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THE NATURAL LAW PHILOSOPHY OF LON L. FULLER

CHARLES L. PALMS, C.S.P.*†

MUCH OF THE NEW EMPHASIS on natural law can be traced to the failure of positivism, the prevailing legal philosophy, to give meaningful answers to the problems of life in society; also to the fear generated by the dreadful experiences of "lawless law" enacted by totalitarian dictatorships like Adolph Hitler's.¹

One contemporary legal philosopher who has been vitally aware of the failure of legal positivism and who was articulately urging a return to the natural law even before the full tragedy of Hitler had run its course, is the present Carter Professor of General Jurisprudence at the Harvard Law School, Lon Luvois Fuller.

Professor Fuller was born at Hereford, Texas, in 1902. He received his Bachelor of Arts degree from Stanford University in 1924. After acquiring his Doctor of Laws degree from Stanford in 1926, Professor Fuller taught at the University of Oregon Law School (1926-1928), the University of Illinois College of Law (1928-1931) and Duke University Law School (1931-1939). Since 1940, Professor Fuller has been asso-

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† Just as the law is divided into substance and procedure, so the natural law philosophy of Lon L. Fuller conveniently divides itself into a substantive aspect and a procedural one. Fuller's natural law philosophy is not complete unless it is presented under both aspects. Under the substantive rubric, Fuller probes the meaning of law as it relates to the proper ends to be sought through legal rules. In dealing with the procedural aspect, Fuller studies the necessary pre-conditions for good law, such as promulgation, clarity, proper administration and enforcement, etc.

It is difficult for the student of legal theory to find a systematic presentation of Professor Fuller's legal philosophy. Much of Fuller's legal writing is to be found in occasional law review articles and book reviews. Until the present article was written, no comprehensive presentation of Fuller's natural law approach to the *substantive* aspect of law existed. Professor Fuller himself has recently provided us with an organized presentation of the *procedural* aspect, which he terms the "internal morality of law" (*The Morality of Law*, New Haven: Yale University Press, 1964). The present article, combined with Fuller's recent book, makes it possible for the student of legal theory to examine the natural law thinking of one of America's foremost legal philosophers.

¹ Ward, *The 'Natural Law' Rebound*, 21 REV. OF POLITICS 119-20 (1959).

ciated with the Harvard Law School. He is also on the Editorial Board of the *Natural Law Forum*. Father Leo R. Ward, C.S.C., Professor of Philosophy at the University of Notre Dame, has referred to one of Professor Fuller's books² as "one of the simplest and most modest and yet most deceptively powerful affirmations of natural law in our time. . . ."³

The present study of Fuller's natural law philosophy consists of two basic parts: the first presents Fuller's critical exposition of the inadequacies of legal positivism; the second sets forth Fuller's own natural law views.

Critique of Legal Positivism

In 1939 Professor Fuller wrote, in reviewing Hall's *Readings in Jurisprudence*:

Often what an author "stands for" is much less important than how he got to where he is standing; the negative side of a man's work, his critique of opposing views, is often—perhaps usually—more important than his affirmations.⁴

The next year Professor Fuller presented the negative side of his own work, a lucid critique of the influence of positivist theories on American law.⁵ Tracing the history of positivist theories from English philosopher Thomas Hobbes through the so-called American Legal Realists and the Vienna School of Hans Kelsen, Fuller argues that legal positivism is intellectually unsound and that its teachings have disastrous practical results for society.

English Positivism

Legal positivism developed in England

as a result of the law's quest for an exclusive hegemony of its own where it could be free from the complications of ethics and philosophy.⁶ Hobbes believed that the prime objective of law was to achieve peace and order in society. Ethics and philosophy complicated things by supplying reasons for ignoring or disobeying the law. Because the interests of men tended to conflict, and because resort to reason was unable to bring about the requisite peace and order in society, sovereign authority had to be the dominant influence in society. This authority resided in the king or protector, and the rules of the sovereign for settling disputes were the law. According to Hobbes' theory, the law was supreme and men had to blindly obey regardless of personal belief.⁷

Hobbes, however, did not entirely abandon reason. Ideally, the sovereign was to follow it and enact reasonable legislation. But if the sovereign were unreasonable, and enacted an unjust law, the reasonable man would be expected to obey the *law* in the interests of peace and order.⁸ Thus, public order would replace justice as the ultimate criterion of law.

About a century later, John Austin agreed with Hobbes that the starting point for law could not be that which is right or just. This would be "cut-throat science" leading to social upheaval.⁹ It was the sovereign that gave coherence to the legal system and offered a clear-cut definition of law. Therefore, Austin defined law as the command of the state. In Austin's opinion, however, Hobbes had oversimplified the

² FULLER, *THE LAW IN QUEST OF ITSELF* (1940).

³ Ward, *supra* note 1, at 116.

⁴ Fuller, Book Review, 87 U. PA. L. REV. 625-26 (1939).

⁵ FULLER, *op. cit. supra* note 2.

⁶ *Id.* at 16-17.

⁷ *Id.* at 19-25, 86-87.

⁸ *Ibid.*

⁹ Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457, 459-60 (1954).

nature of the sovereign. Austin wanted to identify the sovereign precisely. Once he had located the sovereign, he felt that he would have the essence of law and thereby pinpoint the unifying force in law.

Austin found it difficult to locate the sovereign, however, because the system of checks and balances had complicated the structure of the state. How to explain law laid down by judges independent of the king? To Hobbes, the judge was the agent of the sovereign, and the ruler adopted the judge's decision as his own. Austin could not accept this answer; it was more metaphor than actual fact. Austin, therefore, redefined the sovereign as that person or group of persons which society was in the habit of obeying. Thus, Austin rested the foundations of the legal order on habit or custom.¹⁰

Professor Fuller notes that instead of solving the theoretical problems raised by Hobbes' analysis of the law, Austin's development raises more embarrassing questions. Suppose the bulk of society ceases to render obedience to law — what happens to the sovereign? Suppose certain commands of the sovereign are occasionally ignored — is the ignored command still law? Suppose the sovereign issues contradictory commands — which one is the law? Suppose the sovereign declares that his power is legally limited, for example, by a two-thirds vote of the populace — is the real sovereign power in the people? Finally, the most difficult question of all — suppose there are gaps in the law? Doesn't every gap represent a possible point of entry for ethics and philosophy, the very complication that Hobbes and Austin were trying to eliminate from the

law?¹¹ One answer to this last question is that there really are no gaps in the law of the sovereign. What the sovereign has not forbidden he implicitly permits. This answer is typical of the fantasy that Austin's theory had led him into.

Professor Fuller points out that in defining the law in terms of its source (the sovereign) the positivists had one advantage. They could point to a statute or a command and say, "This is law." What the sovereign *does* is clear; it makes positivism possible. But a question that remained unresolved in the theories of Hobbes and Austin was the precise identity of the sovereign. Fuller asks:

Is it (the sovereign) a real thing, a datum of nature existing apart from men's thinking? Or is it merely a way of viewing the world of possible legal phenomena? Is it an actuality, or a metaphor?¹²

Austin's writings were tinged with ambiguity on this point,¹³ and anxious to clear up the problem, Austin's philosophical heirs diverged along two lines: the "realists," and the "pure law" theorists.¹⁴

In America and Europe a school of legal "realists," enamoured with the scientific method, abandoned the metaphorical sovereign of Hobbes and the ephemeral custom of Austin, and rested the basis of law on a more concrete datum of nature. They sought law in external reality just as the physicist seeks physical laws in the laboratory experiment. They wanted a law easily identified and purified of ethics and morality.¹⁵

In Vienna, another school developed.

¹¹ FULLER, *op. cit. supra* note 2, at 33-38.

¹² *Id.* at 45.

¹³ *Id.* at 46.

¹⁴ *Id.* at 46-47.

¹⁵ *Id.* at 46-47, 53.

¹⁰ *Ibid.* FULLER, *op. cit. supra* note 2, at 26-31.

Hans Kelsen saw the futility of founding law either in the sovereign or custom or other datum of nature. Kelsen believed in an ideal of pure law — purified of morality which he called “wish law.”¹⁶ Realizing, however, that this pure law could not be founded in a datum of nature, he was bold enough to base his pure law on a simple methodological assumption.¹⁷

American Positivism

Professor Fuller, concerned principally with legal positivism as it has affected the American scene, concentrates his critique of legal positivism primarily on the American legal realists. The more prominent members of this school include John Gray, Oliver Wendell Holmes, Joseph W. Bingham, Walter Wheeler Cook, Karl N. Llewellyn, Jerome Frank, W. Underhill Moore and Edwin W. Patterson.

John Chipman Gray, in his *Nature and Sources of Law*, abandoning Austin’s criteria of custom, reverted to Hobbes’ sovereign, utilizing however, a more scientific approach. He held that the sovereign was not a “determinate” group of persons but a shifting and anonymous body. The state was an artificial unity; the real unifying principle in the practice of an attorney was the judge, a flesh and blood reality. Here was a concentration of power in a definite human being. The law was, therefore, defined as “the rules laid down by the courts.”¹⁸

Professor Fuller points out that Gray has not yet answered all the questions. What about the “inconsiderate” sovereign — two judges at odds with each other who hand down contrary opinions? And sup-

pose that when a number of judges are sitting in judgment on a case that the “majority” lays down a decision. A majority is a corporate entity, and the flesh and blood reality that the “realists” had found in the judge-made rule is lost. Gray ended up with the same problem that Austin never solved — trying to identify the sovereign.¹⁹

Oliver Wendell Holmes had reservations of his own about Gray’s definition of law as “the rules laid down by the court.” He saw that what judges *say* is different from what judges *do*. Holmes suggested that the definition of law should be the rules *acted on* by courts. This tendency of the realists in the direction of increasing realism was taken up by Bingham, Cook, Llewellyn and Frank. Agreeing with Holmes, they defined law in terms of the patterns of judicial behavior. Law was a generalization of the way judges act. Just as the behavior of atoms was the concern of the physicist, so the behavior of judges was the concern of the lawyer.²⁰ Why, asks Professor Fuller, stop at the behavior patterns of judges? What about the behavior of commissioners, the sheriff and the sanitary inspector? These officials make rules that affect us — ones that they talk about and then act on. Wouldn’t every state official have to be included within the realist schema?²¹

Professor Underhill Moore took the behavioristic approach one step further. He held that law was determined by “institutional patterns of behavior.”²² Banking Law, for example, would be determined

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 47.

¹⁸ *Id.* at 49.

¹⁹ *Ibid.*

²⁰ *Id.* at 51-53.

²¹ *Id.* at 53.

²² Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 453 (1934).

in part by the observed behavior patterns of bank tellers. Professor Fuller objects to Moore's behavioristic approach. He points out that behavior is often the expression of underlying mental attitudes, and that an analysis of these attitudes of mind involves more than the mere rationalization of behavior.²³ Moreover, regularities of behavior do not always provide the norm of the pattern. Often it is the unusual case that provides the norm because in such a case, the mental attitude behind the pattern is shown. It is not the behavior itself, but the purpose behind the behavior that is important to the lawyer and judge. For judges to simply search out and catalogue the habits of bank tellers is to make the bank teller the judge instead of the man sitting on the bench.²⁴

Finally, Professor Fuller asks, even if behavior patterns are the basis of law, how are judges to know these behavior patterns in deciding cases? Can these patterns be observed and recorded?²⁵ Is there some way that judges' attitudes and ideas are moulded by a cultural matrix whose patterns are engraved by frequency? How does a judge get to know all the patterns of activity of bank tellers?²⁶ Fuller suggests that the realists' insistence on law as a behavior pattern is reliance on an even greater phantom than Austin's sovereign.²⁷

Kelsenianism

Hans Kelsen reacted against absurdities implicit in the theories of the legal realists and their Austinian forebears. He believed in the positivist ideal — purifying the law

of the complications of ethics and morality and of every non-legal influence. He could not accept, however, the realist approach to this ideal. The realists were trying to separate the law that *is* (the "pure law" datum of nature) from the law that *ought to be* (ethics and morality). Yet realism yielded no useful test of this law that *is*. Ultimately, every kind of behavior pattern was law. There was no standard behavior that was not law, *i.e.*, mis-behavior. Besides, the study of behavior was not properly legal study at all.²⁸

Going back to Austin, Kelsen saw that the English jurist was begging the whole question by assuming that the sovereign was the essence of law. Kelsen asked, if the sovereign defines what *is* law, how do we define and describe this sovereign except by a prior legal order that the sovereign admittedly does not enact?²⁹

Isn't the very sovereign who defines a law, brought into existence and delimited by some pre-existing procedural law which places the law-making power in the hands of the sovereign in the first place? Law then becomes law in virtue of rules that are not "law."³⁰

Kelsen pushed his search for "pure law" to its logical conclusions. He saw that the search for the sovereign begun by Austin and continued by the realists ended in absurdity. Yet Kelsen believed that Austin's sovereign served a good purpose. The sovereign prevented ethics and morality from complicating the law. Thus, Kelsen retained the purpose for which the sovereign existed and rejected the search for the sovereign in any flesh and blood reality.

Kelsen, therefore, carefully analyzed the

²³ *Id.* at 455.

²⁴ *Id.* at 457-58.

²⁵ FULLER, *op. cit. supra* note 2, at 57.

²⁶ Fuller, *supra* note 22, at 459.

²⁷ FULLER, *op. cit. supra* note 2, at 59.

²⁸ *Id.* at 66-69.

²⁹ *Id.* at 81.

³⁰ Fuller, *supra* note 9, at 460-61.

purpose that the sovereign served, adopted the minimum of assumptions necessary to accomplish this purpose and set these assumptions down in a sort of charter. His law was not, therefore, founded in any flesh and blood reality like the sovereign or judicial behavior, but rather upon a fiction—a methodological premise. Kelsen whittled his starting point down to a minimum of metaphor. He made an honest fiction out of positivism.³¹

Instead of the sovereign of Austin or judicial behavior patterns of the realists, Kelsen substituted the idea of the “basic norm.” Professor Fuller points out that Kelsen’s theory of the “basic norm” admits that one must accept at least one pre-existing rule governing the law-making process before the law-making process itself can get started. The basic norm, being expressed in the singular, reduces this indispensable starting point to an ideal but fictitious minimum.³²

Professor Fuller concludes that though realism and Kelsenianism commence in opposite directions, they terminate with much in common. Both reject the unreal sovereign of Austin. Both see that as soon as the law tries to become “scientific” the road forks sharply, one branch leading to the realm of pure fact (the realists), the other leading to the realm of pure assumption (Kelsenianism). Each takes a different branch and is determined to follow it logically and uncompromisingly. Each reaps the results of its own limitation of method.³³

Separation of “Is” and “Ought”

Professor Fuller is not interested in mak-

ing a critique of legal positivism for criticism’s sake. His critique of positivism is more a by-product of his unrelenting quest for the underlying assumption of the law and legal theories. He has called his quest a rationalistic one. In pushing reason as far as he can, Fuller sees the purpose of legal philosophy as a quest for those principles that make possible the successful living together of men.³⁴ He sees the basic task of the lawyer as a search for truth and justice³⁵—finding ways by which people can live and work together successfully.³⁶ The task of the lawyer goes on in a dynamic social order, and law must be able to respond to ever changing situations.³⁷ The ideal is a just social order, and the law must always struggle to approach this ideal.

Professor Fuller sees the quest of the positivist as stopping precariously short of the goal of law. Positivism does not seek to promote ethical or moral or social goals for society. A positivist is fearful of ethics and morality which he believes confuse and distort the law. Positivism claims to have discovered the raw datum of law—the basic fact of law beyond which ethical research is useless.³⁸

The first principle of positivism is this: law can be discovered, sought out, examined and defined.³⁹ It is not the expression of the non-existent ideal of justice. In any given rule of conduct there is a basic distinction between what *is* in fact the law, and what that law *ought to be*. Therefore, the

³⁴ Fuller, *On Teaching Law*, 3 STAN. L. REV. 35, 46 (1950).

³⁵ Fuller, *Objectives of Legal Education*, 2 RECORD OF N.Y.C.B.A. 120, 121 (1947).

³⁶ FULLER, THE PROBLEMS OF JURISPRUDENCE 694 (1949).

³⁷ FULLER, *op. cit. supra* note 2, at 121.

³⁸ *Id.* at 109.

³⁹ Fuller, *supra* note 4, at 627.

³¹ FULLER, *op. cit. supra* note 2, at 69-75.

³² Fuller, *supra* note 9, at 461.

³³ FULLER, *op. cit. supra* note 2, at 76.

task of the legal philosopher is to give the principles for making this distinction, and the task of the lawyer is to find out what the law actually *is*.⁴⁰

Austin's positivism meant something *set* (*positus*) by the human will of the sovereign;⁴¹ therefore, the law that *is* was found in the expressed will of the sovereign. The realists, as stated previously, ultimately located the law that *is* in the behavior patterns of judges. Others who fall into the general classification of positivists either hold that the law that *is* can be found in some observable phenomena, or hold with Kelsen, that the law that *is* is not found in the observable, but is located in a methodological premise.

Professor Fuller's argument with positivism goes much deeper than occasional objections to the particular theories of Austin, Kelsen and the legal realists. Fuller attacks positivism at its very core. He takes the basic premise of the positivists—the striving for a complete separation of the *is* and the *ought* in law—and shows first that it cannot be justified in terms of reality. He thereafter points out in example after example how this attempted separation leads to disastrous consequences in practice.

The thesis that has dominated Professor Fuller's writing over the years is the inseparability of *is* and *ought* in the law. In 1940 he wrote: "In the field of purposive human activity, which includes . . . the law, value and being are not two different things, but two aspects of an integral reality."⁴² Sixteen years after the above was written, Professor Fuller was still making the same point:

⁴⁰ FULLER, *op. cit. supra* note 2, at 4-6, 55-56, 60-61.

⁴¹ FULLER, *supra* note 4, at 627.

⁴² FULLER, *op. cit. supra* note 2, at 11.

The problem I have in mind is that which arises when we attempt to reconcile the now generally accepted dichotomy of fact and value with a purposive interpretation of human behavior. For it is my thesis that when we accept the full consequences that flow from a view which treats human action as goal-directed, the relation between fact and value assumes an aspect entirely different from that implied in the alleged "truism" that from *what is* nothing whatever follows as to *what ought to be*.⁴³

Professor Fuller always brings his thesis down to the concrete test of its soundness. In simple examples he shows that what the law is cannot be separated from what it is for, and what it is for cannot be separated from what it ought to be.

A judge, for example, cannot properly interpret a law without considering its purpose. Positivists have tried to argue that words have a core of meaning and that this core is enough for the judge to work with. Fuller poses the case of a statute which excludes "vehicles" from parks, and then asks if such a law would exclude a truck used in World War II mounted on a pedestal as a memorial.⁴⁴

One cannot interpret a word in a statute without knowing the aim of the statute. Suppose a statute reads: "All improvements must be promptly reported to . . ." Notice how the meaning of "improvements" changes when you fill in "to the head nurse," or "to the town planning authority." The word "improvements" has no extra-legal standard that helps interpretation here. We know what the rule *is* only in the light of what the rule *ought to be*.⁴⁵

⁴³ Fuller, *Human Purpose and Natural Law*, 3 NATURAL L. F. 64, 68 (1958).

⁴⁴ Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-63 (1958).

⁴⁵ *Id.* at 664-66.

In another example, Professor Fuller supposes that an engineer, awkward in English, drafts instructions for the assembly of a machine. A professor of English and a mechanic both read and follow the instructions. The professor applies the words of the instructions in their literal sense and gets into trouble. The mechanic hardly notices the literal meaning and looks to what the engineer was trying to say. He assembles the machine easily. The professor was refraining from "value judgments" and kept the distinction between *is* and *ought*. But Fuller asks, *who* penetrated most truly to the empirical fact of these instructions, the professor of English or the mechanic?⁴⁶

Positivism makes the rigid distinction between *is* and *ought* in order to promote clear thinking in law. But Fuller asks if clarity in legal discussions is really advanced by this sharp distinction. The drawing of distinctions is not an activity that can be an end in itself. Fuller facetiously supposes that one might write a long treatise on the sharp distinction between pie and cake "disposing definitively of all the hard borderline cases, like Boston cream pie and upside-down cake. . . ."⁴⁷ Nor is it an answer to say that the distinction between *is* and *ought* involves the distinction between law and morality, that these concepts are important, and therefore must be distinguished. Is it important to distinguish pie and cake because they deal with the important subject of human nutriment? The question is, whether drawing the sharp line is important. Does making this distinction really dispel confusion? Does it really help?⁴⁸

When Professor Fuller rejects the positivist attempt to exclude *ought* from the law by making an absolute distinction between *is* and *ought*, he does not deny that there is some legitimate distinction between fact and value, and that it can be useful. Fuller's point is that the absolute distinction cannot be made the basic premise of any legal philosophy because it is not in accord with basic reality in which the *is* and the *ought* are both present. One cannot confine one's study to the *is* in the law and exclude the *ought*. Both are part of an integral reality. The distinction between *is* and *ought* may be useful for analytical purposes, but it cannot be assumed as a starting point.⁴⁹ In other words, the analysis of law must begin with experience, not self-imposed abstraction. One cannot separate the inseparable; and the positivist attempt to make such a separation leads to unfortunate results.

The attempt to eliminate the *ought* from the law has tremendous implications in the life work of the judge, the lawyer, the professor and student of law and the legal scholar.⁵⁰

The judge: Shall he be faithful to existing law, or assume a more creative role? Suppose he has impulses toward reform? Can he improve a tradition while transmitting it?⁵¹ Not as a positivist.

The lawyer preparing a brief: Shall he argue the letter or the spirit of the law? Shall he argue the rights of his client or the rightness of the case?⁵² Positivism dismisses the argument of "rightness."

⁴⁶ Fuller, *supra* note 9, at 469.

⁴⁷ FULLER, *op. cit. supra* note 2, at 86.

⁴⁸ *Id.* at 85-89.

⁴⁹ *Id.* at 7-12; Fuller, *supra* note 22, at 451-52.

⁵⁰ FULLER, *op. cit. supra* note 2, at 2-4.

⁵¹ *Id.* at 12; Fuller, *supra* note 44, at 646-47.

⁵² FULLER, *THE LAW IN QUEST OF ITSELF* 12 (1940).

The professor: How shall he teach? Will he ignore the ethical foundations of the law—the law that *ought* to be?⁵³ He will as a positivist.

The student: Shall he seek the professor who expounds “the existing law,” or the one who delves into the “shifting ethical background of the law?”⁵⁴ A positivist seeks the law that *is*.

The scholar: Shall his legal writing state the law or his ideas of what the law *ought* to be?⁵⁵ *Ought* is outside the realm of positivism.

Positivism, in taking creativity (oughtness) out of law, tends to reduce law to a pure science.⁵⁶ Thus, positivism fails to give a profitable and satisfying direction to the creative application of human energies in the law. It defeats the very function of legal philosophy—to decide how the lawyer may best spend his professional life.⁵⁷

Ideally, the administration of a legislative or decisional rule is a process by which the rule is enabled, through the constant purposive reinterpretation of judges in varying factual situations, to become more and more what it ought to be. Positivism, in excluding purpose or oughtness, deliberately takes the striving for perfection out of the law. The law, instead of growing and reproducing itself anew in each fresh factual situation, remains sterile.⁵⁸

Positivism is scientific. It seeks to extract the law that *is*, leaving to politics or some other discipline the law that *ought to be*. In failing to say anything significant about the content and purpose of law, positivism loses its capacity to say anything at all

about specific rules of law or specific problems of legislation or decision. Positivism, in becoming a pure science, ends up by confining itself to terminological disputes.⁵⁹ Professor Fuller cites some examples as evidence of the sterility and formalism of positivism. (1) The notes on recent cases published in the various law reviews in the nation and written by law students reflect a good cross section of the working philosophy of our law schools. Usually these notes deal with cases that touch the law at a vital spot—where it is growing. Instead of trying to see if the law is growing in the right direction, the analyst usually objects to the fact that the law is growing. Often the dissatisfied analyst will write that the decision was based on “extra-legal considerations” which are not discussed by the student authors. Obviously the law that *ought to be* is not legally relevant to these students.⁶⁰ (2) The modern preference for legislation as a means of legal reform indicates that lawyers and judges do not sufficiently recognize the purposive and creative element in the law.⁶¹ (3) In Britain, the law has become so formalized that commercial cases seek arbitration rather than judicial adjudication. Arbitrators are willing to take into account the changing needs of commerce and the ordinary standards of commercial fairness. The judicial law that *is* refuses to bend to needs that demand a law that *ought to be*.⁶² (4) In this country where our written Constitution is authoritatively interpreted by a Supreme Court, lawyers unfortunately think more about what the Supreme Court will do, *i.e.*,

⁵³ *Id.* at 13-14.

⁵⁴ *Id.* at 15.

⁵⁵ *Id.* at 14, 38-39.

⁵⁶ *Id.* at 91.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 88-89, 99.

⁵⁹ *Id.* at 91.

⁶⁰ *Id.* at 128.

⁶¹ *Id.* at 130.

⁶² Fuller, *supra* note 44, at 637-38.

the "legality" of a problem or doubtful procedure, instead of seeking to articulate the restraints that must be accepted to insure orderly, fair and decent government.⁶³

Not only has legal thinking been stifled, but fact analysis as well. *Is* and *ought* are mixed in with facts as well as with law. As a result of positivist concentration on the *is* element in factual analysis, there has been an emphasis on those facts which can be statistically or graphically presented. Yet Fuller points out, some of the most significant facts involve intangible realities, such as moral facts, lying not in behavior patterns, but in attitudes and conceptions of rightness.⁶⁴

Professor Fuller points out that we are living in an era of great basic changes in our social structure. Positivism, by concentrating on what the law *is*, tends to freeze the law and the legal framework. Human relations continue to develop and take on new forms, but the law which excludes *oughtness* fails to respond to the pressing needs of the times.⁶⁵ Fuller describes positivism's most dangerous quality as "the inhibitive effect it inevitably has upon the development of a spontaneous ordering of human relations. . . ."⁶⁶

Along with its inhibitive effect is the fact that positivism encourages a blind obedience to law. The law is not followed because of its reasonableness or its capacity to effect a happy compromise among conflicting human desires. The law is followed because it is the law. Hitler's Germany was an extreme of this aspect of positivism.

The inherited conception of law that ruled unchallenged, among German legal scholars, for decades taught that "law is law." This view was helpless when confronted with lawlessness in statutory form. No matter how unjust the statute, as long as it was enacted into legal form—as long as it was a sovereign command and an accomplished fact of the power of the state—it had to be treated as law. Thus, positivism paved the way for Hitler.⁶⁷

Professor Fuller sees examples of the same dangerous type of thinking in our country. There was an article in the *Boston Herald* apropos of the investigatory methods of a certain senator. The writer said that he had heard all of the debate over the senator's methods and had consulted three lawyers—one opposed to the senator, one in favor and one indifferent. The writer asked the three lawyers if the senator had done anything illegal, and the answer was, no. Fuller concludes: "That to me is an extremely dangerous state of public opinion where law is simply taken as the authority determining what should be done and should not be done, and its moral roots are ignored."⁶⁸

Professor Fuller worries that many undergraduates today are receiving from the "behavioral sciences" an indoctrination in the notion that the whole social process is a scramble for "power." He is disturbed about the deep roots this teaching seems to strike in many students who glibly reject as "naive" any view that seems to contradict it.⁶⁹

⁶³ Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457, 464 (1954).

⁶⁴ FULLER, *op. cit. supra* note 52, at 64-65.

⁶⁵ *Id.* at 110-14.

⁶⁶ *Id.* at 110.

⁶⁷ Fuller, *supra* note 63, at 483-84, 465-66; Fuller, *supra* note 44, at 659.

⁶⁸ FULLER, ON THE TEACHING OF LAW IN THE LIBERAL ARTS CURRICULUM 86 (Berman ed. 1956).

⁶⁹ *Id.* at 42.

Keeping duly enacted law distinct from personal opinion and individual moral conviction—a basic tenet of positivism—is one of the most worthy goals of civilization. But in a review of Buckland's *Some Reflections on Jurisprudence*, Professor Fuller warns of the danger of pretending that this goal has been achieved when it hasn't. It is doubly dangerous, he adds, to suppose that this goal is, under all circumstances, and in all relationships the most important objective man can strive for.⁷⁰

Why Positivism Succeeds

Noting that the harmful inhibitive effects of positivism have been felt in American legal thinking for nearly a century,⁷¹ Professor Fuller indicates that some of the reasons for its success are its worthy aims, its real contributions to legal thinking and its alliance with the "scientific method." Positivism's worthy purposes include: the preservation of order in society by clearly defining what is law and by encouraging fidelity to law;⁷² the placing of law-making not in the hands of the judiciary but in the legislature; and, the facilitation of scientific understanding of law and government.⁷³ This latter goal, the scientific understanding of law, includes the separation of law from morality. The positivist fear of morality in the law stems not only from the possibility of anarchy when law can be branded and repudiated by citizens as immoral—but even more important—from the possibility of an over-purposive interpretation of law that would fasten on so-

ciety some all-embracing orthodoxy.⁷⁴ These positivist goals appeal to, and have enlisted support from, many a non-positivist legal thinker.

Besides sympathizing with the purposes and goals of the positivists, Professor Fuller acknowledges that positivism has made its contributions to American legal thinking:

One seldom encounters a law review article today [1934] of the type so common ten years ago [1924], in which the writer starts with an inquiry into the "nature" of some legal concept and ends by deducing all sorts of important consequences from the supposed inner nature of the concept,—without more than a passing reference to the practical effects of his conclusions, and then with an air of condescension, as if to compliment the facts for showing good judgment in conforming to his theories.⁷⁵

Fuller acknowledges that Kelsen did the law a favor in purging it of such imaginings as "the sovereign."⁷⁶ Also, there was Professor Cook's war on "verbal trifling" or "unconscious metaphysics"⁷⁷ and Professor Llewellyn's crusade against concepts which he attacked as the shadowy figments of our minds, wholly unworthy of the simple faith the conceptualist placed in them.⁷⁸ Positivists by their emphasis on the concrete — on the raw datum of law — represented a healthy reaction to over-conceptualism in legal thinking.

Still another important reason for legal positivism's century of success has been its alliance with the scientific method.⁷⁹ "The religion of modern man is science, and he

⁷⁰ Fuller, Book Review, 59 HARV. L. REV. 826, 828 (1946).

⁷¹ FULLER, *op. cit. supra* note 52, at 61.

⁷² FULLER, *op. cit. supra* note 36, at 113; Fuller, *supra* note 44, at 632.

⁷³ FULLER, *op. cit. supra* note 36, at 113.

⁷⁴ Fuller, *supra* note 63, at 463; Fuller, *supra* note 44, at 671.

⁷⁵ Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 443 (1934).

⁷⁶ FULLER, *op. cit. supra* note 52, at 72-73.

⁷⁷ *Id.*, at 63.

⁷⁸ Fuller, *supra* note 75, at 443.

⁷⁹ FULLER, *op. cit. supra* note 52, at 117.

prefers whenever possible to couch his thoughts in the language of piety, that is, in words that sound scientific."⁸⁰

This holy alliance with science has given positivism the appearance of modernity and sophistication. Because of the belief that scientific thinking alone was intellectually respectable, positivism alone had "brave things to say."⁸¹ And Holmes, who had such great influence on American legal thinking,⁸² was one of this holy alliance's⁸³ most revered prophets.

While Professor Fuller sympathizes with many of the things that positivism has tried to do, he insists that the goals of positivism will never be achieved, because the positivist tries to separate the inseparable: is and ought; fact and value. And in attempting the impossible — to eliminate oughtness and value from law — positivism is strangling legal development and endangering the future of society by failing to give needed legal structure to the vast social changes of the time. By eliminating purpose and morality from the law, positivism leaves untouched the difficult issues of the day where real dangers lie.⁸⁴ Professor Fuller believes that the answers to the pressing problems of the day, and a

real understanding of law, lie in a return to the true fundamental basis of law and order:

For I believe that law is not a datum, but an achievement that needs ever to be renewed, and that it cannot be renewed unless we understand the springs from which its strength derives.⁸⁵

What these "springs" are is the content of Professor Fuller's own natural law view.

Fuller's Natural Law View

Professor Fuller's initial (1940) sweeping critique of positivism was delivered as a series of three lectures, later bound in a small volume and published under the title of *The Law in Quest of Itself*.⁸⁶ Within the next year over twenty reviews of this 147-page work had appeared. The reaction showed that Fuller had touched the law at a very sensitive spot.

Professor Fuller's critics, most of whom were sympathetic, made three general points: (1) Fuller's critique was too negative; (2) Fuller's own natural law position was too vague; (3) the term "natural law" was an unhappy choice of terminology. In his subsequent writings, however, Professor Fuller has met the challenge of his critics by clarifying his natural law views.

Professor Fuller's interest in the natural law stems from his encounter with the dominant legal philosophy of the present generation — legal positivism. As we have seen, although Fuller has many fundamental disagreements with legal positivism on the practical level, his basic quarrel with positivism is at a speculative level —

⁸⁰ Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305, 1307 (1955).

⁸¹ FULLER, *op. cit. supra* note 52, at 104.

⁸² *Id.* at 117.

⁸³ Professor Fuller has no patience with the scientific method as applied to law. He points out that the proper method for solving a problem depends to a large degree on the kind of problem to be solved. Just because a method works in the natural sciences, there is no guarantee that it will work also in the social sciences or in the law. See FULLER, *op. cit. supra* note 52, at 118-19; Fuller, *supra* note 80, at 1307-09; Fuller, *supra* note 63, at 475-76.

⁸⁴ Fuller, *supra* note 44, at 661-63; Fuller, *supra* note 63, at 466-67.

⁸⁵ Fuller, *supra* note 63, at 467.

⁸⁶ These three lectures were sponsored by the Julius Rosenthal Foundation For General Law and delivered at the Law School of Northwestern University at Chicago, April 1940.

the impossibility of a complete separation of *is* and *ought* in the law.

When Fuller came upon a legal philosophy that desired to purge the law of oughtness and purpose — something that to his mind partook of the very nature of law — he was forced to speak out. And he spoke out even though at the time (1940) he was not very clear himself on what he meant by law as it involved purpose — which he called natural law:

Natural law, on the other hand, is 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. There are, of course, many “systems” of natural law. Men have drawn their criteria of justice and of right law from many sources: from the nature of things, from the nature of man, from the nature of God. But what unites the various schools of natural law, and justifies bringing them under a common rubric, is the fact that in all of them a certain coalescence of the *is* and the *ought* will be found.⁸⁷

This original insight — the inseparability of *is* and *ought* in the law — has always been at the basis of Professor Fuller’s natural law view. The subsequent development of Professor Fuller’s natural law view has been an examination of the *oughtness* in law — its discovery by reason, its standard in nature, and its working out in practice.

Reason and Natural Law

Professor Fuller’s original plea for natural law seemed to be nothing more precise than a plea for the natural creative role of reason in discovering the law that ought to be — discovering the basic principles of justice underlying the relations of men, and applying these principles to human rela-

tions.⁸⁸ Just how reason would do this — discover the “just” law or the “right” law for promoting effective and satisfactory life in common — Professor Fuller illustrates by a simple example.

We are asked to imagine a shipwreck. The survivors are cast off on an isolated corner of the earth. All have a convenient case of amnesia that has wiped out the memory of previous social existence. When disputes arise a judge is selected. This judge, says Fuller, would soon realize:

That it was his responsibility to see that his decisions were *right* — right for the group, right in the light of the group’s purposes and the things that its members sought to achieve through common effort. Such a judge would find himself driven into an attempt to discover the natural principles underlying group life, so that his decisions might conform to them. He would properly feel that he, no less than the engineers and carpenters and cooks in the company, was faced with the task of mastering a segment of reality and of discovering and utilizing its regularities for the benefit of the group.⁸⁹

Fuller states that if you take this desert-island judge and put him down in a society that is already a real and going concern, essentially only one new factor has been introduced into the judging process — the force of established institutions has now become one of the realities that the judge must respect in making his decisions.⁹⁰

Fuller’s faith in human reason’s ability to solve the problems of successful group living, does not mean that he has unlimited confidence in human reason. He disclaims any “code of nature” that can solve all

⁸⁸ *Id.* at 3, 104.

⁸⁹ FULLER, REASON AND FIAT IN CASE LAW 4-7 (1943).

⁹⁰ *Id.* at 10.

⁸⁷ FULLER, *op. cit.* *supra* note 52, at 5-6.

cases.⁹¹ He severely criticizes the “extremists” of the natural law school who maintain all law is the product of reason, and that there is no place for arbitrary fiat in the law. Sometimes the law must be arbitrary.

Fuller adds we can never have a law without *both* reason and fiat. The necessity of fiat in the law is itself a reality that reason must take into account.⁹² But at the same time law can never be stated solely in terms of fiat, *i.e.*, in terms of power relations without reference to its rational basis (ethics).⁹³ Indeed without a rational basis, there is no legitimate authority.

Another area where Fuller recognizes the limits of reason relates to the pursuit of “justice” itself:

It seems impossible to give an adequate definition of justice; the quest for justice is in this sense an “irrational” one. Yet this does not prevent the lawyer from recognizing clear cases of injustice.⁹⁴

The lawyer who cannot define justice is compared to the doctor who cannot define health, but who can recognize disease. Fuller holds that the lawyer who gives up his quest for justice in the name of a narrow rationalism is no more justified than the doctor who gives up healing the sick because he cannot define health with Euclidean exactness. Justice is one of those imperfectly rationalized elements which we are intellectually and morally bound to recognize in the law.⁹⁵

But even though reason has its limitations, it must be pushed as far as it will

go in discovering the basic principles that underlie the successful living together of men⁹⁶ — even if this means entering the “forbidden territory of metaphysics and ethics.”⁹⁷

Justice and Reason

Professor Fuller has put in tentative form a general exposition of his own rational quest for the principles of a just social order.⁹⁸ He points out that the basic task of the lawyer is to find ways by which people can live and work together successfully. But men cannot live and work together without some organizing principles that will resolve conflicts and promote cooperative action. There are four ways by which men may achieve the necessary order. These are:

- 1) joint discovery and recognition of the common need;
- 2) the establishment of some rule-making power;
- 3) the solution of disputes by adjudication; and,
- 4) negotiation and agreement among the interested parties.

Corresponding to these four ways of achieving order are four principles of order:

- 1) the principle of the common need;
- 2) the principle of legitimated power;
- 3) the principle of adjudication; and,
- 4) the principle of contract.⁹⁹

⁹¹ Fuller, *supra* note 43; Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L. F. 83, 84 (1958).

⁹² FULLER, *op. cit. supra* note 89, at 11.

⁹³ *Id.* at 29.

⁹⁴ FULLER, MY PHILOSOPHY OF LAW 120 (1941).

⁹⁵ *Ibid.*

⁹⁶ FULLER, *op. cit. supra* note 52, at 109; FULLER, THE PROBLEMS OF JURISPRUDENCE 104 (1949); Fuller, *supra* note 91.

⁹⁷ Fuller, *On Teaching Law*, 3 STAN. L. REV. 35, 47 (1950).

⁹⁸ FULLER, *op. cit. supra* note 96, at 693.

⁹⁹ *Id.* at 694.

The principle of the common need is a *sine qua non* and the most basic of the four principles. A just or right ordering of society can be attained only by a discovery and recognition of the common need. The other three principles are intelligible and defensible only as necessary supplements to the principle of the common need, and as devices or procedures for realizing the common need. It would be ideal if the common need could be achieved without resort to adjudication or the use of power, but such a spontaneous corporate spirit is not found in human society. Thus, the three lesser principles must serve the principle of the common need in order to approach that order by which men can best live and work together.

The three lesser principles are never ends in themselves; they can only be understood as indirect means of achieving results that are likely to approximate the common need. Each of the lesser three principles is a kind of *pis aller* (last resort), a principle that must be resorted to only if the common need cannot be otherwise attained — either because of an irreconcilable conflict between individual and social values, or because the common need is not properly perceived and understood.¹⁰⁰

What is the common need? Professor Fuller equates the common need with the law of nature. To achieve the common need is to approach a just or right ordering of society. It is a search for the most effective and least disruptive pattern of order that will satisfy men's desires and interests, reconciling individual interests with social values. When the members of society act in accordance with the perceived common

need, their actions are dictated by the necessities of the situation and their shared understanding of what those necessities demand of each of them.¹⁰¹

How is the common need to be achieved in practice? There must be an intense study of the factual situation to which the pattern of order is to relate. The common need is that pattern of order that is right for the situation—that reaches the result most consonant with the interests and desires of the generality of men.¹⁰² If commissioned to draft a comprehensive statute for the regulation of automobile traffic, the legislator primarily would seek

a set of rules that would keep people from running into one another, which would, at the same time, not slow traffic unduly or create impossible burdens of administration for traffic officers and traffic courts. In other words, the sources of his law would lie in the necessities inherent in the problem with which he had to deal. Given a situation, and given certain generally felt and accepted human desires about that situation, his task would be to work out a way of effectuating those desires within the compulsions of the situation to which they relate.¹⁰³

Some have criticized the principle of the common need because it is nebulous. Professor Fuller admits that the common need is not a mathematical calculation or a patent medicine guaranteed to cure. Rather it is the application of a principle of just ordering to a particular concrete situation involving the use of discretion.¹⁰⁴ When the critics argue that no one can point to

¹⁰¹ *Id.* at 694-98, 706, 736.

¹⁰² Fuller, *The Place and Uses of Jurisprudence in the Law School Curriculum*, 1 J. LEGAL ED. 457, 499 (1949).

¹⁰³ *Ibid.*

¹⁰⁴ FULLER, *op. cit. supra* note 96, at 695-97; FULLER, *op. cit. supra* note 89, at 25-27.

¹⁰⁰ *Id.* at 695-737.

any particular rule of law or of the social order that is unambiguously demanded by the common need, Fuller replies:

Because the common interest does not tell us everything, there is no reason to conclude that it tells us nothing. Those who reject the principle of the common need because it does not dot all the i's or cross all the t's should recall the saying of an ancient Chinese philosopher, Mencius: When a cobbler undertakes to make a pair of shoes without knowing the measure of the feet, he does not end by making a bushel basket.¹⁰⁵

Human Nature: The Standard

At this point we may ask: what keeps Professor Fuller's natural law (common need) from being something purely relative? Fuller has stated that the natural law is derived from the "compulsions of the situation."¹⁰⁶ What is to prevent his natural law from being what men *want* rather than what *ought to be*? The positivists have criticized the natural law for failing to transcend "personal predilections."¹⁰⁷ Can Professor Fuller's explanation of natural law escape this criticism?

Professor Fuller does not agree with those who hold that the object of law is simply to resolve conflicts.¹⁰⁸ He insists on a *right* ordering of society and looks for right solutions to problems.¹⁰⁹ The right and just solution makes good law.¹¹⁰

¹⁰⁵ FULLER, *op. cit. supra* note 96, at 696.

¹⁰⁶ Fuller, *supra* note 102, at 499.

¹⁰⁷ FULLER, *THE LAW IN QUEST OF ITSELF* 5 (1940).

¹⁰⁸ Fuller, *supra* note 91, at 103-04.

¹⁰⁹ FULLER, *op. cit. supra* note 96, at 695; Fuller, *supra* note 102, at 499; Fuller, *supra* note 97, at 45.

¹¹⁰ Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 644 (1958).

But the right and just solution is not purely subjective. There is an objective moral goodness. There are good and bad laws just as there are good and bad purposes of law. Arguing on the basis of the intrinsic appeal of law, Fuller denies that evil aims of the law have as much coherence and inner logic as good aims. Professor Fuller also has an answer for the ethical skeptics. In his review of *A Dialectic of Morals: Towards the Foundations of Political Philosophy*, he distinguishes his own answer from that of Professor Mortimer Adler.

Adler refutes ethical skepticism by beginning with a minimal good. Thus, Adler argues that if the unhampered pursuit of pleasure were man's only goal, at least one standard of preference would have validity, namely, that as between two pleasures, the greater should be preferred.

Professor Fuller begins his refutation of ethical skepticism with the maximal bad. He asks us to imagine a society in which all ordinarily accepted values are reversed—a society in which treason, murder, and rape are officially encouraged; in which breach of contract is rewarded and its observance punished; a society where assisting one's neighbor is regarded as a heinous crime. No sane person would hesitate to call such a society "bad." It would be bad by every conceivable standard, whether it be the dignity of man, the maximization of happiness, the fullest realization of human capacities.¹¹¹

When Professor Fuller seeks a *right* solution derived from the "compulsions of the situation," he sees the most fundamental element in this human "situation" as

¹¹¹ Fuller, Book Review, 9 *U. CHI. L. REV.* 759, 760 (1942).

the only standard of rightness—human nature. What is right for the “situation” depends upon what is right for man.

To say “man” is, necessarily, to say “purpose” or “oughtness,” since man is by nature a self-directing, purpose-achieving creature. And what is right for man (the right purpose) must be in conformity with man’s nature:

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 judgements. That is good which advances man’s nature; that is bad which keeps him from realizing it.¹¹²

Natural law philosophy is not confined in its application to the study of law. Every science that has something to say about human activity is involved in natural-law thinking. Fuller illustrates:

Take, for example, psychoanalysis. This theory originated in a context of thought that certainly seems remote from the philosophy of natural law. Yet it assumes that the purpose-forming system called a man may be in need of being “straightened out,” and at the same time contains within itself the sign posts that will direct the straightening-out process. This is the essence of the natural law position. If the psychoanalyst does not do something roughly equivalent to helping his patient realize his “true nature” then his whole profession loses intelligible meaning.¹¹³

Professor Fuller also holds that there are natural laws of social order. This is so because society is made up of men, and the

right ordering of men living together must respect human nature just as much as the individual acts of a man must respect his nature. Social arrangements are therefore not infinitely pliable. There are certain ends of society, certain patterns of order—whether agreed upon by a majority or imposed by a dictator—that will fail to achieve a successful ordering of society if human nature is not respected.¹¹⁴

Professor Fuller points out that business administration, economics, and political science do not operate on the premise of the infinite pliability of ends. A factory management does not simply dream up an ideal pattern of production. Management is concerned with the natural laws underlying the production of goods. Many factors are taken into consideration: individual and social psychology, the construction and operation of the human body, etc. Fuller notes that economic theory today holds to the view that the forms through which economic objectives can be achieved are limited in number, and that for certain objectives, certain forms must be employed. Fuller sees political science as being concerned with the effects that flow from the adoption of different forms of political order.¹¹⁵

In law and sociology, Professor Fuller says we should find the same line of inquiry. But he notes that we do not because of the influence of empirical science, which treats man not as a self-directing phenomenon, but as determined (thus determinable to any conceivable order or social arrangement). Fuller insists that the sociologist and legal philosopher must treat man under both aspects—as determined and as mak-

¹¹² Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457, 472 (1954).

¹¹³ *Id.* at 473.

¹¹⁴ *Id.* at 473-74.

¹¹⁵ *Id.* at 474-75.

ing choices. In making choices, man's nature must be respected, and therefore there are limits of the possible forms of social arrangement. The sociologist and lawyer should discover and utilize the natural laws of social order—natural in the sense that they represent compulsions necessarily contained in certain ways of organizing men's relations with one another.¹¹⁶

Professor Fuller points out that the Russians who tried to impose a pure Marxian pattern on society failed when it came to law. Pashukanis theorized that all law was capitalist, finding its rationale in exchange and in the market essential to capitalism. Fuller says it is interesting to compare the pure Marxian theory of the now discredited and liquidated Pashukanis with the unblushing "bourgeois" elements that appear in the later theories of Vyshinsky.¹¹⁷

Problems Raised

Even though Professor Fuller insists that human nature is the standard for measuring human purposive activity, there are still many questions to be answered:

1) Has the natural law the right to sit in judgment over positive law, and counsel a disregard of any enactment of the positive law that violates natural law?

In principle, Fuller answers yes. He holds that when a statute is sufficiently evil it ceases to be law.¹¹⁸ Admittedly, when it is suggested that this imperious attitude toward positive law be adopted, there is ground for real concern. However, if the

matter be examined candidly, it will be found that there is no one who cannot imagine himself, even as a judge, being faced by a law so infamous that he would feel bound to disobey it. For most of us, says Fuller, such a situation could only arise in the event of some great dislocation in the ordinary processes of government, such as might be occasioned by a dictatorship or an occupation by enemy forces.¹¹⁹ In the Hitler regime, for example, the most serious deteriorations in legal morality took place precisely in those areas of the law where the purposes of the law were most repulsive to human nature. In other words, where one would have been most tempted to say, "This is so evil it cannot be a law," one could usually have said instead, "This thing is the product of a system so oblivious to the morality of law that it is not entitled to be called a law."¹²⁰

Thus it is only by way of exception that the natural law would be invoked to overrule positive law. As a general rule, the natural law demands obedience to positive law—even though the particular positive law in question is not "good" law in all respects. Indeed, the very obligation of obeying positive law derives from the natural law, as this obligation cannot come from positive law itself.¹²¹

2) Is there a "higher law" that sits in judgment over the natural law?

Professor Fuller makes it clear that he does not accept any doctrine of natural law which asserts that the demands of the natural law can be the subject of an authoritative pronouncement, or the notion that there is a "higher law" transcending the concerns of this life against which human

¹¹⁶ *Id.* at 475-76.

¹¹⁷ Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 MICH. L. REV. 1157, 1165 (1949).

¹¹⁸ Fuller, *supra* note 110, at 655; Fuller, *supra* note 91, at 91.

¹¹⁹ Fuller, *supra* note 112, at 467-68.

¹²⁰ Fuller, *supra* note 110, at 661.

¹²¹ Fuller, *supra* note 112, at 467-68.

enactments must be measured and declared invalid in case of conflict.¹²² Fuller declares that these exclusions are "at least as ancient as Aristotle, in whom I find no trace of the elements I reject."¹²³

An authoritative interpretation of moral law, for example, the November 7, 1949 speech of Pius XII to the Union of Catholic Italian Lawyers regarding the duty of Catholic judges in divorce actions, troubles Fuller and raises "grave issues."¹²⁴ But Fuller can see why the Catholics believe in an authoritative interpretation of the natural law, even though he doesn't share these same beliefs himself. Indeed, Fuller pays the Catholics a compliment for their contribution to natural law thinking:

It should be remarked at this point that it is chiefly in Roman Catholic writings that the theory of natural law is considered, not simply as a search for those principles that will enable men to live together successfully, but as a quest for something that can be called "a higher law." This identification of natural law with a law that is above human laws seems in fact to be demanded by any doctrine that asserts the possibility of an authoritative pronouncement of the demands of natural law. In those areas affected by such pronouncements as have so far been issued, the conflict between Roman Catholic doctrine and opposing views seems to me to be a conflict between two forms of positivism. Fortunately, over most of the area with which lawyers are concerned, no such pronouncements exist. In these areas I think those of us who are not adherents of its faith can be grateful to the Catholic Church for having kept alive the rationalistic tradition in ethics.¹²⁵

3) Even if a "higher law" be excluded,

what about the fear of the positivists that the purposive interpretation of law will be pushed too far?

The positivists fear not so much that a purposive interpretation of law will lead to anarchy as that it will lead to the opposite of anarchy—the imposing on society of some all-embracing orthodoxy¹²⁶ or "immoral morality."¹²⁷ Fuller shares this fear with the positivists.¹²⁸ He sees the possible danger of imposing conformity which would be a threat to human dignity and freedom. As an example of the kind of development in law which he fears, Fuller cites a hypothetical statute which forbids golf on Sunday. Conceivably, such a law might be interpreted as a law imposing compulsory church attendance and recitation of prayers. This type of judicial interpretation is a threat to human dignity because it commands something that only has meaning when done voluntarily.¹²⁹

How is purposive interpretation to be kept within bearable proportions? Fuller answers that just to say "common sense" is not enough. To give this answer would be an evasion, and would amount to saying that although we know the answer, we cannot say what it is. Fuller apologizes for his own lack of preciseness, but does offer a suggestion. Asserting that judges must have respect for the concept of legal *structure*, Fuller points out that a statute or a rule of common law has, either explicitly, or by virtue of its relation with other rules, something that may be called a structural integrity. Structural integrity is what we have in mind when we speak of the "intent of the statute"—though we know it is men

¹²² Fuller, *supra* note 91, at 84.

¹²³ *Ibid.*

¹²⁴ Fuller, *supra* note 110, at 638.

¹²⁵ *Id.* at 660.

¹²⁶ Fuller, *supra* note 112, at 463.

¹²⁷ Fuller, *supra* note 110, at 635-36.

¹²⁸ Fuller, *supra* note 112, at 463.

¹²⁹ Fuller, *supra* note 110, at 669-71.

who have intentions and not words on paper. The judge must limit his creative role to the confines of the structure of the law.¹³⁰

4) If the jurist confines himself to "legal structure," how deeply into human purpose can the legal philosophy go? What, if anything, can he say about the ultimate purpose or end of man and of the law?

Here we move into the very blueprint of the legal structure itself. How are we to draw the basic lines of the legal structure? What is the end of law? For what purposes do its constraints exist? We have seen that the goal of society is the achievement of peace and order; that the discovery and implementation of the common need promote the successful living together of men. But how to achieve the common need? Professor Fuller has told us that the answer lies in an understanding of human nature and of the human social order. But how far, how deep, is the law to penetrate the complex, purpose-achieving animal we call man? How much can the law understand man and specify his goals?¹³¹

Professor Fuller believes that the law should not try to go too far or ask too much. He holds that the law ought to be content to discover and implement those minimum principles which make the law possible.¹³² Here Professor Fuller makes an important distinction. He holds that the law should not try to discover ultimate purposes as such. Rather the law should concentrate on the procedures or social forms *through which* the ultimate, by collective activity, are determined. Arguing on the theory that if we do things the right way,

we are likely to do the right things, Fuller believes that if the procedures and social forms are sound, the results achieved through them will tend to be sound.¹³³ For example, a constitution drafted for a country emerging from violence and disorder should establish a basic procedural framework for future governmental action and substantive limitations should be kept at a minimum:

In so far as possible, substantive aims should be achieved procedurally, on the principle that if men are compelled to act in the right way, they will generally do the right things.¹³⁴

Why does not the law look for ultimates? One reason we have already seen: because such a search is really the search of metaphysics. The law would be asking questions bigger than itself. But there are some ultimates that the law must seek. Professor Fuller has given us one such ultimate when he asks, what do we mean by a "right" decision.¹³⁵ At the same time, Fuller warns, human terminal ends are obscure, and our reasoning powers sometimes fail us:

I have no intention of attempting to draw here the line at which the effort to define ends should be permitted to relax. I should like to suggest, however, that this is a matter in which the cultural forces that surround us play a more important part than we generally realize. How far we should pursue ultimates is a question more likely to be determined by currents of intellectual fashion than by deliberate choice. The pressures of our present intellectual climate are toward truncating the inquiry at the earliest possible point.¹³⁶

¹³³ Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL ED. 176, 204 (1948).

¹³⁴ Fuller, *supra* note 110, at 643.

¹³⁵ Fuller, *supra* note 97, at 45.

¹³⁶ *Id.* at 36.

¹³⁰ *Id.* at 670.

¹³¹ Fuller, *supra* note 97, at 35.

¹³² Fuller, *supra* note 112, at 463.

Even though Fuller sees the quest for ultimates as a difficult quest, a push into the unknown and obscure—still he does not hold with the positivists that human ends and values cannot be the object of reasoned demonstration. As a natural law exponent, Professor Fuller sees the work of the natural law involving the selection of apt means for the realization of a given end by an activity which engages man's reason and his capacity for accurate analysis and observation. But Fuller points out that ends and means are not as simple as they first seem. In actual concrete situations and in actual decisions, means and ends no longer arrange themselves in tandem fashion, but move in circles of interaction. This complex of ends and means can be the object of reasoned demonstration, but it is impossible to assign in advance precise limits to the role of reason. Fuller therefore urges that we push our understanding as far as it will take us into the obscure area where means and ends interact. He says we must seek collectively to discover as much agreement in this area as the nature of the case permits.¹³⁷

Because of the complex interaction between ends and means, and because of the obscurity involved in searching out the ultimates, Fuller sets the sights of his natural law approach more on means than on ends—but his approach includes both. Thus Fuller concentrates more on legal processes and social forms. He believes that if the legal processes are perfected and thoroughly understood, the goals or ends which result from the intelligent employment of these processes will be the best goals for man and society. It is not so much a ques-

tion of defining ultimates, as defining the conditions under which the ultimates are realized.¹³⁸ Fuller calls this practical natural law approach "Eunomics."¹³⁹

Eunomics

Eunomics is derived from the Greek, and means "good law." Professor Fuller chooses this term:

Because of the confusions invited by the term "natural law," I believe we need a new name for the field of study, and I suggest the term "eunomics," which may be defined as "the science, theory or study of good order and workable arrangements."¹⁴⁰

Professor Fuller goes on to describe the limits of his proposed study:

Eunomics involves no commitment to "ultimate ends." To be sure, it may reject particular ends as presenting what Michael Polanyi calls "unmanageable social tasks." It may, in other words, reveal that there are ends which seem in the abstract desirable, but for the attainment of which no social form can be devised that will not involve an obviously disproportionate cost. But the primary concern of eunomics is with the means aspect of the means-end relation, and its contribution to the clarification of ends will lie in its analysis of the available means for achieving particular ends.¹⁴¹

Professor Fuller stresses the means aspect of the means-end relation. He points out that, in concrete decisions, means and ends interact, and means have a decided influence on ends. He suggests that the failure to recognize the significance of this interaction was the mistake of the natural law school of 150 years ago. But Professor

¹³⁷ Fuller, *Human Purpose and Natural Law*, 3 NATURAL L. F. 64, 68, 71-73 (1958).

¹³⁸ Fuller, *supra* note 97, at 42; Fuller, *supra* note 137, at 73.

¹³⁹ Fuller, *supra* note 112, at 473.

¹⁴⁰ *Id.* at 477.

¹⁴¹ *Id.* at 477-78.

Fuller is careful to point out that economics is not unmindful of ends:

In attempting to define a branch of social study that might be called economics, I stated that an acceptance of this subject as worthy of pursuit implies no commitment to "ultimate ends." I was careful not to say that economics is indifferent to ends. In view of the interaction of means and ends any sharp distinction between a science of means and an ethics of ends is impossible. In leaving the problem of "ultimates" unresolved I mean merely to acknowledge that after a careful study of the interaction of means and ends with respect to a particular problem, men may still differ as to what ought to be done and that economics cannot promise to resolve all such differences.¹⁴²

While economics stresses the means aspect of the means-end relation, it must not concentrate too heavily on the means aspect. To concentrate on means to the exclusion of ends (as is often found in economics and sociology) leads to a situation in which the various social disciplines (law, sociology, economics) talk past each other and no effective communication takes place at all. This is another reason why Fuller insists that economics consider ends and means in interaction.¹⁴³ Economics also helps solve the problems of a pluralistic society. To immediately begin arguing about ultimates cuts off discussion. Fuller urges a reasoned analysis of the processes or means as a way of airing and understanding ends and goals.

Where does human nature fit into economics? Fuller admits that in stating the case for economics he had tried to keep it distinct from the question whether the nature of man can furnish a meaningful standard

of ethical judgments. He has done this in order to get those who reject the natural law to accept economics and be party to the discussion of the problems that beset society in our day. But no matter how emphatic the rejection of the natural law and human nature as a standard, Fuller points out that if certain constants and "social regularities" persist through a change in suggested social forms and procedures, these constants must reflect some stability in the nature of man himself. It is at this point that economics reaches common ground with the natural law theory.¹⁴⁴

What is the relation between the principles of the common need¹⁴⁵ and economics? Although Professor Fuller does not relate the two, it seems clear that economics exists precisely in order to achieve the common need—a just ordering of society. The primary focus of economics is upon the procedures or subsidiary principles (adjudication, legitimate authority, and contract) through which the common need is attained.

The working out of economics and the attainment of the common need in practice requires that men get together, collaborate, discuss, and reflect; that men try to understand what the common need is, what the best social forms and processes are, and what effect these means have on social goals.

Just as in the affairs of daily life, we all know from personal experience that in moments of crisis, consultation with a friend will often help us to understand personal problems; so in the larger issues of law and ethics, men may, by pooling their intelligent resources, come to understand

¹⁴² *Id.* at 480.

¹⁴³ *Ibid.*

¹⁴⁴ Fuller, *supra* note 112, at 481.

¹⁴⁵ See page 108 *supra*.

better what their true purposes are. Professor Fuller calls this way of solving the problems of law and ethics, the *collaborative articulation of shared purposes*.¹⁴⁶ In other words, what ought to be done is improved by discussion and reflection. This collaboration of men and ideas not only helps toward the choosing of a better means, but can clarify the end as well.¹⁴⁷ It is the collaborative articulation of shared purposes that has produced the traditional case by case development of the English and American common law. This is the way the common law has worked itself pure through the centuries and kept pace with the changes in the social order.¹⁴⁸

Continued collaboration is our hope for the future. Professor Fuller points out that our republic was conceived in the spirit of natural law. We enacted constitutional guarantees of free speech on the theory that through discussion men find truth, and that truth, when found, should regulate our lives and institutions.¹⁴⁹ Fuller insists social change can only take place peacefully in a natural law climate—where ideas can compete with each other for men's acceptance and the successful ordering of society. In the long run, ideas compete with each other successfully not because they are espoused by a majority or can be forced on society by an effective power in society; rather ideas compete successfully only to the extent of their reasonableness and consequent acceptance by society.¹⁵⁰ With the

philosophy of positivism, which excludes purpose from the law and which therefore stifles development in the law, we tend to live on today with the successful ideas of social order of the past.¹⁵¹ We cannot go on for long with a sterile positivism. We need new solutions for the pressing problems of our own day. So men must get together and seek to understand the facts of our modern industrial society. By the collaborative articulation of shared purposes, men must discover the ideas and patterns of order that spring from the nature of man and society and that provide the only answer to the challenge of our times.¹⁵²

Conclusion

Professor Fuller does not associate himself with any particular school of natural law. But Professor H. Gill Reuschlein, Dean of the University of Villanova Law School, who has studied some seventy different American writers in jurisprudence, classifies Fuller with the "Integrative Jurisprudence School"—with Benjamin Cardozo, Roscoe Pound, Huntington Cairns, Morris R. Cohen, Jerome Hall, and Edmond N. Cahn.¹⁵³ Professor Fuller is pleased with this classification.¹⁵⁴ (Reuschlein classifies Mortimer J. Adler, Robert Hutchins, and Harold R. McKinnon as "Neo-Scholastics.")¹⁵⁵

Neither Scholastic nor Thomist, Professor Fuller is interested in and critical of Thomistic legal analysis. He finds that when

¹⁴⁶ Fuller, *supra* note 137, at 73-74.

¹⁴⁷ Fuller, *supra* note 110, at 668.

¹⁴⁸ Fuller, *supra* note 137, at 74; Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L. F. 83, 96, 98 (1958).

¹⁴⁹ FULLER, *THE PROBLEMS OF JURISPRUDENCE* 724 (1949).

¹⁵⁰ FULLER, *op. cit. supra* note 107, at 110-14, 121-23.

¹⁵¹ Fuller, *supra* note 137, at 75-76.

¹⁵² *Id.* at 74-76; FULLER, *op. cit. supra* note 107, at 126-27.

¹⁵³ REUSCHLEIN, *JURISPRUDENCE—ITS AMERICAN PROPHETS* 404-05 (1951).

¹⁵⁴ Fuller, Book Review, 12 LA. L. REV. 531, 532 (1952).

¹⁵⁵ REUSCHLEIN, *op. cit. supra* note 153.

Thomists set themselves against legal positivism, the writings are largely polemic and even vituperative in character, usually ending up in an attack on Holmes.¹⁵⁶

Professor Fuller is not satisfied with a negative Thomism. He wants to know what Thomism is *for*, not what it is *against*:

What does the neo-Thomist philosophy say about such questions as the interpretation of statutes, the proper role of the judiciary, or the methods of reconciling freedom and control in our complex modern society? I find no coherent answer to questions of this sort in the published professions of this philosophy.¹⁵⁷

Fuller urges the Thomist to go back to St. Thomas for coherent answers:

Though there are some startling things in St. Thomas on such subjects as monsters and angels, I personally have found him full of useful wisdom on matters of law and government. But curiously most of the neo-Thomist writings in the legal field are almost destitute of reference to St. Thomas himself, who taught, as I read him, that positive law is a human thing intended to promote happiness of human beings.¹⁵⁸

At least one writer in the Thomist tradition concurs with Professor Fuller in criticizing neo-Thomists for failing to give natural law coherence to pressing questions in our complex modern society. Father Leo R. Ward, C.S.C., writes:

As is clear to all and as some persons have noted, Roman Catholics with their Aristotelian-Thomist background — itself generally not profoundly studied and renewed in this regard — were almost the only persons affirming natural law in the United States, and their statements, quite possibly true statements, were a bit lifeless, and had

gone sterile. This was because they were studied out of relation to reality and its perpetual problems, and thus had come to be as if meaningless. There are notable exceptions, such as the works of Maritain already mentioned, distinguished work by Rommen and those by Lottin, and the work by Robert Russell and that by Peter Stanlis; but the usual textbook treatment of natural law had become incredible because of missing the existential situation which natural law doctrine is presumably designed to meet.¹⁵⁹

When we come to value Professor Fuller's contribution to natural law thinking, it would seem that it is to be found precisely in those areas where he and Father Ward are most critical of neo-Thomists — in giving the natural law relevance to the existential situation.

The Thomist tends to begin his natural law approach in the upper reaches of immutable principle — principles of good and evil, the sacredness of human life, the inviolability of the human person. But the Thomist has been found wanting when it comes to the hard reasoning needed to pull the principle down to the level of the existential.

We find Professor Fuller, on the other hand, beginning his natural law approach on the concrete level. After a mastery of the existential, he asks, "What is good for man and good for society as measured by the standard of human nature?" Fuller has thought problems through on the lower level — principles for interpreting statutes, the proper role of the judiciary in a democracy, the methods of reconciling freedom and control in our complex society.

(Continued on page 137)

¹⁵⁶ Fuller, *supra* note 154, at 534.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Id.* at 534-35.

¹⁵⁹ Ward, *The Natural Law Rebound*, 21 REV. OF POLITICS 117 (1959).

FULLER
(Continued)

Any inadequacy in Professor Fuller's approach seems to lie precisely in the area where he confesses his greatest weakness—the "forbidden territory" of metaphysics and ethics.¹⁶⁰ What do we mean by right? What is the purpose of human existence? What is the metaphysical foundation of natural law? This is the forbidden territory that Professor Fuller insists the legal philosopher must not be afraid to enter. For if we do not know what we mean by right, how can we arrive at a just law? If we do

not have some idea of human purpose, how can we know what law is good for man? If we do not have a metaphysic of natural law, how can natural law be grounded in nature and rationally intelligible?

It is in the forbidden territory of metaphysics and ethics, on the other hand, that the Aristotelian-Thomistic approach can make perhaps its strongest claim. The conclusion is clear: a truly cooperative venture between the integrative jurisprudential scholar and the Thomist might do much to advance the "collaborative articulation" needed for the more effective elaboration of natural law theory and its application to the complex problems facing our developing society.

¹⁶⁰ See pages 106-09 *supra*.

