the related rights to abstain from exercising his office when the law gives him that option, or to eschew the office, so as to remove himself from the moral dilemma which offers the alternatives of a breach of trust and a breach of some other conscientious duty. Why, then, does the Pope's pronouncement disturb him? Perhaps because the newspaper report[67] upon which alone he relies did not make the Pope's position clear. Yet, because Professor Fuller takes this pronouncement as only one instance illustrating a view of natural law which he rejects, more general and fundamental reasons for his dissatisfaction must be found.

A Pauline Paradox

In one paragraph, Professor Fuller mentions the Catholic acceptance of Church pronouncements on natural law and the Catholic Church's fostering of the "rationalistic tradition in ethics."[68] He has stated here, apparently without realizing it, the elements of a paradox which is as old as Christianity. St. Paul, in the first chapter of Romans,[69] announces that God has shown Himself and His law to the Gentiles by manifesting His attributes in creation, so that the principles of His law can be perceived by men who reason upon "the things that are made." Paul declares not only that certain conduct is contrary to God's law, but that such conduct's opposition to God's law is manifest to one who attends to the indications of nature. The elements of the Pauline paradox are these: the moral law is so manifest in nature that its precepts can be discovered there, without revelation; God has now revealed that the moral law is manifest in nature not only in a general way but in respect of certain of its specific precepts.

The Christian Church has always claimed to teach without error what God has revealed through Christ and His Apostles.[70] The Church thus teaches (1) the existence of natural law, (2) the ability of human reason to discover the precepts of that law and to apply them, (3) the content of some of those precepts and their correct application in some circumstances.[71]

The Catholic doctrine of natural law does not present to the civil society or to the student of legal science a " 'natural law' capable of concrete application like a written code" – a phenomenon which Professor Fuller rejects. The Catholic doctrine validates the power of civil society to make,

[67] Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 638 (1958), citing N. Y. Times, Nov. 8, 1949, p. 1, col. 4 (late city ed.).

[68] Fuller, *supra* note 67, at 660.

[69] Romans 1: 18-32.

[70] St. Athanasius said of the first Ecumenical Council, "The word of the Lord, pronounced by the ecumenical synod of Nicea, remains forever." Letter to the Africans, n. 2.

[71] The Vatican Council, in the chapter on Revelation, cites St. Paul, Rom. 1:20, and declares that revelation is not absolutely necessary for man to know his natural purpose as God's creature, for by reason man can know that purpose and how he should attain it. DENZINGER-BANNWART, ENCHIRIDON SYMBOLORUM, Nos. 1785, 1786.

The Second Lateran Council in 1139 condemned the neo-Manichean heresy which alleged that the marital union is contrary to God's law. *Id.* No. 367. That the Church taught the lawfulness of natural marriage appears more explicitly in the condemnation of Manichean doctrine in 563: "If anyone condemns human marriage and declares the begetting of children a horrible thing . . . let him be anathema." *Id.* No. 241. The Council of Trent in 1563 attributed to natural marriage as well as to sacramental marriage the qualities of perpetuity and indissolubility. *Id.* No 969. The decree of the Holy Office cited above in note 61 is one example of how the Church indicates specific application of the doctrine that marriage is indissoluble by the law of nature.

and the competence of the jurisprudent to recommend, reasonable accommodation of the broad principles of human conduct to the concrete contingencies in which a society may find itself.[72]

Aristotle and Antigone

Professor Fuller relies upon Aristotle for justification of his renunciation of "the notion that there is a 'higher law' transcending the concerns of this life against which human enactments must be measured and declared invalid in case of conflict."[73]

Of course, Aristotle never contemplated even the possibility of a general or public divine revelation such as that declared by St. Paul. True too, it was in the *Rhetoric,* and not in the *Ethics,* that Aristotle cited the lines that Sophocles gave Antigone.[74]

Yet Aristotle did not foreclose inquiry into the divine fundament and finality of morals. Indeed some of the teleological doctrines announced in Aristotle's *Metaphysics*[75] are pregnant with a much larger view of man's natural responsibility to God than is suggested in the *Ethics*' few allusions to the divine elements of human virtue.[76] Can one say that this view is closed forever to Aristotle's followers because the Philosopher himself applied to morals only a limited measure of his teleology?

The purposes of this paper are to state the elements of the revived debate on the legal character of unmoral laws, and to relate those elements to their historical context. A full restatement of the Thomistic position on the general question, an adequate analysis of the duties of Catholic officials applying divorce laws, and a more thorough consideration of the difficulties Professor Fuller raises, are tasks the accomplishment of which will require much labor from many writers.

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[72] See AQUINAS, SUMMA THEOLOGICA, I-II, q. 91, art. 3, ad 1; q. 94, art. 4; q. 95, art. 2; q. 104, art. 3, ad 1.

[73] Fuller, *A Rejoinder to Professor Nagel,* 3 NATURAL L. F. 83, 84, (1958).

[74] ARISTOTLE, RHETORIC BK. I. 13 (1373b, *l.* 12); Bk. I. 15 (1375b) (Cooper transl. 1932).
"The unwritten and unswerving laws of Heaven.
Not of to-day and yesterday they are,
But everlasting: none can date their birth.
Was I to fear the wrath of any man,
And brave Gods' vengeance for defying these?"
SOPHOCLES ANTIGONE 453-59, in 1 WAY, SOPHOCLES IN ENGLISH VERSE 195 (1909).

[75] ARISTOTLE, MERAPHYSICS Bk. a 2 (994a and b, especially 994b, *l.* 5-10), Bk. K. 7 (1064a and b, 1065a and 1065b, *l.* 1-5) (Ross transl. 1928).

[76] See, *e.g.*, ARISTOTLE, NICOMACHEAN ETHICS Bk. X. 8 (1178b, *l.* 7-25; 1179a, *l.* 23-33) (Ross transl. 1925).