The Appeal of Natural Law†
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IT might seem that analytical jurisprudence has made redundant the ideas and perspectives of classical common law thought with which Chapter 2 was concerned. But this book’s discussion of the development of English analytical jurisprudence in the writings of Bentham, Austin and Hart and the associated development reflected in Kelsen’s work has tried to show that normative legal theory does not necessarily progress through a straightforward superseding of inadequate theory by better theory addressing the same concerns. Rather, it sometimes shows important shifts of emphasis and altered concerns. These, in turn, may be the result of felt political or professional necessities. Analytical jurisprudence can be understood in part as reflecting a demand for a systematic, rational legal science to underpin modern legal professionalism and to accommodate the political idea of law as a technical instrument of government in modern western states. Classical common law thought flourished in a different era with different preoccupations. Nevertheless, analytical jurisprudence has not necessarily provided a fully adequate perspective from which to view contemporary Anglo-American law. The modern so-called “natural law” theory to be considered in this chapter can be viewed as, in part, an attempt to push the methods of analytical jurisprudence to conclusions more satisfactory in various ways than those the analytical jurists themselves typically reach. At the same time it can be seen as, in part, a means of recovering certain themes in classical common law thought which analytical jurisprudence seems to have largely relegated to the sidelines of theoretical concern.

LEGAL POSITIVISM AND NATURAL LAW

One aspect of the aspiration towards a “science” of law reflected in the work of such different writers as Bentham, Austin, Hart and Kelsen is the insistence on an analytical separation of law from morality. In no case does this imply that morality is unimportant. But it does entail the claim that clear thinking about the nature of law and its analytical structure necessitates treating it as a distinct phenomenon capable of being analysed without invoking moral judgements. Hence, as Austin explains in a famous passage: “The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law,

though we happen to dislike it... This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is... the enumeration of the instances in which it has been forgotten would fill a volume” (Austin 1832: 184).

So Austin, like Bentham before him, criticises Blackstone for continually confusing legal and moral analysis in his Commentaries; for treating as law what he thought ought to be law; for declaring that human laws are invalid if contrary to the laws of God; for asserting that all human laws derive validity only from God’s superior law (cf. Blackstone 1809 I: 41). The invocation of moral precepts — whether or not linked to a supra-human authority such as the will or law of God — as part of the criteria of the validity of man-made law seemed to Bentham and Austin to be dangerous. It prevented an objective, “scientific” analysis of the nature of law as human creation, and a clear set of indisputably objective criteria for determining which regulations should be recognised as possessing the authority of law. It left such matters to ethical speculation. Since ethical views vary, the way is opened for anyone to claim the right to “second guess” the authority of law and state. Danger lies also in another direction, according to Bentham. To confuse legal and moral authority allows reactionaries to claim “this is the law; therefore it must be right;” existing law is assumed to possess not only authority as law but also moral authority. Blackstone’s primary failing in Bentham’s eyes was, thus, his tendency to merge legal and moral authority, which went along with a complacency implying that English law as expounded in the Commentaries was the best of all law for the best of all possible worlds (Benham 1977: 498–9; Hart 1958: 53).

This chapter is concerned with the claim of the major analytical jurists that law and morality should be clearly separated for purposes of analysis, and with some important challenges to that claim. Since the term analytical jurisprudence refers only to an aspiration and effort to analyse systematically law’s conceptual structures, on the basis that they are worthy of study in their own right as distinct objects of analysis, it does not necessarily demand this law-morality separation. So, although writers who have considered themselves or been considered to be analytical jurists have typically subscribed to the separation of law and morality, it is convenient to use a more specific term to refer to the adoption of this analytical separation. As has been seen, Austin treated positive law as the appropriate focus of legal science and distinguished it from all moral rules or principles not specifically “set down” (posited) or legislated in some form but merely accepted, as well as from (religious) rules or principles attributed to some supra-human authority. Thus, the term now generally used to refer to insistence on the separation of law and morality is legal positivism. It is sometimes used imprecisely to refer also to a number of actual or supposed characteristics of analytical jurisprudence (cf. Hart 1958: 57–8). In this chapter, however, legal positivism will be taken to mean specifically the insistence by Bentham, Austin, Hart, Kelsen and many other jurists on the necessity of analytically separating normative legal theory’s inquiries into the nature of law from inquiries into its moral worth.

In contrast to legal positivism stands a tradition of thought adopting an apparently diametrically opposed position — that law cannot be properly understood except in moral terms; that it is fundamentally a moral phenomenon; that questions of law’s nature and existence cannot be isolated from questions about its moral worth. This tradition is usually termed natural law theory. Its history extends through at least 2,500 years of Western philosophy. One of its most powerful themes (though an ambiguous one, as will appear) is expressed in the declaration that lex inusta non est lex — an unjust law is no law at all. It may well be that statements like this in the history of natural law theory have never meant what they seem, at face value, to mean (Finnis 1980: 363–6). Nevertheless, they do suggest the persistent claim that questions about the nature of law and the conditions of its existence as an authoritative normative order cannot be treated in isolation from questions about its moral foundations. Thus typically, in many different ways throughout its long history, natural law theory has postulated the existence of moral principles having a validity and authority independent of human enactment, and which can be thought of as “higher” or more fundamental law against which the worth or authority of human law can be judged. This fundamental “natural law” is variously seen as derived from human nature, the natural conditions of existence of humanity, the natural order of the universe, or the eternal law of God. The method of discovering it is usually claimed to be human reason. Natural law thus requires no human legislator. Yet it stands in judgment on the law created by human legislators.

Natural Law and Classical Common Law Thought

Why might this dispute about the relations of law and morality bear on the question of whether any of the perspectives or concerns of classical common law thought survive their displacement by positivist analytical jurisprudence, from Bentham onwards? As was seen in Chapter 2, classical common law thought assumed various sources of law’s authority. Law was seen as rooted in immemorial custom, or community life; in a transcendent reason, or the accumulation of ancient wisdom greater than that of any individual. By contrast, Bentham’s and Austin’s writings ground law’s authority in the existence of habitual obedience to a sovereign, a purportedly objective “test” to distinguish law from non-law and identify legal author-
ity. Hart and Kelsen focus on the fact of social acceptance of a rule of recognition or a basic norm as the fundamental prerequisite for a determination of legal authority. Positivist theories attempt to provide criteria of the "legal" and of law's authority in specific formal conditions which avoid vague ideas of the nature of the community or of social organisation, or of some transcendent reason. Because common law thought identified the source of legal authority, not in the state or sovereign or in rule-governed procedures of legal enactment but in reason or community, it allowed at various times, as has been seen, for the possibility that — in theory, at least — some legislation or judicial decisions could be void either as abuses of legal authority or as misstatements of the law.

Given this facet of classical common law thought it is unsurprising that at times it related closely to natural law ideas (Gough 1955: ch 3; Haines 1930: ch 2), which also claimed the possibility of evaluating law's authority before the tribunal of reason. The notion of common law as something not residing in rules but in more fundamental principles expressing a transcendent reason or ancient wisdom had close affinities with natural law doctrines asserting the existence of some higher (moral) law governing and providing ultimate authority for the ordinary rules of human (positive) law. On the other hand, natural law theory was always a two-edged sword. In English history it was used to defend the divine right of the monarch, as expressed in prerogatives, against the claims of common law (Pocock 1957: 55). Equally, it could be used to assert limits on, or a limiting interpretation of, the powers of Parliament, as in Coke's famous pronouncements in Calvin's Case (1608) (Gough 1955: 44–5). But appeals to natural law as a set of principles which could control the substance of human law ceased to be practically significant in England once parliamentary sovereignty was recognised. As classical common law thought had to accommodate and eventually give way to a view of law as created by political authority, so natural law thought gave way to legal positivism.

In the United States, natural law ideas proved important in the formative era of judicial interpretation of the Constitution, since, the temptation to fill out the meaning of a written fundamental constitutional document by appealing to an unwritten fundamental natural law proved irresistible to the courts. Constitutional adjudication entrusted to a Supreme Court which assumed the authority to pronounce on the constitutional validity of legislation raised special issues. Indeed, this may be one consideration which has made legal positivism somewhat less secure in modern American legal philosophy (as exemplified by Lon Fuller's work discussed later in this chapter, and the literature considered in Chapter 6) than it has been in England (but cf. Fuller 1940: 116–21).

Today, in the Anglo-American context, the fate of common law thought is not unconnected with that of natural law thought (although, outside the Anglo-American context, natural law's history must necessarily be understood in different terms). Common law thought has had to find a place, if at all, in an environment dominated by conceptions of law as posited by sovereign law-makers of various kinds or their delegates or agencies. Equally, natural law theory, insofar as it has survived at all in the Anglo-American legal world, has tended to locate itself in the interstices of legal positivism, accepting much of positivist analytical jurisprudence and seeking to supplement or correct, rather than dismiss out of hand, many of the ideas which have been the concern of Chapters 3 and 4.

IS NATURAL LAW DEAD?

Our concern is not with the long history of natural law theory in Western civilization but with its particular appearances in the modern Anglo-American legal context. In this perspective the decline of natural law theory can be dated conveniently from Bentham's attack on natural law ideas in Blackstone's Commentaries. Bentham's view that natural law was a "formidable non-entity," and natural law reasoning a "labyrinth of confusion" (Bentham 1777: 17, 20) based on moral prejudices, or unprovable speculations about human nature, went along with a profound political distrust of resonant phrases about the "rights of man" enshrined in constitutional documents such as those inspired by the French Revolution of 1789. In a single line of positivist legal thinking in England, running from Bentham to A.V. Dicey's late nineteenth century work on The Law of the Constitution, specific positive rules of law providing clearly defined rights enforceable in the ordinary courts are contrasted favourably with "practically worthless" (Dicey 1959: 256) broad declarations of the rights of man grounded in natural law conceptions but unenforced in practice. The rise of legal positivism is often associated with the nineteenth century prestige of "science" in general and the aspiration to produce a specific legal science which has been noted in previous chapters. But more is at stake than that. It is not a change in attitudes to science, morality or religion which should be held primarily accountable for the decline of natural law thinking and the rise of modern legal positivism but a change in the nature of law itself and its political and professional environment.

Insofar as law became seen as an instrument of state policy — and in the utilitarian view an instrument of progress, if used with caution — it was revealed as an amoral and infinitely plastic device of government. Insofar as it regulated increasingly complex and differentiated Western societies it could be seen as, above all, a means of controlling the interplay of conflicting interests. The social theorist Max Weber, writing of nineteenth century developments, noted that: "In consequence of both juridi-
In some sense - the natural order of things, and usually technical means of a compromise between conflicting interests۠(Strauss 1953: 9). The problem is that even if there are universal principles of natural law they may not offer a convincing guide or grounding for complex, highly technical and ever-changing modern law. After all, legal positivism does not deny that the substance of law can be subject to moral criticism.۠The issue is not whether law can be morally evaluated but whether its essential character must be explained in moral terms. As an effort to provide such an explanation, natural law ideas are, in the view of many writers, “devoid of any and every convincing theoretical justification” (Habermas 1974: 113).

**NATURAL LAW AND LEGAL AUTHORITY**

None of this should necessarily lead to the conclusion that the problems which natural law theory addressed in the past have disappeared. Different kinds of classical natural law theory confronted a variety of issues. Among the most important are the following: what is the ultimate source of authority or legitimacy of human law and of human lawmakers; assuming this authority to be in essence a moral one is it limited and, if so, what are the limits and whence do they derive; by what criteria is it possible to evaluate the moral worth and authority of laws; how should one view laws created by abuse of lawmaking authority; in what circumstances, if any, do governments and laws cease to command moral authority with the result that any obligation to obey them ceases? If the word “moral” is replaced in these questions with the word “legal”, all of them are ones which positivist analytical jurists have sought to answer in various ways. The concern which links positivist analytical jurisprudence and natural law theory is a concern with the nature of legal authority; with identifying its sources and its limits.

In positivist theory this concern is treated as raising technical issues. It is, above all, a matter of adequately conceptualising the highest authority of a legal system - for example, in terms of sovereignty, rule(s) of recognition, or basic norm - and determining the logical or practical relations between this authority concept and the other conceptual components of legal analysis and legal practice. For natural lawyers, however, the issues raised are moral ones. Almost inevitably, however, they turn into - or serve as cloaks for - political issues. This is because, while moral reasoning as applied to matters of private conscience may produce a coherent ethics to govern an individual’s life, moral reasoning applied to such a social and public matter as legal regulation will typically produce prescriptions as to how the power of the state should be exercised or limited in controlling citizens’ actions. Natural law theory, when taken seriously, becomes a force in political struggle - usually in defence of existing legal and political systems (by demonstrating their legitimacy grounded in “reason” or “nature”), but occasionally...
as a weapon of rebellion or revolution (cf. Kelsen 1945: 416–7).

As regards law’s authority, therefore, the primary difference between positivist theory and natural law theory is not a polar opposition but a difference as to how far inquiries about law’s ultimate authority should be taken, insofar as positivists are prepared to admit that law’s authority over the individual can be evaluated in moral terms and natural lawyers are prepared to recognise political authorities (such as the state) as having general, inherent law-making authority. The medieval theologian St. Thomas Aquinas, whose writings are one of the primary sources of natural law theory, recognised the state’s authority to legislate on numerous morally neutral matters about which natural law — the part of God’s eternal law which can be grasped by mankind’s unaided reason — would have nothing directly to say. The moral significance of this legislation would be only as part of the state’s overall system of regulation which must, in Aquinas’ view, serve the common good in order to conform with natural law.

Even as regards exercises of state authority which transgress dictates of natural law, issue is not necessarily clearly joined between classical natural law theory and legal positivism. Aquinas does not declare that all such laws lack validity or force. The philosopher John Finnis has argued that the “central tradition of natural law theorising” — essentially that grounded in Aquinas’ ideas and their antecedents — recognises the legal validity of unjust laws. That is, it recognises them as laws according to the criteria (such as Hartian rules of recognition) that positivist theorists would emphasise (Finnis 1980: 364–5). Certainly, where laws represent an abuse of the authority indicated by natural law (as where they are not created for the common good but for the whim of the lawmaker) one should, in Aquinas’ view, obey God rather than the human lawmaker. But where laws are unjust merely because they do not conform to the established norms of human welfare (for example, because they impose an unjust distribution of burdens on those subject to the law) he suggests that it might be better to obey. Even if the laws do not bind in conscience one should avoid the corrupting example and civil disorder attendant on law-breaking (cf. Finnis 1980: 360).

This apparent hedging of bets on the moral obligation to obey unjust laws can be understood as an attempt to work out realistically the idea that the authority of a legal system as a whole is founded on its dedication to the “common good”. Hence even where some laws are unjust, obligation to the system as a whole may remain insofar as it is of sufficient worth to justify its being protected against adverse effects arising from the corrupting example and disorder of law-breaking. The conflict between natural law and positivism thus tends to become a dispute as to whether the authority of a legal system as a whole can only be understood and judged in relation to some specific moral purpose (such as promotion of the common good) for which all legal systems exist. In general, the answer of natural lawyers is yes, and of positivists, no.

THE “REBIRTH” OF NATURAL LAW

The key to the debate around natural law is thus the issue of the nature of legal authority. Natural law theory seems to become significant in debate at times when political and legal authority are under challenge. In times of stability positivist criteria of legal authority typically seem sufficient. In times of political turmoil or rapid political change they frequently seem inadequate; legal understanding seems to demand not merely technical guidance about the nature of valid law but moral or political theory. Questions as to what rules are valid as law become elements of ideological struggle; a matter of winning hearts and minds for or against established regimes. Some of the material in Chapter 4 hinted at this dimension of the determination of legal validity. Kelsen’s efforts to establish a pure theory of law are, in part, an attempt to protect law from politicisation; an attempt made in full awareness of the difficulties of doing so “when in great and important countries, under the rule of party dictatorships, some of the most prominent representatives of jurisprudence know no higher task than to serve — with their ‘science’ — the political power of the moment” (Kelsen 1945: xvii). Indeed, Kelsen recognises that acceptance of a positivist science of law, such as his own, may be possible only “in a period of social equilibrium” (1945: xvii).

Thus, it is tempting to suggest that the enduring appeal of natural law arises precisely from its willingness to confront directly the moral-political issues of legality which arise in times of disorder and conflict, while positivist analytical jurisprudence presupposes a political stability which it cannot, itself, explain or even consider as a subject within the concerns of legal philosophy. However, the situation is more complex than that because modern versions of natural law theory have been developed in relatively stable societies such as those of twentieth century Britain and the United States. This suggests that legal positivism is seen by natural law writers as inadequate even where political authority is not being seriously challenged. Perhaps the best way to understand the matter is to recognise that a degree of “instability” as regards law-making authority is actually built into the structure of stable legal systems as portrayed by positivist analytical jurisprudence. This is because key questions about how law changes remain apparently impossible to address in modern positivist theory. This has been seen in Chapter 4 where it was noted that judicial law-making is, for Hart, the exercise of “discretion”, which his normative legal theory cannot really analyse, and is, for Kelsen, explicitly
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a matter of politics outside the compass of the pure theory of law.

Certain processes of law-making are, therefore, "unstable" in the sense that what determines their outcome is a matter which positivist theory cannot subject to rational legal analysis. Given this state of affairs it is not surprising that natural law began to become a focus of attention again precisely at the time when modern legal positivism might be thought to have consolidated its victories. In 1911, the American jurist Roscoe Pound wrote "It is not an accident that something very like a resurrection of natural law is going on the world over" (Pound 1911: 162; cf. Pound 1921: 82) and Charles Grove Haines, analysing this twentieth century rebirth, saw, as an important reason for it, the felt need to elaborate principles of "higher law" to guide the actions of judges in developing law (Haines 1930: 323-30). In the common law world where, traditionally, the role of the judge has seemed central within the legal system this matter is, no doubt, of special importance. It returns us to the link noted earlier, between common law thought and natural law theory.

Nevertheless, part of the motivation for rethinking the relative virtues of legal positivism and natural law theory has come from twentieth century experience of tyranny and political instability, and especially from ex post facto reflection by jurists on the legal history of the German Third Reich (1933-45). Here issues of the ultimate authority of law are thrown into sharp relief and the theme of the Rule of Law, which was identified in Chapter 4 as an important political preoccupation informing modern analytical jurisprudence, is highlighted in a new form. In this context, the Rule of Law appears not just as a matter of protecting the autonomy of legal structures, processes and professional knowledge against politisation by overweening state direction, but as a defence against uncontrolled terror and arbitrary violence. In the light of the Nazi experience, professional legal knowledge founded on a separation of law and morals — the positivist science of law — can be portrayed in a natural law perspective as, itself, a weapon of tyranny. This is precisely because it refuses to confront ultimate questions about the necessary moral criteria which state regulation must conform to in order to possess authority which a lawyer, or any other citizen, must recognise. The debate between positivists and natural lawyers, in this context, becomes a debate about the meaning of the Rule of Law. Should it be understood as the positivist aspiration to remove political and moral choices as far as possible from the determination of rights and duties; or should it be seen as the natural lawyer's insistence that morally acceptable purposes must govern the unavoidably political decisions as to what rights and duties will be held to exist?

ANGLO-AMERICAN LESSONS FROM THE NAZI ERA

The historical legacy of the Nazi era has explicitly influenced modern Anglo-American debates between legal positivists and natural lawyers. One of the most direct confrontations, between the positivist H.L.A. Hart and the American natural lawyer Lon Fuller, centred in part on discussion of the way in which post-war German courts were apparently evaluating the legality of acts done during the Nazi period and which were claimed to be lawful on the basis of Nazi law (Hart 1958; Fuller 1958). More generally, the influence of emigre scholars, who fled from Germany during the 1930s and, in many cases, settled eventually in the United States, helped to feed into Anglo-American legal and political consciousness insights and dilemmas about the nature and authority of legal regulation which experience of Nazi practices and policies inspired (e.g., Neumann 1944: Neumann 1986; Kirchheimer 1961). In addition, reflection on the character of war crimes trials and their basis of legitimacy and on the ultimate foundation of the principles applied to judge guilt in them, undoubtedly made the issue of the nature and authority of Nazi regulation a matter of direct concern in the Anglo-American world and, at the same time, informed wider speculation about legal methods and reasoning (e.g., Shklar 1964: Part 2) and the adequacy of legal positivism (Paulson 1973).

The 1958 Hart-Fuller debate is a good starting point in considering the recent confrontation of legal positivism and modern natural law in the Anglo-American context, and especially as an introduction to Fuller's influential ideas which will be the concern of much of the remainder of this chapter. At the time of his exchange with Hart, Fuller was professor of jurisprudence at Harvard University, where he taught, with a break during the 1940s, for more than thirty years until his retirement in 1972. As his biographer notes, he is "unquestionably the leading secular natural lawyer of the twentieth century in the English-speaking world" (Summers 1984: 151).

Hart argues that the positivists' analytical separation of law and morality is an aid to clear thinking; it avoids confusing legal and moral obligation. To say that a rule is a valid law (judged by such positivist criteria as its being the sovereign's command, authorised by a rule of recognition or imputed from a basic norm) merely asserts the existence of legal obligation. Whether one ought morally to disobey an unjust law is a matter about which positivist analytical jurisprudence can remain uncommitted, for moral issues are not within its province. For Fuller, however, such a view is both unrealistic and dangerous. It oversimplifies problems of obligation under a manifestly unjust regime and it sets up an unreal opposition — a legal obligation to obey as against a moral obligation to disobey; as if one can keep them separate. It assumes that there can
be order in a legal system without any moral content in it. For Fuller, the legal obligation to obey laws does not automatically follow from their enactment by a recognised, formal procedure. It depends on the legal system's claim, and ability to command, what Fuller calls fidelity to law. When certain minimum moral qualities cease to exist in a legal system, it ceases to command fidelity; that is, it ceases to have a claim to citizens' obedience. The order and coherence of a legal system (its ability simply to exist in a legal system, it ceases to command fidelity; that is, it ceases to have a claim to citizens' obedience. Without this it ceases to be a legal system at all.

It is not very clear what is involved in this last claim. It seems to relate to the question of the definition or specification law; to what it is to be able to say that law exists. In terms of normative legal theory's concerns, therefore, the claim is that a general concept of law necessarily entails moral elements of some sort. If, however, the criticism is raised that — as suggested earlier in this chapter — much of modern regulation is technical and conventional (for example, a requirement that a will must be attested by two witnesses to be valid; or the rule that in England one must drive on the left hand side of the road) rather than the expression of moral values — Fuller's answer is that law's existence depends on its authority (its capacity to demand fidelity) and this authority ultimately depends on certain elements of moral worth. Again, however, a positivist critic could deny that legal authority requires any moral component. As Austin noted: "The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals... An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice..." (Austin 1832: 185). Must we say, therefore, that the positivist view offers hard-headed realism about the way legal systems actually function (with no necessary direct dependence on moral principle), whereas Fuller's thesis is merely wishful thinking about values which ought to be, but are not necessarily, built into law?

In this 1958 paper, as in earlier writings (1940: 101, 110; 1946), Fuller distances his thinking from classical natural law theory. As has been noted, this classical theory was generally vulnerable to the positivist criticism that modern law — in Weber's terms, a technical means of compromising or managing conflicting interests — is no longer usefully analysed in terms of moral absolutes and requires a "science" explicitly recognising its human origins and instrumental political character. Fuller's strategy is to emphasise that the necessary morality of law is a procedural one, relating to the way law is created, expressed, interpreted and applied, rather than to any particular substantive content of legal rules. Looked at this way, even purely technical rules, such as the one requiring two witness attestations for a valid will, have a moral dimension. Everything depends on how the rule operates, how it comes into being, is expressed, interpreted or enforced.

The historical example of Nazi Germany provides material to illustrate Fuller's thesis. To assume, as Hart does, that the only difference between Nazi law and English law was that the Nazis used their laws to achieve purposes odious to English people is, Fuller argues, to ignore the much more fundamental moral differences between the two legal regimes. Nazi law made frequent and pervasive use of methods which show, in terms of Anglo-American standards, a most serious perversion of procedural regularity. For example, frequent use was made of retroactive statutes to cure irregularities. A notorious example occurred after the Roehm purge of June 30th and July 1st 1934 when, on Adolf Hitler's orders, more than seventy members of the Nazi party were shot. On July 3rd, a law was passed ratifying the massacre as a series of lawful executions. Hitler apparently later declared that at the time of the purge "the supreme court of the German people consisted of myself" (Fuller 1958: 650). Secondly, Fuller notes "repeated rumours" of secret laws and regulations making it impossible for most people even to discover the rules upon which officials were supposed to act. More generally, however, since "unpublished instructions to those administering the law could destroy the letter of any published law by imposing on it an outrageous interpretation, there was a sense in which the meaning of every law was 'secret'" (Fuller 1958: 652). Thirdly, when legal formalities and procedures became inconvenient to the Nazi regime they could be bypassed by means of Nazi gangs taking action "on the street" and achieving the required objective by violence. Fourthly, "the Nazi-dominated courts were always ready to disregard any statute, even those enacted by the Nazis themselves, if this suited their convenience or if they feared that a lawyer-like interpretation might incur displeasure 'above'" (Fuller 1958: 652).

Assuming this picture of Nazi law in action is correct, what should be said of a legal system like this? The first point is that it seems less like a system of legal order than of discretions in policy-implementation organised around the furtherance of political aims of the regime in power (cf. Kirchheimer 1941). Not only is it inefficient, as a functioning system of rules, but it lacks all procedural fairness and propriety. These latter deficiencies point to a decline in what Fuller terms the internal morality of law. Thus, for him, they involve not just issues of efficiency but moral issues. We should be prepared to say (irrespective of the substantive content of Nazi laws) that the way the laws were applied was not merely procedurally inefficient but manifestly unjust. Fuller argues (1958: 642) that the authority of law (its capacity to demand fidelity) derives from a moral understanding3 between rulers and ruled, such that citizens accord moral respect to the constitution which governs them as "necessary, right, and
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good". In the 1958 paper this is inadequately analysed because there is no clear indication of the criteria to be satisfied to ensure this recognition by citizens.

The best way to support Fuller's argument about a link between the moral authority of law and its procedural proprieties would be to suggest that a gross and cynical discarding of formal and predictable procedure constitutes a kind of "fraud" on those who must obey. There can be no moral understanding between rulers and ruled in such circumstances. The ruled have no chance to orient themselves to the dictates of the ruler's authority. Although they must obey, they are not given a reasonable chance to do so in an orderly and rational manner. This is not, however, spelled out in Fuller's 1958 paper, though related arguments appear in his later writings (cf. Fuller 1969a: 153, 159–62). Instead he claims, without any real justification, that a decline in the moral aims or purposes of law, which he calls law's "external" morality and which determine the authority and respect attaching to the legal system, is likely to be accompanied by a decline in the (procedural) internal morality, and vice versa (Fuller 1958: 645).

THE IDEAL OF LEGALITY AND THE EXISTENCE OF LAW

However, the important point being made from the Nazi example is that the stable forms and procedures of law and the nature of its authority are linked and Fuller is specific in his claims about the consequence of disintegration of these forms and procedures in practice in Nazi Germany. He suggests that the decline in procedural propriety, in the internal morality of law, was so serious that a legal system, as such, ceased to exist in Germany during the Nazi period. Hence post-war courts should not recognise Nazi law. Matters of legality in the Nazi period should be clarified, where necessary, by retroactive legislation. This claim about the non-existence of law in Nazi Germany is, indeed, one which other writers had already made, and on the basis of similar arguments about the effects of the procedural arbitrariness of the Nazi regime. Franz Neumann, a distinguished jurist who practiced law in Germany during the years leading to the Nazi accession to power in 1933, wrote, observing Nazi Germany from exile in America, that "there is no realm of law in Germany, although there are thousands of technical rules that are calculable" (Neumann 1944: 468). Another eminent German scholar, Otto Kirchheimer, wrote to similar effect: "With the access to power of National Socialism the common legal bond of a generally applicable civil law disappeared more and more..." (Kirchheimer 1941: 89).

Obviously a specific definition of the word "law" is involved here and Nazi regulation is being tested against it. But, in Fuller's 1958 essay, no such definition is made explicit. In Kirchheimer's and especially Neumann's writings, however, the concept of law employed is elaborated. Indeed Neumann used it in major writings of the 1930s and 1940s as the criterion for assessing general changes in the character of twentieth century regulation and as the organising concept for the most detailed historical analysis available in English of the notion of the Rule of Law (Neumann 1986).

Neumann writes bluntly: "the National Socialist legal system is nothing but a technique of mass manipulation by terror" (1944: 458). If law is merely the sovereign's command such a system must be recognised as legal. But if law "must be rational either in form or in content" Nazi regulation definitely does not deserve the name of law. For Neumann, law is both voluntas (the expression of sovereign power) and ratio (the expression of reason, or rational principle grounded in general ethical postulates) and the legal history of Western civilization is a history of the attempt to reconcile these typically incompatible yet essential components of legality (Neumann 1986: 45–6; 1944: 451–2). The component of ratio insists that law be a matter of general rules, not special individualised commands. It requires also that these general rules be clear and predictable in application, not vague general norms providing broad authority for virtually free official discretion. Hence, although Nazi regulation made considerable use of technical rules, it lacked the character of law.

Kirchheimer elaborates similar arguments. He sees Nazi regulation as guided wholly by policy demands. These necessitated technically rational norms of a purely provisional character which could be changed quickly to meet the needs of the moment, without notice and, if necessary, retrospectively. Such requirements precluded the existence of a stable body of general laws which could only hamper governmental freedom to shape, adjust and implement policy. The aim of adjudication and rule application in such a regime is not to maximise legal stability but to execute given commands "so as to have the maximum effect in the shortest possible time" (Kirchheimer 1941: 99). Thus, the legal regime of contract is largely replaced by a system of private command and administrative order; that of family law becomes a regime of policy regarding population development and social organisation. Even the idea of the state, as the abstract source or structure of regulation, is discarded in favour of the ultimate "total and all-embracing" personal authority of the leader (Krausnik et al. 1968: 128; Neumann 1944: 467–70).

For Fuller, the point of referring to evidence from a grossly pathological regulatory system is to try to show that legality is a more complex notion than legal positivism understands it to be. For rules to be "legal" it is not enough that they conform to the legal criteria expressed in a rule of recognition, or can be imputed from some basic norm of the legal system. Legality is a matter also of the way rules operate, of how they are drafted, promulgated, applied, interpreted and enforced. Neumann and Kirchhe-
Immer had already offered a broadly similar message. Neumann, however, rejects natural law theory in his writings as a mystification usually adopted to justify the status quo. He is concerned only to confront positivist analytical jurisprudence with political and social realities and to demonstrate its descriptive inadequacy in failing to take account of them. Fuller, by contrast, eventually chooses the terrain of natural law on which to fight (cf. Fuller 1969a: 96–7). The message of Nazi experience for him is that legal positivism cannot appreciate the moral conditions under which legality is possible. Legal order must be “good order” so as to create conditions for fidelity to law. Good order demands conformity, at least a minimum extent, with the internal morality of law. Legality, for Fuller, is thus a special kind of morality.

Before considering Fuller’s ideas expressed in other writings it is appropriate to take stock, in a preliminary way, of this critique of legal positivism, since it remains substantially unchanged in his later work. A familiar positivist reaction to Fuller is to express approval of all the procedural proprieties upon which he insists while denying their moral character, and denying also that Fuller’s conception of legality in any way invalidates positivist analyses of law. The positivist claim is that the theoretical relationships between legal rules (in Hart’s concept of law) and legal norms (in Kelsen’s theory) are not invalidated by procedural impropriety. They exist even if denied in practice. Indeed, as has been seen, part of Kelsen’s objective is to defend a rational legal science (as professional legal reasoning) in the face of political manipulation of law. The proper framing, application and interpretation of law are thus not moral matters for Kelsen and Hart, but consequences of adherence to a coherent positivist view of a legal system and of the necessary relationships between its doctrinal elements.

Fuller’s claims are symptomatic of an impatience with legal positivism’s silences — with what it refuses to say about law — rather than with its explicit tenets. In Chapter 4 it was noted that modern analytical jurisprudence contributes to lawyers’ professional concerns by attempting to establish a coherent concept (Hart) or science (Kelsen) of law which adequately reflects the normative view of rules or norms held by legal “insiders”; in other words, above all, by lawyers. At the same time, a political dimension to these theories was noted. They suggest an image of the Rule of Law as somehow inbuilt in the very concept of law or legal system, because of their portrayal of law as a self-regulating system. But Fuller’s procedural natural law theory seeks to show the inadequacy of this formal Rule of Law conception. Legality is typically reduced in the implicit positivist conception to a professional understanding of the doctrinal consequences of a logically integrated systems of rules. The actual operation of rules is ignored and, indeed, is largely irrelevant to this conception. Fuller, however, passionate about the evils of Nazism (Summers 1984: 7,152), insists on the inadequacy of any such abstract and formal view of legality and the Rule of Law and emphasises the need to examine the practical conditions of the making and application of rules.

Nevertheless, if the legal professional concern for a coherent portrayal of doctrine in its logical relationships is the concern which analytical jurisprudence as a type of normative legal theory is attempting to meet, its failure to address wider political and ethical dimensions of law in action is not necessarily inimical to the achievement of its objectives. Its silences on the moral issues of Nazi law do not, in themselves, invalidate its theses or render them incoherent. On this view, Fuller’s natural law approach merely strains at the limits of normative legal theory as a rationalisation of legal professional knowledge; it asserts a need to infuse a more profound political awareness into normative legal theory. As will appear later, even legal positivists have realized that this might be desirable.

A PURPOSE VIEW OF LAW

Fuller’s other writings make it clear, however, that his main concerns about law’s morality are not with such questions of legal pathology as whether Nazi law was too evil to be law, but with constructive issues as to how to infuse the highest legal virtues into systems, such as those of Anglo-American law, which he would regard as far from pathological. The principles of internal morality of law — the procedural criteria by which Nazi legal tyranny is measured in the 1958 essay — are discussed in Fuller’s most influential book The Morality of Law, first published in 1964, as criteria also of possible legal excellence.

In The Morality of Law Fuller distinguishes between two kinds of morality or moral judgement. The morality of duty refers to the basic moral demands of order without which mere existence (whether of a society or of a legal system) becomes impossible. The morality of aspiration, by contrast, refers not to a moral minimum, but a maximum. “It is the morality of the Good Life, of excellence, of the fullest realisation of human powers” (1969: 5). Duty and aspiration constitute the ends of a moral scale rising from the bare moral necessities for any human achievement, through to the highest moral ideals. Moral demands can be pitched at various points on this scale. For example, a judgment about the morality of gambling could stress that extensive gambling directly harms society, the individual and the individual’s family in economic, psychological and other ways. These “duty” considerations might suggest that gambling should be legally prohibited. On the other hand, gambling on a small scale and for low stakes might not seem harmful in these basic ways but only a matter for regret that the individual can find no better use of time and energy. The aspiration that people should live “good lives” is not something to
which they should be compelled. We assume that law should require the moral minimum, not try to force citizens to become saints.

This idea of a moral scale enables Fuller to pose, as a fundamental problem of all legal regulation, that of deciding where the pressures of duty stop and the excellences of aspiration begin. Law’s impositions must be sufficient to sustain duty but they become tyrannous if they seek to impose excellence. Hence one of the most important arts of law-making is that of judging for each issue, each law each activity or situation, what level of moral demands law should operate with. But the demand for legality is itself a moral demand. Therefore, it is necessary to decide how far it relates to the morality of duty and how far to that of aspiration. Where on the moral scale is the internal morality of law to be located? In The Morality of Law law’s internal morality is first presented negatively as “eight ways to fail to make law”. These are:

(i) a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis;
(ii) a failure to publicise the rules to be observed;
(iii) the abuse of retroactive legislation “which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change”;
(iv) a failure to make rules understandable;
(v) enactment of contradictory rules or
(vi) rules requiring conduct beyond the powers of the affected party;
(vii) introducing such frequent changes in the rules that those addressed cannot orient their conduct by them; and
(viii) a failure of congruence between the rules and their actual administration (Fuller 1969a: 39).

Total failure in any one of these directions, or a pervasive general failure in them (as with Nazi regulation) would, for Fuller, result in the non-existence of a legal system (1969a: 39). At this basic level, therefore, the internal morality of law provides a minimum morality of duty without which the existence of a legal system is impossible.

Beyond such rare pathological cases, however, the internal morality of law is primarily a morality of aspiration; the aspiration to maximise legality, to make legal order as good an order as can be. The internal morality can then be expressed as eight excellences which are the reverse of the “eight ways to fail to make”: government always by rules, which are always publicised, prospective, understandable, non-contradictory, etc. Yet Fuller stresses that it would be counterproductive to try to realise fully all eight excellences in a working legal system. No system of rules could function on such a basis but would collapse in chaos or paralysis. For example, retroactive laws are sometimes inevitable, not all legal disputes can be solved by existing rules, and rules cannot achieve perfect clarity in advance of all applications of them. Thus, the achievement of legality is not merely the acceptance of a set of moral principles. It is a matter of judging the point on the moral scale between duty and aspiration where each component of legality, as related to each concrete problem of legal regulation in the particular legal system concerned, should be set. And the point on the scale will vary with circumstance and time. The achievement of legality is, thus, a task requiring all the skills of legislator and jurist. It is the heart of “the enterprise of subjecting human conduct to the governance of rules” (1969a: 91, 96).

The use of this last mentioned phrase is the closest Fuller comes to defining law (cf. 1969a: 106), but the definition, such as it is, is instructive. It emphasises that law is a purposive activity (not merely rules or norms which are the product of the activity). Equally Fuller’s definition reflects his view (readily acceptable to many legal sociologists but sometimes less so to lawyers and legal philosophers) that the term “law” need not be limited to refer only to rules enforced by state agencies. Fuller’s purposive concept of law allow it to be applied to rule structures governing numerous social institutions — such as schools, hospitals or business corporations — and social groups. The internal morality of law provides criteria of legality by which rule systems of many kinds can be judged. Indeed, this concept of legality has been used in sociological studies in such fields as industrial relations (Selznick 1969) and policing (Skolnick 1975).

There is much of value in these ideas. Nevertheless, it is clear that we have moved on to different terrain from that of positivist analytical jurisprudence. What is now offered by Fuller no longer appears as a direct critique of legal positivism but as a different enterprise concerned with the examination of law in purposive terms. Although Fuller presents his ideas as an attack on legal positivism, they cannot be defended as a critique of the logic of positivist analytical jurisprudence but only of the inappropriateness, narrowness or political and social irrelevance of its projects. His claims are strong ones. But they amount to saying: you should have devoted your researches to this rather than that. And the positivist can still reply: maybe so, but your arguments are no criticism of what I have done in seeking to rationalise the legal knowledge which is important to lawyers.

Endnotes

1. Marbury v. Madison (1803), 1 Cranch 137.