VOLUME 71 FEBRUARY 1958 NUMBER 4

HARVARD LAW REVIEW

POSITIVISM AND THE SEPARATION OF LAW AND MORALS †

H. L. A. Hart *

Professor Hart defends the Positivist school of jurisprudence from many of the criticisms which have been leveled against its insistence on distinguishing the law that is from the law that ought to be. He first insists that the critics have confused this distinction with other Positivist theories about law which deserved criticism, and then proceeds to consider the merits of the distinction.

IN this article I shall discuss and attempt to defend a view which Mr. Justice Holmes, among others, held and for which he and they have been much criticized. But I wish first to say why I think that Holmes, whatever the vicissitudes of his American reputation may be, will always remain for Englishmen a heroic figure in jurisprudence. This will be so because he magically combined two qualities: one of them is imaginative power, which English legal thinking has often lacked; the other is clarity, which English legal thinking usually possesses. The English lawyer who turns to read Holmes is made to see that what he had taken to be settled and stable is really always on the move. To make this discovery with Holmes is to be with a guide whose words may leave you unconvinced, sometimes even repelled, but never mystified. Like our own Austin, with whom Holmes shared many ideals and thoughts, Holmes was sometimes clearly wrong; but again like Austin, when this was so he was always wrong clearly. This surely is a sovereign virtue in jurisprudence. Clarity I know is said not to be enough; this may be true, but there are still questions in jurisprudence where the issues are confused because

† The original version of this article was delivered in April 1957 as the Oliver Wendell Holmes Lecture at the Harvard Law School.

* Professor of Jurisprudence and Fellow of University College, Oxford; Visiting Professor of Law, Harvard Law School, 1956–57.

HeinOnline -- 71 Harv. L. Rev. 593 1957

they are discussed in a style which Holmes would have spurned for its obscurity. Perhaps this is inevitable: jurisprudence trembles so uncertainly on the margin of many subjects that there will always be need for someone, in Bentham's phrase, "to pluck the mask of Mystery" from its face.[1] This is true, to a pre-eminent degree, of the subject of this article. Contemporary voices tell us we must recognize something obscured by the legal "positivists" whose day is now over: that there is a "point of intersection between law and morals,"[2] or that what *is* and what *ought* to be are somehow indissolubly fused or inseparable,[3] though the positivists denied it. What do these phrases mean? Or rather which of the many things that they *could* mean, *do* they mean? Which of them do "positivists" deny and why is it wrong to do so?

I.

I shall present the subject as part of the history of an idea. At the close of the eighteenth century and the beginning of the nineteenth the most earnest thinkers in England about legal and social problems and the architects of great reforms were the great Utilitarians. Two of them, Bentham and Austin, constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be. This theme haunts their work, and they condemned the natural-law thinkers precisely because they had blurred this apparently simple but vital distinction. By contrast, at the present time in this country and to a lesser extent in England, this separation between law and morals is held to be superficial and wrong. Some critics have thought that it blinds men to the true nature of law and its roots in social life.[4]

---

[1] BENTHAM, *A Fragment on Government*, in 1 WORKS 221, 235 (Bowring ed. 1859) (preface, 41st para.).

[2] D'ENTRÈVES, NATURAL LAW 116 (2d ed. 1952).

[3] FULLER, THE LAW IN QUEST OF ITSELF 12 (1940); Brecht, *The Myth of Is and Ought*, 54 HARV. L. REV. 811 (1941); Fuller, *Human Purpose and Natural Law*, 53 J. PHILOS 697 (1953).

[4] See FRIEDMANN, LEGAL THEORY 154, 294–95 (3d ed. 1953). Friedmann also says of Austin that "by his sharp distinction between the science of legislation and the science of law," he "inaugurated an era of legal positivism and self-sufficiency which enabled the rising national State to assert its authority undisturbed by juristic doubts." *Id.* at 416. Yet, "the existence of a highly organised State which claimed sovereignty and unconditional obedience of the citizen" is said to be "the political condition which makes analytical positivism possible." *Id.* at 163. There is therefore some difficulty in determining which, in this account, is to be hen and which egg (analytical positivism or political condition). Apart from this, there seems to be little evidence that any national State rising in or after 1832 (when the *Province*

HeinOnline -- 71 Harv. L. Rev. 594 1957

Others have thought it not only intellectually misleading but corrupting in practice, at its worst apt to weaken resistance to state tyranny or absolutism,[5] and at its best apt to bring law into disrespect. The nonpejorative name "Legal Positivism," like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins. One of them is the sin, real or alleged, of insisting, as Austin and Bentham did, on the separation of law as it is and law as it ought to be.

How then has this reversal of the wheel come about? What are the theoretical errors in this distinction? Have the practical consequences of stressing the distinction as Bentham and Austin did been bad? Should we now reject it or keep it? In considering these questions we should recall the social philosophy which went along with the Utilitarians' insistence on this distinction. They stood firmly but on their own utilitarian ground for all the principles of liberalism in law and government. No one has ever combined, with such even-minded sanity as the Utilitarians, the passion for reform with respect for law together with a due recognition of the need to control the abuse of power even when power is in the hands of reformers. One by one in Bentham's works you can identify the elements of the *Rechtstaat* and all the principles for the defense of which the terminology of natural law has in our day been revived. Here are liberty of speech, and of press, the right of association,[6] the need that laws should be published and made widely known before they are enforced,[7] the need to control administrative agencies,[8] the insistence that there should be no criminal liability without fault,[9] and the importance of the prin-

---

of Jurisprudence Determined was first published) was enabled to assert its authority by Austin's work or "the era of legal positivism" which he "inaugurated."

[5] See Radbruch, *Die Erneuerung des Rechts*, 2 DIE WANDLUNG 8 (Germany 1947); Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105 (Germany 1946) (reprinted in RADBRUCH, RECHTSPHILOSOPHIE 347 (4th ed. 1950)). Radbruch's views are discussed at pp. 617–21 *infra*.

[6] BENTHAM, *A Fragment on Government*, in 1 WORKS 221, 230 (Bowring ed. 1859) (preface, 16th para.); BENTHAM, *Principles of Penal Law*, in 1 WORKS 365, 574–75, 576–78 (Bowring ed. 1859) (pt. III, c. XXI, 8th para., 12th para.).

[7] BENTHAM, *Of Promulgation of the Laws*, in 1 WORKS 155 (Bowring ed. 1859); BENTHAM, *Principles of the Civil Code*, in 1 WORKS 297, 323 (Bowring ed. 1859) (pt. I, c. XVII, 2d para.); BENTHAM, *A Fragment on Government*, in 1 WORKS 221, 233 n.[*m*] (Bowring ed. 1859) (preface, 35th para.).

[8] BENTHAM, *Principles of Penal Law*, in 1 WORKS 365, 576 (Bowring ed. 1859) (pt. III, c. XXI, 10th para., 11th para.).

[9] BENTHAM, *Principles of Morals and Legislation*, in 1 WORKS 1, 84 (Bowring ed. 1859) (c. XIII).

HeinOnline -- 71 Harv. L. Rev. 595 1957

ciple of legality, *nulla poena sine lege*.[10] Some, I know, find the political and moral insight of the Utilitarians a very simple one, but we should not mistake this simplicity for superficiality nor forget how favorably their simplicities compare with the profundities of other thinkers. Take only one example: Bentham on slavery. He says the question at issue is not whether those who are held as slaves can reason, but simply whether they suffer.[11] Does this not compare well with the discussion of the question in terms of whether or not there are some men whom Nature has fitted only to be the living instruments of others? We owe it to Bentham more than anyone else that we have stopped discussing this and similar questions of social policy in that form.

So Bentham and Austin were not dry analysts fiddling with verbal distinctions while cities burned, but were the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws. Why then did they insist on the separation of law as it is and law as it ought to be? What did they mean? Let us first see what they said. Austin formulated the doctrine:

> 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, or though it vary from the text, by which we regulate our approbation and disapprobation. 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, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.
>
> Sir William Blackstone, for example, says in his "Commentaries," that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original.
>
> Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. . . . Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which

[10] BENTHAM, *Anarchical Fallacies*, in 2 WORKS 489, 511–12 (Bowring ed. 1859) (art. VIII); BENTHAM, *Principles of Morals and Legislation*, in 1 WORKS 1, 144 (Bowring ed. 1859) (c. XIX, 11th para.).

[11] *Id.* at 142 n.§ (c. XIX, 4th para. n.§).

HeinOnline -- 71 Harv. L. Rev. 596 1957

> they impose by that ultimate standard, because if they do not, God will punish them. To this also I entirely assent . . . .
>
> But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law *is a law* . . . .[12]

Austin's protest against blurring the distinction between what law is and what it ought to be is quite general: it is a mistake, whatever our standard of what ought to be, whatever "the text by which we regulate our approbation or disapprobation." His examples, however, are always a confusion between law as it is and law as morality would require it to be. For him, it must be remembered, the fundamental principles of morality were God's commands, to which utility was an "index": besides this there was the actual accepted morality of a social group or "positive" morality.

Bentham insisted on this distinction without characterizing morality by reference to God but only, of course, by reference to the principles of utility. Both thinkers' prime reason for this insistence was to enable men to see steadily the precise issues posed by the existence of morally bad laws, and to understand the specific character of the authority of a legal order. Bentham's general recipe for life under the government of laws was simple: it was "*to obey punctually; to censure freely.*"[13] But Bentham was especially aware, as an anxious spectator of the French revolution, that this was not enough: the time might come in any society when the law's commands were so evil that the question of resistance had to be faced, and it was then essential that the issues at stake at this point should neither be oversimplified nor obscured.[14] Yet, this was precisely what the confusion between law and morals had done and Bentham found that the confusion had spread symmetrically in two different directions. On the one hand

---

[12] AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184–85 (Library of Ideas ed. 1954).

[13] BENTHAM, *A Fragment on Government*, in 1 WORKS 221, 230 (Bowring ed. 1859) (preface, 16th para.).

[14] See BENTHAM, *Principles of Legislation*, in THE THEORY OF LEGISLATION 1, 65 n.* (Ogden ed. 1931) (c. XII, 2d para. n.*).

> Here we touch upon the most difficult of questions. If the law is not what it ought to be; if it openly combats the principle of utility; ought we to obey it? Ought we to violate it? Ought we to remain neuter between the law which commands an evil, and morality which forbids it?

See also BENTHAM, *A Fragment on Government*, in 1 WORKS 221, 287–88 (Bowring ed. 1859) (c. IV, 20th–25th paras.).

HeinOnline -- 71 Harv. L. Rev. 597 1957

Bentham had in mind the anarchist who argues thus: "This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it." On the other hand he thought of the reactionary who argues: "This is the law, therefore it is what it ought to be," and thus stifles criticism at its birth. Both errors, Bentham thought, were to be found in Blackstone: there was his incautious statement that human laws were invalid if contrary to the law of God,[15] and "that spirit of obsequious *quietism* that seems constitutional in our Author" which "will scarce ever let him recognise a difference" between what is and what ought to be.[16] This indeed was for Bentham the occupational disease of lawyers: "[I]n the eyes of lawyers — not to speak of their dupes — that is to say, as yet, the generality of non-lawyers — the *is* and *ought to be* . . . were one and indivisible."[17] There are therefore two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.

In view of later criticisms it is also important to distinguish several things that the Utilitarians did not mean by insisting on their separation of law and morals. They certainly accepted many of the things that might be called "the intersection of law and morals." First, they never denied that, as a matter of historical fact, the development of legal systems had been powerfully influenced by moral opinion, and, conversely, that moral standards had been profoundly influenced by law, so that the content of many legal rules mirrored moral rules or principles. It is not in fact always easy to trace this historical causal connection, but Bentham was certainly ready to admit its existence; so too Austin

---

[15] 1 BLACKSTONE, COMMENTARIES *41. Bentham criticized "this dangerous maxim," saying "the natural tendency of such a doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like." BENTHAM, *A Fragment on Government*, in 1 WORKS 221, 287 (Bowring ed. 1859) (c. IV, 19th para.). See also BENTHAM, A COMMENT ON THE COMMENTARIES 49 (1928) (c. III). For an expression of a fear lest anarchy result from such a doctrine, combined with a recognition that resistance may be justified on grounds of utility, see AUSTIN, *op. cit. supra* note 12, at 186.

[16] BENTHAM, *A Fragment on Government*, in 1 WORKS 221, 294 (Bowring ed. 1859) (c. V, 10th para.).

[17] BENTHAM, *A Commentary on Humphreys' Real Property Code*, in 5 WORKS 389 (Bowring ed. 1843).

HeinOnline -- 71 Harv. L. Rev. 598 1957

spoke of the "frequent coincidence"[18] of positive law and morality and attributed the confusion of what law is with what law ought to be to this very fact.

Secondly, neither Bentham nor his followers denied that by explicit legal provisions moral principles might at different points be brought into a legal system and form part of its rules, or that courts might be legally bound to decide in accordance with what they thought just or best. Bentham indeed recognized, as Austin did not, that even the supreme legislative power might be subjected to legal restraints by a constitution[19] and would not have denied that moral principles, like those of the fifth amendment, might form the content of such legal constitutional restraints. Austin differed in thinking that restraints on the supreme legislative power could not have the force of law, but would remain merely political or moral checks;[20] but of course he would have recognized that a statute, for example, might confer a delegated legislative power and restrict the area of its exercise by reference to moral principles.

What both Bentham and Austin were anxious to assert were the following two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.

The history of this simple doctrine in the nineteenth century is too long and too intricate to trace here. Let me summarize it by saying that after it was propounded to the world by Austin it dominated English jurisprudence and constitutes part of the framework of most of those curiously English and perhaps unsatisfactory productions — the omnibus surveys of the whole field of jurisprudence. A succession of these were published after a full text of Austin's lectures finally appeared in 1863. In each of them the utilitarian separation of law and morals is treated as something that enables lawyers to attain a new clarity. Austin was said by one of his English successors, Amos, "to have delivered the law from the dead body of morality that still clung to

[18] AUSTIN, *op. cit. supra* note 12, at 162.

[19] BENTHAM, *A Fragment on Government*, in 1 WORKS 221, 289–90 (Bowring ed. 1859) (c. IV, 33d–34th paras.).

[20] See AUSTIN, *op. cit. supra* note 12, at 231.

HeinOnline -- 71 Harv. L. Rev. 599 1957

it";[21] and even Maine, who was critical of Austin at many points, did not question this part of his doctrine. In the United States men like N. St. John Green,[22] Gray, and Holmes considered that insistence on this distinction had enabled the understanding of law as a means of social control to get off to a fruitful new start; they welcomed it both as self-evident and as illuminating — as a revealing tautology. This distinction is, of course, one of the main themes of Holmes' most famous essay "The Path of the Law,"[23] but the place it had in the estimation of these American writers is best seen in what Gray wrote at the turn of the century in *The Nature and Sources of the Law*. He said:

> The great gain in its fundamental conceptions which Jurisprudence made during the last century was the recognition of the truth that the Law of a State . . . is not an ideal, but something which actually exists. . . . [I]t is not that which ought to be, but that which is. To fix this definitely in the Jurisprudence of the Common Law, is the feat that Austin accomplished.[24]

II.

So much for the doctrine in the heyday of its success. Let us turn now to some of the criticisms. Undoubtedly, when Bentham and Austin insisted on the distinction between law as it is and as it ought to be, they had in mind *particular* laws the meanings of which were clear and so not in dispute, and they were concerned to argue that such laws, even if morally outrageous, were still laws. It is, however, necessary, in considering the criticisms which later developed, to consider more than those criticisms which were directed to this particular point if we are to get at the root of the dissatisfaction felt; we must also take account of the objection that, even if what the Utilitarians said on this particular point were true, their insistence on it, in a terminology suggesting a general cleavage between what is and ought to be law, obscured the fact

[21] AMOS, THE SCIENCE OF LAW 4 (5th ed. 1881). See also MARKBY, ELEMENTS OF LAW 4–5 (5th ed. 1896):

> Austin, by establishing the distinction between positive law and morals, not only laid the foundation for a science of law, but cleared the conception of law . . . of a number of pernicious consequences to which . . . it had been supposed to lead. Positive laws, as Austin has shown, must be legally binding, and yet a law may be unjust. . . . He has admitted that law itself may be immoral, in which case it may be our moral duty to disobey it . . . .

Cf. HOLLAND, JURISPRUDENCE 1–20 (1880).

[22] See Green, Book Review, 6 AM. L. REV. 57, 61 (1871) (reprinted in GREEN, ESSAYS AND NOTES ON THE LAW OF TORT AND CRIME 31, 35 (1933)).

[23] 10 HARV. L. REV. 457 (1897).

[24] GRAY, THE NATURE AND SOURCES OF THE LAW 94 (1st ed. 1909) (§ 213).

HeinOnline -- 71 Harv. L. Rev. 600 1957

that at other points there is an essential point of contact between the two. So in what follows I shall consider not only criticisms of the particular point which the Utilitarians had in mind, but also the claim that an essential connection between law and morals emerges if we examine how laws, the meanings of which are in dispute, are interpreted and applied in concrete cases; and that this connection emerges again if we widen our point of view and ask, not whether every particular rule of law must satisfy a moral minimum in order to be a law, but whether a system of rules which altogether failed to do this could be a legal system.

There is, however, one major initial complexity by which criticism has been much confused. We must remember that the Utilitarians combined with their insistence on the separation of law and morals two other equally famous but distinct doctrines. One was the important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was as vital to our understanding of the nature of law as historical or sociological studies, though of course it could not supplant them. The other doctrine was the famous imperative theory of law — that law is essentially a command.

These three doctrines constitute the utilitarian tradition in jurisprudence; yet they are distinct doctrines. It is possible to endorse the separation between law and morals and to value analytical inquiries into the meaning of legal concepts and yet think it wrong to conceive of law as essentially a command. One source of great confusion in the criticism of the separation of law and morals was the belief that the falsity of any one of these three doctrines in the utilitarian tradition showed the other two to be false; what was worse was the failure to see that there were three quite separate doctrines in this tradition. The indiscriminate use of the label "positivism" to designate ambiguously each one of these three separate doctrines (together with some others which the Utilitarians never professed) has perhaps confused the issue more than any other single factor.[25] Some of the early American critics of the Austinian doctrine were, however,

[25] It may help to identify five (there may be more) meanings of "positivism" bandied about in contemporary jurisprudence:

(1) the contention that laws are commands of human beings, see pp. 602–06 *infra*,

(2) the contention that there is no necessary connection between law and morals or law as it is and ought to be, see pp. 594–600 *supra*,

(3) the contention that the analysis (or study of the meaning) of legal con-

HeinOnline -- 71 Harv. L. Rev. 601 1957

admirably clear on just this matter. Gray, for example, added at the end of the tribute to Austin, which I have already quoted, the words, "He may have been wrong in treating the Law of the State as being the command of the sovereign" [26] and he touched shrewdly on many points where the command theory is defective. But other critics have been less clearheaded and have thought that the inadequacies of the command theory which gradually came to light were sufficient to demonstrate the falsity of the separation of law and morals.

This was a mistake, but a natural one. To see how natural it was we must look a little more closely at the command idea. The famous theory that law is a command was a part of a wider and more ambitious claim. Austin said that the notion of a command was "the *key* to the sciences of jurisprudence and morals," [27] and contemporary attempts to elucidate moral judgments in terms of "imperative" or "prescriptive" utterances echo this ambitious claim. But the command theory, viewed as an effort to identify even the quintessence of law, let alone the quintessence of morals, seems breathtaking in its simplicity and quite inadequate. There is much, even in the simplest legal system, that is distorted if presented as a command. Yet the Utilitarians thought that the essence of a legal system could be conveyed if the notion of a command were supplemented by that of a habit of obedience. The simple scheme was this: What is a command? It is simply an expression by one person of the desire that another person should do or abstain from some action, accompanied by a threat of punishment which is likely to follow disobedience. Commands are laws if two conditions are satisfied: first, they must be general;

---

cepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, "functions," or otherwise, see pp. 608–10 *infra*,

(4) the contention that a legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards, see pp. 608–10 *infra*, and

(5) the contention that moral judgments cannot be established or defended, as statements of facts can, by rational argument, evidence, or proof ("noncognitivism" in ethics), see pp. 624–26 *infra*.

Bentham and Austin held the views described in (1), (2), and (3), but not those in (4) and (5). Opinion (4) is often ascribed to analytical jurists, see pages pp. 608–10 *infra*, but I know of no "analyst" who held this view.

[26] GRAY, THE NATURE AND SOURCES OF THE LAW 94–95 (2d ed. 1921).

[27] AUSTIN, *op. cit. supra* note 12, at 13.

HeinOnline -- 71 Harv. L. Rev. 602 1957

second, they must be commanded by what (as both Bentham and Austin claimed) exists in every political society whatever its constitutional form, namely, a person or a group of persons who are in receipt of habitual obedience from most of the society but pay no such obedience to others. These persons are its sovereign. Thus law is the command of the uncommanded commanders of society — the creation of the legally untrammelled will of the sovereign who is by definition outside the law.

It is easy to see that this account of a legal system is threadbare. One can also see why it might seem that its inadequacy is due to the omission of some essential connection with morality. The situation which the simple trilogy of command, sanction, and sovereign avails to describe, if you take these notions at all precisely, is like that of a gunman saying to his victim, "Give me your money or your life." The only difference is that in the case of a legal system the gunman says it to a large number of people who are accustomed to the racket and habitually surrender to it. Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.

This scheme, despite the points of obvious analogy between a statute and a command, omits some of the most characteristic elements of law. Let me cite a few. It is wrong to think of a legislature (and a fortiori an electorate) with a changing membership, as a group of persons habitually obeyed: this simple idea is suited only to a monarch sufficiently long-lived for a "habit" to grow up. Even if we waive this point, nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential lawmaking procedures. This is true even in a system having a simple unitary constitution like the British. These fundamental accepted rules specifying what the legislature must do to legislate are not commands habitually obeyed, nor can they be expressed as habits of obedience to persons. They lie at the root of a legal system, and what is most missing in the utilitarian scheme is an analysis of what it is for a social group and its officials to accept such rules. This notion, not that of a command as Austin claimed, is the "key to the science of jurisprudence," or at least one of the keys.

Again, Austin, in the case of a democracy, looked past the legislators to the electorate as "the sovereign" (or in England as part of it). He thought that in the United States the mass of the electors to the state and federal legislatures were the sovereign whose

HeinOnline -- 71 Harv. L. Rev. 603 1957

commands, given by their "agents" in the legislatures, were law. But on this footing the whole notion of the sovereign outside the law being "habitually obeyed" by the "bulk" of the population must go: for in this case the "bulk" obeys the bulk, that is, it obeys itself. Plainly the general acceptance of the authority of a lawmaking procedure, irrespective of the changing individuals who operate it from time to time, can be only distorted by an analysis in terms of mass habitual obedience to certain persons who are by definition outside the law, just as the cognate but much simpler phenomenon of the general social acceptance of a rule, say of taking off the hat when entering a church, would be distorted if represented as habitual obedience by the mass to specific persons.

Other critics dimly sensed a further and more important defect in the command theory, yet blurred the edge of an important criticism by assuming that the defect was due to the failure to insist upon some important connection between law and morals. This more radical defect is as follows. The picture that the command theory draws of life under law is essentially a simple relationship of the commander to the commanded, of superior to inferior, of top to bottom; the relationship is vertical between the commanders or authors of the law conceived of as essentially outside the law and those who are commanded and subject to the law. In this picture no place, or only an accidental or subordinate place, is afforded for a distinction between types of legal rules which are in fact radically different. Some laws require men to act in certain ways or to abstain from acting whether they wish to or not. The criminal law consists largely of rules of this sort: like commands they are simply "obeyed" or "disobeyed." But other legal rules are presented to society in quite different ways and have quite different functions. They provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law. Such are the rules enabling individuals to make contracts, wills, and trusts, and generally to mould their legal relations with others. Such rules, unlike the criminal law, are not factors designed to obstruct wishes and choices of an antisocial sort. On the contrary, these rules provide facilities for the realization of wishes and choices. They do not say (like commands) "do this whether you wish it or not," but rather "if you wish to do this, here is the way to do it." Under these rules we exercise powers, make claims, and assert rights. These phrases mark off characteristic features

HeinOnline -- 71 Harv. L. Rev. 604 1957

of laws that confer rights and powers; they are laws which are, so to speak, put at the disposition of individuals in a way in which the criminal law is not. Much ingenuity has gone into the task of "reducing" laws of this second sort to some complex variant of laws of the first sort. The effort to show that laws conferring rights are "really" only conditional stipulations of sanctions to be exacted from the person ultimately under a legal duty characterizes much of Kelsen's work.[28] Yet to urge this is really just to exhibit dogmatic determination to suppress one aspect of the legal system in order to maintain the theory that the stipulation of a sanction, like Austin's command, represents the quintessence of law. One might as well urge that the rules of baseball were "really" only complex conditional directions to the scorer and that this showed their real or "essential" nature.

One of the first jurists in England to break with the Austinian tradition, Salmond, complained that the analysis in terms of commands left the notion of a right unprovided with a place.[29] But he confused the point. He argued first, and correctly, that if laws are merely commands it is inexplicable that we should have come to speak of legal rights and powers as conferred or arising under them, but then wrongly concluded that the rules of a legal system must necessarily be connected with moral rules or principles of justice and that only on this footing could the phenomenon of legal rights be explained. Otherwise, Salmond thought, we would have to say that a mere "verbal coincidence" connects the concepts of legal and moral right. Similarly, continental critics of the Utilitarians, always alive to the complexity of the notion of a subjective right, insisted that the command theory gave it no place. Hägerström insisted that if laws were merely commands the notion of an individual's right was really inexplicable, for commands are, as he said, something which we either obey or we do not obey; they do not confer rights.[30] But he, too, concluded that

[28] See, *e.g.*, KELSEN, GENERAL THEORY OF LAW AND STATE 58–61, 143–44 (1945). According to Kelsen, all laws, not only those conferring rights and powers, are reducible to such "primary norms" conditionally stipulating sanctions.

[29] SALMOND, THE FIRST PRINCIPLES OF JURISPRUDENCE 97–98 (1893). He protested against "the creed of what is termed the English school of jurisprudence," because it "attempted to deprive the idea of law of that ethical significance which is one of its most essential elements." *Id.* at 9, 10.

[30] HÄGERSTRÖM, INQUIRIES INTO THE NATURE OF LAW AND MORALS 217 (Olivecrona ed. 1953): "[T]he whole theory of the subjective rights of private individuals . . . is incompatible with the imperative theory." See also *id.* at 221:

> The description of them [claims to legal protection] as rights is wholly derived from the idea that the law which is concerned with them is a true ex-

HeinOnline -- 71 Harv. L. Rev. 605 1957

moral, or, as he put it, common-sense, notions of justice must therefore be necessarily involved in the analysis of any legal structure elaborate enough to confer rights.[31]

Yet, surely these arguments are confused. Rules that confer rights, though distinct from commands, need not be moral rules or coincide with them. Rights, after all, exist under the rules of ceremonies, games, and in many other spheres regulated by rules which are irrelevant to the question of justice or what the law ought to be. Nor need rules which confer rights be just or morally good rules. The rights of a master over his slaves show us that. "Their merit or demerit," as Austin termed it, depends on how rights are distributed in society and over whom or what they are exercised. These critics indeed revealed the inadequacy of the simple notions of command and habit for the analysis of law; at many points it is apparent that the social acceptance of a rule or standard of authority (even if it is motivated only by fear or superstition or rests on inertia) must be brought into the analysis and cannot itself be reduced to the two simple terms. Yet nothing in this showed the utilitarian insistence on the distinction between the existence of law and its "merits" to be wrong.

III.

I now turn to a distinctively American criticism of the separation of the law that is from the the law that ought to be. It emerged from the critical study of the judicial process with which American jurisprudence has been on the whole so beneficially occupied. The most skeptical of these critics — the loosely named "Realists" of the 1930's — perhaps too naïvely accepted the conceptual framework of the natural sciences as adequate for the characterization of law and for the analysis of rule-guided action of which a living system of law at least partly consists. But they opened men's eyes to what actually goes on when courts decide cases, and the contrast they drew between the actual facts of judicial decision and the traditional terminology for describing it as if it were a wholly logical operation was usually illuminating; for in spite of some exaggeration the "Realists" made us acutely conscious of one cardinal feature of human language and human

---

pression of rights and duties in the sense in which the popular notion of justice understands these terms.

[31] *Id.* at 218.

HeinOnline -- 71 Harv. L. Rev. 606 1957

thought, emphasis on which is vital not only for the understanding of law but in areas of philosophy far beyond the confines of jurisprudence. The insight of this school may be presented in the following example. A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called "vehicles" for the purpose of the rule or not? If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use — like "vehicle" in the case I consider — must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case. Human invention and natural processes continually throw up such variants on the familiar, and if we are to say that these ranges of facts do or do not fall under existing rules, then the classifier must make a decision which is not dictated to him, for the facts and phenomena to which we fit our words and apply our rules are as it were *dumb*. The toy automobile cannot speak up and say, "I am a vehicle for the purpose of this legal rule," nor can the roller skates chorus, "We are not a vehicle." Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.

We may call the problems which arise outside the hard core of standard instances or settled meaning "problems of the penumbra"; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution. If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or

HeinOnline -- 71 Harv. L. Rev. 607 1957

indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises. So if it is rational or "sound" to argue and to decide that for the purposes of this rule an airplane is not a vehicle, this argument must be sound or rational without being logically conclusive. What is it then that makes such decisions correct or at least better than alternative decisions? Again, it seems true to say that the criterion which makes a decision sound in such cases is some concept of what the law ought to be; it is easy to slide from that into saying that it must be a moral judgment about what law ought to be. So here we touch upon a point of necessary "intersection between law and morals" which demonstrates the falsity or, at any rate, the misleading character of the Utilitarians' emphatic insistence on the separation of law as it is and ought to be. Surely, Bentham and Austin could only have written as they did because they misunderstood or neglected this aspect of the judicial process, because they ignored the problems of the penumbra.

The misconception of the judicial process which ignores the problems of the penumbra and which views the process as consisting pre-eminently in deductive reasoning is often stigmatized as the error of "formalism" or "literalism." My question now is, how and to what extent does the demonstration of this error show the utilitarian distinction to be wrong or misleading? Here there are many issues which have been confused, but I can only disentangle some. The charge of formalism has been leveled both at the "positivist" legal theorist and at the courts, but of course it must be a very different charge in each case. Leveled at the legal theorist, the charge means that he has made a theoretical mistake about the character of legal decision; he has thought of the reasoning involved as consisting in deduction from premises in which the judges' practical choices or decisions play no part. It would be easy to show that Austin was guiltless of this error; only an entire misconception of what analytical jurisprudence is and why he thought it important has led to the view that he, or any other analyst, believed that the law was a closed logical system in which judges deduced their decisions from premises.[32] On the

[32] This misunderstanding of analytical jurisprudence is to be found in, among others, STONE, THE PROVINCE AND FUNCTION OF LAW 141 (1950):

HeinOnline -- 71 Harv. L. Rev. 608 1957

contrary, he was very much alive to the character of language, to its vagueness or open character;[33] he thought that in the penumbral situation judges must necessarily legislate,[34] and, in accents that sometimes recall those of the late Judge Jerome Frank, he berated the common-law judges for legislating feebly and timidly and for blindly relying on real or fancied analogies with past cases instead of adapting their decisions to the growing needs of society as revealed by the moral standard of utility.[35] The villains of

> In short, rejecting the implied assumption that all propositions of all parts of the law must be logically consistent with each other and proceed on a single set of definitions . . . he [Cardozo, J.,] denied that the law is actually what the analytical jurist, *for his limited purposes*, assumes it to be.

See also *id.* at 49, 52, 138, 140; FRIEDMANN, LEGAL THEORY 209 (3d ed. 1953). This misunderstanding seems to depend on the unexamined and false belief that analytical studies of the meaning of legal terms would be impossible or absurd if, to reach sound decisions in particular cases, more than a capacity for formal logical reasoning from unambiguous and clear predetermined premises is required.

[33] See the discussion of vagueness and uncertainty in law, in AUSTIN, *op. cit. supra* note 12, at 202–05, 207, in which Austin recognized that, in consequence of this vagueness, often only "fallible tests" can be provided for determining whether particular cases fall under general expressions.

[34] See AUSTIN, *op. cit. supra* note 12, at 191: "I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated . . . ." As a corrective to the belief that the analytical jurist must take a "slot machine" or "mechanical" view of the judicial process it is worth noting the following observations made by Austin:

(1) Whenever law has to be applied, the " 'competition of opposite analogies' " may arise, for the case "may resemble in some of its points" cases to which the rule has been applied in the past and in other points "cases from which the application of the law has been withheld." 2 AUSTIN, LECTURES ON JURISPRUDENCE 633 (5th ed. 1885).

(2) Judges have commonly decided cases and so derived new rules by "building" on a variety of grounds including sometimes (in Austin's opinion too rarely) their views of what law ought to be. Most commonly they have derived law from pre-existing law by "consequence founded on analogy," *i.e.*, they have made a new rule "in *consequence* of the existence of a similar rule applying to subjects which are *analogous* . . . ." 2 *id.* at 638–39.

(3) "[I]f every rule in a system of law were perfectly definite or precise," these difficulties incident to the application of law would not arise. "But the ideal completeness and correctness I now have imagined is not attainable in fact. . . . though the system had been built and ordered with matchless solicitude and skill." 2 *id.* at 997–98. Of course he thought that much could and should be done by codification to eliminate uncertainty. See 2 *id.* at 662–81.

[35] 2 *id.* at 641:

> Nothing, indeed, can be more natural, than that legislators, direct or judicial (especially if they be narrow-minded, timid and unskillful), should lean as much as they can on the examples set by their predecessors.

See also 2 *id.* at 647:

> But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future) . . . . This is the reproach I should be inclined to make against Lord Eldon. . . . [T]he Judges of the Common Law Courts would not do what

HeinOnline -- 71 Harv. L. Rev. 609 1957

this piece, responsible for the conception of the judge as an automaton, are not the Utilitarian thinkers. The responsibility, if it is to be laid at the door of any theorist, is with thinkers like Blackstone and, at an earlier stage, Montesquieu. The root of this evil is preoccupation with the separation of powers and Blackstone's "childish fiction" (as Austin termed it) that judges only "find," never "make," law.

But we are concerned with "formalism" as a vice not of jurists but of judges. What precisely is it for a judge to commit this error, to be a "formalist," "automatic," a "slot machine"? Curiously enough the literature which is full of the denunciation of these vices never makes this clear in concrete terms; instead we have only descriptions which cannot mean what they appear to say: it is said that in the formalist error courts make an excessive use of logic, take a thing to "a dryly logical extreme," [36] or make an excessive use of analytical methods. But just how in being a formalist does a judge make an excessive use of logic? It is clear that the essence of his error is to give some general term an interpretation which is blind to social values and consequences (or which is in some other way stupid or perhaps merely disliked by critics). But logic does not prescribe interpretation of terms; it dictates neither the stupid nor intelligent interpretation of any expression. Logic only tells you hypothetically that *if* you give a certain term a certain interpretation then a certain conclusion follows. Logic is silent on how to classify particulars — and this is the heart of a judicial decision. So this reference to logic and to logical extremes is a misnomer for something else, which must be this. A judge has to apply a rule to a concrete case — perhaps the rule that one may not take a stolen "vehicle" across state lines, and in this case an airplane has been taken.[37] He either does not see or pretends not to see that the general terms of this rule are susceptible of different interpretations and that he has a choice left open uncontrolled by linguistic conventions. He ignores, or is blind to, the fact that he is in the area of the penumbra and is not dealing with a standard case. Instead of

---

they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.

[36] Hynes v. New York Cent. R.R., 231 N.Y. 229, 235, 131 N.E. 898, 900 (1921); see POUND, INTERPRETATIONS OF LEGAL HISTORY 123 (2d ed. 1930); STONE, *op. cit. supra* note 32, at 140–41.

[37] See McBoyle v. United States, 283 U.S. 25 (1931).

HeinOnline -- 71 Harv. L. Rev. 610 1957

choosing in the light of social aims, the judge fixes the meaning in a different way. He either takes the meaning that the word most obviously suggests in its ordinary nonlegal context to ordinary men, or one which the word has been given in some other legal context, or, still worse, he thinks of a standard case and then arbitrarily identifies certain features in it — for example, in the case of a vehicle, (1) normally used on land, (2) capable of carrying a human person, (3) capable of being self-propelled — and treats these three as always necessary and always sufficient conditions for the use in all contexts of the word "vehicle," irrespective of the social consequences of giving it this interpretation. This choice, not "logic," would force the judge to include a toy motor car (if electrically propelled) and to exclude bicycles and the airplane. In all this there is possibly great stupidity but no more "logic," and no less, than in cases in which the interpretation given to a general term and the consequent application of some general rule to a particular case is consciously controlled by some identified social aim.

Decisions made in a fashion as blind as this would scarcely deserve the name of decisions; we might as well toss a penny in applying a rule of law. But it is at least doubtful whether any judicial decisions (even in England) have been quite as automatic as this. Rather, either the interpretations stigmatized as automatic have resulted from the conviction that it is fairer in a criminal statute to take a meaning which would jump to the mind of the ordinary man at the cost even of defeating other values, and this itself is a social policy (though possibly a bad one); or much more frequently, what is stigmatized as "mechanical" and "automatic" is a determined choice made indeed in the light of a social aim but of a conservative social aim. Certainly many of the Supreme Court decisions at the turn of the century which have been so stigmatized [38] represent clear choices in the penumbral area to give effect to a policy of a conservative type. This is peculiarly true of Mr. Justice Peckham's opinions defining the spheres of police power and due process.[39]

[38] See, *e.g.*, Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615–16 (1908).

[39] See, *e.g.*, Lochner v. New York, 198 U.S. 45 (1905). Justice Peckham's opinion that there were no reasonable grounds for interfering with the right of free contract by determining the hours of labour in the occupation of a baker may indeed be a wrongheaded piece of conservatism but there is nothing automatic or mechanical about it.

HeinOnline -- 71 Harv. L. Rev. 611 1957

But how does the wrongness of deciding cases in an automatic and mechanical way and the rightness of deciding cases by reference to social purposes show that the utilitarian insistence on the distinction between what the law is and what it ought to be is wrong? I take it that no one who wished to use these vices of formalism as proof that the distinction between what is and what ought to be is mistaken would deny that the decisions stigmatized as automatic are law; nor would he deny that the system in which such automatic decisions are made is a legal system. Surely he would say that they are law, but they are bad law, they ought not to be law. But this would be to use the distinction, not to refute it; and of course both Bentham and Austin used it to attack judges for failing to decide penumbral cases in accordance with the growing needs of society.

Clearly, if the demonstration of the errors of formalism is to show the utilitarian distinction to be wrong, the point must be drastically restated. The point must be not merely that a judicial decision to be rational must be made in the light of some conception of what ought to be, but that the aims, the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law in some suitably wide sense of "law" which is held to be more illuminating than that used by the Utilitarians. This restatement of the point would have the following consequence: instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges' choice are in a sense there for them to discover; the judges are only "drawing out" of the rule what, if it is properly understood, is "latent" within it. To call this judicial legislation is to obscure some essential continuity between the clear cases of the rule's application and the penumbral decisions. I shall question later whether this way of talking is salutory, but I wish at this time to point out something obvious, but likely, if not stated, to tangle the issues. It does not follow that, because the opposite of a decision reached blindly in the formalist or literalist manner is a decision intelligently reached by reference to some conception of what ought to be, we have a junction of law and morals. We must, I think, beware of thinking in a too simple-minded fashion about the word "ought." This is not

HeinOnline -- 71 Harv. L. Rev. 612 1957

because there is no distinction to be made between law as it is and ought to be. Far from it. It is because the distinction should be between what is and what from many different points of view ought to be. The word "ought" merely reflects the presence of some standard of criticism; one of these standards is a moral standard but not all standards are moral. We say to our neighbour, "You ought not to lie," and that may certainly be a moral judgment, but we should remember that the baffled poisoner may say, "I ought to have given her a second dose." The point here is that intelligent decisions which we oppose to mechanical or formal decisions are not necessarily identical with decisions defensible on moral grounds. We may say of many a decision: "Yes, that is right; that is as it ought to be," and we may mean only that some accepted purpose or policy has been thereby advanced; we may not mean to endorse the moral propriety of the policy or the decision. So the contrast between the mechanical decision and the intelligent one can be reproduced inside a system dedicated to the pursuit of the most evil aims. It does not exist as a contrast to be found only in legal systems which, like our own, widely recognize principles of justice and moral claims of individuals.

An example may make this point plainer. With us the task of sentencing in criminal cases is the one that seems most obviously to demand from the judge the exercise of moral judgment. Here the factors to be weighed seem clearly to be moral factors: society must not be exposed to wanton attack; too much misery must not be inflicted on either the victim or his dependents; efforts must be made to enable him to lead a better life and regain a position in the society whose laws he has violated. To a judge striking the balance among these claims, with all the discretion and perplexities involved, his task seems as plain an example of the exercise of moral judgment as could be; and it seems to be the polar opposite of some mechanical application of a tariff of penalties fixing a sentence careless of the moral claims which in our system have to be weighed. So here intelligent and rational decision is guided however uncertainly by moral aims. But we have only to vary the example to see that this need not necessarily be so and surely, if it need not necessarily be so, the Utilitarian point remains unshaken. Under the Nazi regime men were sentenced by courts for criticism of the regime. Here the choice of sentence might be guided exclusively by consideration of what was needed to maintain the state's tyranny effectively. What sentence would

HeinOnline -- 71 Harv. L. Rev. 613 1957

both terrorize the public at large and keep the friends and family of the prisoner in suspense so that both hope and fear would cooperate as factors making for subservience? The prisoner of such a system would be regarded simply as an object to be used in pursuit of these aims. Yet, in contrast with a mechanical decision, decision on these grounds would be intelligent and purposive, and from one point of view the decision would be as it ought to be. Of course, I am not unaware that a whole philosophical tradition has sought to demonstrate the fact that we cannot correctly call decisions or behavior truly rational unless they are in conformity with moral aims and principles. But the example I have used seems to me to serve at least as a warning that we cannot use the errors of formalism as something which per se demonstrates the falsity of the utilitarian insistence on the distinction between law as it is and law as *morally* it ought to be.

We can now return to the main point. If it is true that the intelligent decision of penumbral questions is one made not mechanically but in the light of aims, purposes, and policies, though not necessarily in the light of anything we would call moral principles, is it wise to express this important fact by saying that the firm utilitarian distinction between what the law is and what it ought to be should be dropped? Perhaps the claim that it is wise cannot be theoretically refuted for it is, in effect, an *invitation* to revise our conception of what a legal rule is. We are invited to include in the "rule" the various aims and policies in the light of which its penumbral cases are decided on the ground that these aims have, because of their importance, as much right to be called law as the core of legal rules whose meaning is settled. But though an invitation cannot be refuted, it may be refused and I would proffer two reasons for refusing this invitation. First, everything we have learned about the judicial process can be expressed in other less mysterious ways. We can say laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social aims. I think Holmes, who had such a vivid appreciation of the fact that "general propositions do not decide concrete cases," would have put it that way. Second, to insist on the utilitarian distinction is to emphasize that the hard core of settled meaning is law in some centrally important sense and that even if there are borderlines, there must first be lines. If this were not so the notion of rules controlling courts' decisions would be senseless as some of the "Realists" — in their

HeinOnline -- 71 Harv. L. Rev. 614 1957

most extreme moods, and, I think, on bad grounds — claimed.[40]

By contrast, to soften the distinction, to assert mysteriously that there is some fused identity between law as it is and as it ought to be, is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with *all* questions being open to reconsideration in the light of social policy. Of course, it is good to be occupied with the penumbra. Its problems are rightly the daily diet of the law schools. But to be occupied with the penumbra is one thing, to be preoccupied with it another. And preoccupation with the penumbra is, if I may say so, as rich a source of confusion in the American legal tradition as formalism in the English. Of course we might abandon the notion that rules have authority; we might cease to attach force or even meaning to an argument that a case falls clearly within a rule and the scope of a precedent. We might call all such reasoning "automatic" or "mechanical," which is already the routine invective of the courts. But until we decide that this *is* what we want, we should not encourage it by obliterating the Utilitarian distinction.

IV.

The third criticism of the separation of law and morals is of a very different character; it certainly is less an intellectual argument against the Utilitarian distinction than a passionate appeal supported not by detailed reasoning but by reminders of a terrible experience. For it consists of the testimony of those who have descended into Hell, and, like Ulysses or Dante, brought back a message for human beings. Only in this case the Hell was not

[40] One recantation of this extreme position is worth mention in the present context. In the first edition of *The Bramble Bush*, Professor Llewellyn committed himself wholeheartedly to the view that "what these officials do about disputes is, to my mind, the law itself" and that "*rules* . . . are important so far as they help you . . . predict what judges will do . . . . That is all their importance, except as pretty playthings." LLEWELLYN, THE BRAMBLE BUSH 3, 5 (1st ed. 1930). In the second edition he said that these were "unhappy words when not more fully developed, and they are plainly at best a very partial statement of the whole truth. . . . [O]ne office of law is to control officials in some part, and to guide them even . . . where no thoroughgoing control is possible, or is desired. . . . [T]he words fail to take proper account . . . of the office of the institution of law as an instrument of conscious shaping . . . ." LLEWELLYN, THE BRAMBLE BUSH 9 (2d ed. 1951).

HeinOnline -- 71 Harv. L. Rev. 615 1957

beneath or beyond earth, but on it; it was a Hell created on earth by men for other men.

This appeal comes from those German thinkers who lived through the Nazi regime and reflected upon its evil manifestations in the legal system. One of these thinkers, Gustav Radbruch, had himself shared the "positivist" doctrine until the Nazi tyranny, but he was converted by this experience and so his appeal to other men to discard the doctrine of the separation of law and morals has the special poignancy of a recantation. What is important about this criticism is that it really does confront the particular point which Bentham and Austin had in mind in urging the separation of law as it is and as it ought to be. These German thinkers put their insistence on the need to join together what the Utilitarians separated just where this separation was of most importance in the eyes of the Utilitarians; for they were concerned with the problem posed by the existence of morally evil laws.

Before his conversion Radbruch held that resistance to law was a matter for the personal conscience, to be thought out by the individual as a moral problem, and the validity of a law could not be disproved by showing that its requirements were morally evil or even by showing that the effect of compliance with the law would be more evil than the effect of disobedience. Austin, it may be recalled, was emphatic in condemning those who said that if human laws conflicted with the fundamental principles of morality then they cease to be laws, as talking "stark nonsense."

> 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. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God . . . the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.[41]

These are strong, indeed brutal words, but we must remember that they went along — in the case of Austin and, of course,

[41] AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 185 (Library of Ideas ed. 1954).

HeinOnline -- 71 Harv. L. Rev. 616 1957

Bentham — with the conviction that if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience. We shall see, when we consider the alternatives, that this simple presentation of the human dilemma which may arise has much to be said for it.

Radbruch, however, had concluded from the ease with which the Nazi regime had exploited subservience to mere law — or expressed, as he thought, in the "positivist" slogan "law as law" (*Gesetz als Gesetz*) — and from the failure of the German legal profession to protest against the enormities which they were required to perpetrate in the name of law, that "positivism" (meaning here the insistence on the separation of law as it is from law as it ought to be) had powerfully contributed to the horrors. His considered reflections led him to the doctrine that the fundamental principles of humanitarian morality were part of the very concept of *Recht* or Legality and that no positive enactment or statute, however clearly it was expressed and however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened basic principles of morality. This doctrine can be appreciated fully only if the nuances imported by the German word *Recht* are grasped. But it is clear that the doctrine meant that every lawyer and judge should denounce statutes that transgressed the fundamental principles not as merely immoral or wrong but as having no legal character, and enactments which on this ground lack the quality of law should not be taken into account in working out the legal position of any given individual in particular circumstances. The striking recantation of his previous doctrine is unfortunately omitted from the translation of his works, but it should be read by all who wish to think afresh on the question of the interconnection of law and morals.[42]

It is impossible to read without sympathy Radbruch's passionate demand that the German legal conscience should be open to the demands of morality and his complaint that this has been too little the case in the German tradition. On the other hand there is an extraordinary naïveté in the view that insensitiveness

[42] See Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105 (Germany 1946) (reprinted in RADBRUCH, RECHTSPHILOSOPHIE 347 (4th ed. 1950)). I have used the translation of part of this essay and of Radbruch, *Die Erneuerung des Rechts*, 2 DIE WANDLUNG 8 (Germany 1947), prepared by Professor Lon Fuller of the Harvard Law School as a mimeographed supplement to the readings in jurisprudence used in his course at Harvard.

HeinOnline -- 71 Harv. L. Rev. 617 1957

to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality. Rather this terrible history prompts inquiry into why emphasis on the slogan "law is law," and the distinction between law and morals, acquired a sinister character in Germany, but elsewhere, as with the Utilitarians themselves, went along with the most enlightened liberal attitudes. But something more disturbing than naïveté is latent in Radbruch's whole presentation of the issues to which the existence of morally iniquitous laws give rise. It is not, I think, uncharitable to say that we can see in his argument that he has only half digested the spiritual message of liberalism which he is seeking to convey to the legal profession. For everything that he says is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: "Ought this rule of law to be obeyed?" Surely the truly liberal answer to any sinister use of the slogan "law is law" or of the distinction between law and morals is, "Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality."

However, we are not left to a mere academic discussion in order to evaluate the plea which Radbruch made for the revision of the distinction between law and morals. After the war Radbruch's conception of law as containing in itself the essential moral principle of humanitarianism was applied in practice by German courts in certain cases in which local war criminals, spies, and informers under the Nazi regime were punished. The special importance of these cases is that the persons accused of these crimes claimed that what they had done was not illegal under the laws of the regime in force at the time these actions were performed. This plea was met with the reply that the laws upon which they relied were invalid as contravening the fundamental principles of morality. Let me cite briefly one of these cases.[43]

In 1944 a woman, wishing to be rid of her husband, denounced him to the authorities for insulting remarks he had made about Hitler while home on leave from the German army. The wife was

[43] Judgment of July 27, 1949, Oberlandesgericht, Bamberg, 5 SÜDDEUTSCHE JURISTEN-ZEITUNG 207 (Germany 1950), 64 HARV. L. REV. 1005 (1951); see FRIEDMANN, LEGAL THEORY 457 (3d ed. 1953).

HeinOnline -- 71 Harv. L. Rev. 618 1957

under no legal duty to report his acts, though what he had said was apparently in violation of statutes making it illegal to make statements detrimental to the government of the Third Reich or to impair by any means the military defense of the German people. The husband was arrested and sentenced to death, apparently pursuant to these statutes, though he was not executed but was sent to the front. In 1949 the wife was prosecuted in a West German court for an offense which we would describe as illegally depriving a person of his freedom (*rechtswidrige Freiheitsberaubung*). This was punishable as a crime under the German Criminal Code of 1871 which had remained in force continuously since its enactment. The wife pleaded that her husband's imprisonment was pursuant to the Nazi statutes and hence that she had committed no crime. The court of appeal to which the case ultimately came held that the wife was guilty of procuring the deprivation of her husband's liberty by denouncing him to the German courts, even though he had been sentenced by a court for having violated a statute, since, to quote the words of the court, the statute "was contrary to the sound conscience and sense of justice of all decent human beings." This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism. The unqualified satisfaction with this result seems to me to be hysteria. Many of us might applaud the objective — that of punishing a woman for an outrageously immoral act — but this was secured only by declaring a statute established since 1934 not to have the force of law, and at least the wisdom of this course must be doubted. There were, of course, two other choices. One was to let the woman go unpunished; one can sympathize with and endorse the view that this might have been a bad thing to do. The other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way. Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems. Surely if we have learned anything from the history of morals it is that the thing

HeinOnline -- 71 Harv. L. Rev. 619 1957

to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are. The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.

"All Discord Harmony not understood
All Partial Evil Universal Good"

This is surely untrue and there is an insincerity in any formulation of our problem which allows us to describe the treatment of the dilemma as if it were the disposition of the ordinary case.

It may seem perhaps to make too much of forms, even perhaps of words, to emphasize one way of disposing of this difficult case as compared with another which might have led, so far as the woman was concerned, to exactly the same result. Why should we dramatize the difference between them? We might punish the woman under a new retrospective law and declare overtly that we were doing something inconsistent with our principles as the lesser of two evils; or we might allow the case to pass as one in which we do not point out precisely where we sacrifice such a principle. But candour is not just one among many minor virtues of the administration of law, just as it is not merely a minor virtue of morality. For if we adopt Radbruch's view, and with him and the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law because of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism. If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted. So perhaps the most important single lesson to be learned from this form of the

HeinOnline -- 71 Harv. L. Rev. 620 1957

denial of the Utilitarian distinction is the one that the Utilitarians were most concerned to teach: when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.

V.

I have endeavored to show that, in spite of all that has been learned and experienced since the Utilitarians wrote, and in spite of the defects of other parts of their doctrine, their protest against the confusion of what is and what ought to be law has a moral as well as an intellectual value. Yet it may well be said that, though this distinction is valid and important if applied to any particular law of a system, it is at least misleading if we attempt to apply it to "law," that is, to the notion of a legal system, and that if we insist, as I have, on the narrower truth (or truism), we obscure a wider (or deeper) truth. After all, it may be urged, we have learned that there are many things which are untrue of laws taken separately, but which are true and important in a legal system considered as a whole. For example, the connection between law and sanctions and between the existence of law and its "efficacy" must be understood in this more general way. It is surely not arguable (without some desperate extension of the word "sanction" or artificial narrowing of the word "law") that every law in a municipal legal system must have a sanction, yet it is at least plausible to argue that a legal system must, to be a legal system, provide sanctions for certain of its rules. So too, a rule of law may be said to exist though enforced or obeyed in only a minority of cases, but this could not be said of a legal system as a whole. Perhaps the differences with respect to laws taken separately and a legal system as a whole are also true of the connection between moral (or some other) conceptions of what law ought to be and law in this wider sense.

This line of argument, found (at least in embryo form) in Austin, where he draws attention to the fact that every developed legal system contains certain fundamental notions which are "necessary" and "bottomed in the common nature of man," [44] is worth pursuing — up to a point — and I shall say briefly why and how far this is so.

---

[44] AUSTIN, *Uses of the Study of Jurisprudence*, in THE PROVINCE OF JURISPRUDENCE DETERMINED 365, 373, 367–69 (Library of Ideas ed. 1954).

HeinOnline -- 71 Harv. L. Rev. 621 1957

We must avoid, if we can, the arid wastes of inappropriate definition, for, in relation to a concept as many-sided and vague as that of a legal system, disputes about the "essential" character, or necessity to the whole, of any single element soon begin to look like disputes about whether chess could be "chess" if played without pawns. There is a wish, which may be understandable, to cut straight through the question whether a legal system, to be a legal system, must measure up to some moral or other standard with simple statements of fact: for example, that no system which utterly failed in this respect has ever existed or could endure; that the normally fulfilled assumption that a legal system aims at some form of justice colours the whole way in which we interpret specific rules in particular cases, and if this normally fulfilled assumption were not fulfilled no one would have any reason to obey except fear (and probably not that) and still less, of course, any moral obligation to obey. The connection between law and moral standards and principles of justice is therefore as little arbitrary and as "necessary" as the connection between law and sanctions, and the pursuit of the question whether this necessity is logical (part of the "meaning" of law) or merely factual or causal can safely be left as an innocent pastime for philosophers.

Yet in two respects I should wish to go further (even though this involves the use of a philosophical fantasy) and show what could intelligibly be meant by the claim that certain provisions in a legal system are "necessary." The world in which we live, and we who live in it, may one day change in many different ways; and if this change were radical enough not only would certain statements of fact now true be false and vice versa, but whole ways of thinking and talking which constitute our present conceptual apparatus, through which we see the world and each other, would lapse. We have only to consider how the whole of our social, moral, and legal life, as we understand it now, depends on the contingent fact that though our bodies do change in shape, size, and other physical properties they do not do this so drastically nor with such quicksilver rapidity and irregularity that we cannot identify each other as the same persistent individual over considerable spans of time. Though this is but a contingent fact which may one day be different, on it at present rest huge structures of our thought and principles of action and social life. Similarly, consider the following possibility (not be-

HeinOnline -- 71 Harv. L. Rev. 622 1957

cause it is more than a possibility but because it reveals why we think certain things necessary in a legal system and what we mean by this): suppose that men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace, and could extract the food they needed from the air by some internal chemical process. In such circumstances (the details of which can be left to science fiction) rules forbidding the free use of violence and rules constituting the minimum form of property — with its rights and duties sufficient to enable food to grow and be retained until eaten — would not have the necessary nonarbitrary status which they have for us, constituted as we are in a world like ours. At present, and until such radical changes supervene, such rules are so fundamental that if a legal system did not have them there would be no point in having any other rules at all. Such rules overlap with basic moral principles vetoing murder, violence, and theft; and so we can add to the factual statement that all legal systems in fact coincide with morality at such vital points, the statement that this is, in this sense, necessarily so. And why not call it a "natural" necessity?

Of course even this much depends on the fact that in asking what content a legal system must have we take this question to be worth asking only if we who consider it cherish the humble aim of survival in close proximity to our fellows. Natural-law theory, however, in all its protean guises, attempts to push the argument much further and to assert that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival, and these dictate a further necessary content to a legal system (over and above my humble minimum) without which it would be pointless. Of course we must be careful not to exaggerate the differences among human beings, but it seems to me that above this minimum the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is "necessary" in this sense.

Another aspect of the matter deserves attention. If we attach to a legal system the minimum meaning that it must consist of general rules — general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals — this meaning connotes the principle of

HeinOnline -- 71 Harv. L. Rev. 623 1957

treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. It is, however, true that *one* essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of the law, not justice of the law. So there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles. Natural procedural justice consists therefore of those principles of objectivity and impartiality in the administration of the law which implement just this aspect of law and which are designed to ensure that rules are applied only to what are genuinely cases of the rule or at least to minimize the risks of inequalities in this sense.

These two reasons (or excuses) for talking of a certain overlap between legal and moral standards as necessary and natural, of course, should not satisfy anyone who is really disturbed by the Utilitarian or "positivist" insistence that law and morality are distinct. This is so because a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between the persons affected, laws which were hideously oppressive, and might deny to a vast rightless slave population the minimum benefits of protection from violence and theft. The stink of such societies is, after all, still in our nostrils and to argue that they have (or had) no legal system would only involve the repetition of the argument. Only if the rules failed to provide these essential benefits and protection for anyone — even for a slave-owning group — would the minimum be unsatisfied and the system sink to the status of a set of meaningless taboos. Of course no one denied those benefits would have any reason to obey except fear and would have every moral reason to revolt.

VI.

I should be less than candid if I did not, in conclusion, consider something which, I suspect, most troubles those who react strongly against "legal positivism." Emphasis on the distinction between law as it is and law as it ought to be may be taken to depend upon and to entail what are called "subjectivist" and "relativist" or "noncognitive" theories concerning the very nature of moral judgments, moral distinctions, or "values." Of course the Utili-

HeinOnline -- 71 Harv. L. Rev. 624 1957

tarians themselves (as distinct from later positivists like Kelsen) did not countenance any such theories, however unsatisfactory their moral philosophy may appear to us now. Austin thought ultimate moral principles were the commands of God, known to us by revelation or through the "index" of utility, and Bentham thought they were verifiable propositions about utility. Nonetheless I think (though I cannot prove) that insistence upon the distinction between law as it is and ought to be has been, under the general head of "positivism," confused with a moral theory according to which statements of what is the case ("statements of fact") belong to a category or type radically different from statements of what ought to be ("value statements"). It may therefore be well to dispel this source of confusion.

There are many contemporary variants of this type of moral theory: according to some, judgments of what ought to be, or ought to be done, either are or include as essential elements expressions of "feeling," "emotion," or "attitudes" or "subjective preferences"; in others such judgments both express feelings or emotions or attitudes and enjoin others to share them. In other variants such judgments indicate that a particular case falls under a general principle or policy of action which the speaker has "chosen" or to which he is "committed" and which is itself not a recognition of what is the case but analogous to a general "imperative" or command addressed to all including the speaker himself. Common to all these variants is the insistence that judgments of what ought to be done, because they contain such "noncognitive" elements, cannot be argued for or established by rational methods as statements of fact can be, and cannot be shown to follow from any statement of fact but only from other judgments of what ought to be done in conjunction with some statement of fact. We cannot, on such a theory, demonstrate, *e.g.*, that an action was wrong, ought not to have been done, merely by showing that it consisted of the deliberate infliction of pain solely for the gratification of the agent. We only show it to be wrong if we add to those verifiable "cognitive" statements of fact a general principle not itself verifiable or "cognitive" that the infliction of pain in such circumstances is wrong, ought not to be done. Together with this general distinction between statements of what is and what ought to be go sharp parallel distinctions between statements about means and statements of moral ends. We can rationally discover and debate what are appropriate means to given ends, but

HeinOnline -- 71 Harv. L. Rev. 625 1957

ends are not rationally discoverable or debatable; they are "fiats of the will," expressions of "emotions," "preferences," or "attitudes."

Against all such views (which are of course far subtler than this crude survey can convey) others urge that all these sharp distinctions between is and ought, fact and value, means and ends, cognitive and noncognitive, are wrong. In acknowledging ultimate ends or moral values we are recognizing something as much imposed upon us by the character of the world in which we live, as little a matter of choice, attitude, feeling, emotion as the truth of factual judgments about what is the case. The characteristic moral argument is not one in which the parties are reduced to expressing or kindling feelings or emotions or issuing exhortations or commands to each other but one by which parties come to acknowledge after closer examination and reflection that an initially disputed case falls within the ambit of a vaguely apprehended principle (itself no more "subjective," no more a "fiat of our will" than any other principle of classification) and this has as much title to be called "cognitive" or "rational" as any other initially disputed classification of particulars.

Let us now suppose that we accept this rejection of "noncognitive" theories of morality and this denial of the drastic distinction in type between statements of what is and what ought to be, and that moral judgments are as rationally defensible as any other kind of judgments. What would follow from this as to the nature of the connection between law as it is and law as it ought to be? Surely, from this alone, nothing. Laws, however morally iniquitous, would still (so far as this point is concerned) be laws. The only difference which the acceptance of this view of the nature of moral judgments would make would be that the moral iniquity of such laws would be something that could be demonstrated; it would surely follow merely from a statement of what the rule required to be done that the rule was morally wrong and so ought not to be law or conversely that it was morally desirable and ought to be law. But the demonstration of this would not show the rule not to be (or to be) law. Proof that the principles by which we evaluate or condemn laws are rationally discoverable, and not mere "fiats of the will," leaves untouched the fact that there are laws which may have any degree of iniquity or stupidity and still be laws. And conversely there are rules that have every moral qualification to be laws and yet are not laws.

HeinOnline -- 71 Harv. L. Rev. 626 1957

Surely something further or more specific must be said if disproof of "noncognitivism" or kindred theories in ethics is to be relevant to the distinction between law as it is and law as it ought to be, and to lead to the abandonment at some point or some softening of this distinction. No one has done more than Professor Lon Fuller of the Harvard Law School in his various writings to make clear such a line of argument and I will end by criticising what I take to be its central point. It is a point which again emerges when we consider not those legal rules or parts of legal rules the meanings of which are clear and excite no debate but the interpretation of rules in concrete cases where doubts are initially felt and argument develops about their meaning. In no legal system is the scope of legal rules restricted to the range of concrete instances which were present or are believed to have been present in the minds of legislators; this indeed is one of the important differences between a legal rule and a command. Yet, when rules are recognized as applying to instances beyond any that legislators did or could have considered, their extension to such new cases often presents itself not as a deliberate choice or fiat on the part of those who so interpret the rule. It appears neither as a decision to give the rule a new or extended meaning nor as a guess as to what legislators, dead perhaps in the eighteenth century, would have said had they been alive in the twentieth century. Rather, the inclusion of the new case under the rule takes its place as a natural elaboration of the rule, as something implementing a "purpose" which it seems natural to attribute (in some sense) to the rule itself rather than to any particular person dead or alive. The Utilitarian description of such interpretative extension of old rules to new cases as judicial legislation fails to do justice to this phenomenon; it gives no hint of the differences between a deliberate fiat or decision to treat the new case in the same way as past cases and a recognition (in which there is little that is deliberate or even voluntary) that inclusion of the new case under the rule will implement or articulate a continuing and identical purpose, hitherto less specifically apprehended.

Perhaps many lawyers and judges will see in this language something that precisely fits their experience; others may think it a romantic gloss on facts better stated in the Utilitarian language of judicial "legislation" or in the modern American terminology of "creative choice."

To make the point clear Professor Fuller uses a nonlegal ex-

HeinOnline -- 71 Harv. L. Rev. 627 1957

ample from the philosopher Wittgenstein which is, I think, illuminating.

> Someone says to me: "Show the children a game." I teach them gaming with dice and the other says "I did not mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order? [45]

Something important does seem to me to be touched on in this example. Perhaps there are the following (distinguishable) points. First, we normally do interpret not only what people are trying to do but what they say in the light of assumed common human objectives so that unless the contrary were expressly indicated we would not interpret an instruction to show a young child a game as a mandate to introduce him to gambling even though in other contexts the word "game" would be naturally so interpreted. Second, very often, the speaker whose words are thus interpreted might say: "Yes, that's what I mean [or "that's what I meant all along"] though I never thought of it until you put this particular case to me." Third, when we thus recognize, perhaps after argument or consultation with others, a particular case not specifically envisaged beforehand as falling within the ambit of some vaguely expressed instruction, we may find this experience falsified by description of it as a mere decision on our part so to treat the particular case, and that we can only describe this faithfully as coming to realize and to articulate what we "really" want or our "true purpose" — phrases which Professor Fuller uses later in the same article.[46]

I am sure that many philosophical discussions of the character of moral argument would benefit from attention to cases of the sort instanced by Professor Fuller. Such attention would help to provide a corrective to the view that there is a sharp separation between "ends" and "means" and that in debating "ends" we can only work on each other nonrationally, and that rational argument is reserved for discussion of "means." But I think the relevance of his point to the issue whether it is correct or wise to insist on the distinction between law as it is and law as it ought to be is very small indeed. Its net effect is that in interpreting legal rules there are some cases which we find after reflection to be so natural an elaboration or articulation of the rule that to think of and

[45] Fuller, *Human Purpose and Natural Law*, 53 J. PHILOS. 697, 700 (1956).

[46] *Id.* at 701, 702.

HeinOnline -- 71 Harv. L. Rev. 628 1957

refer to this as "legislation," "making law," or a "fiat" on our part would be misleading. So, the argument must be, it would be misleading to distinguish in such cases between what the rule is and what it ought to be — at least in some sense of ought. We think it ought to include the new case and come to see after reflection that it really does. But even if this way of presenting a recognizable experience as an example of a fusion between is and ought to be is admitted, two caveats must be borne in mind. The first is that "ought" in this case need have nothing to do with morals for the reasons explained already in section III: there may be just the same sense that a new case will implement and articulate the purpose of a rule in interpreting the rules of a game or some hideously immoral code of oppression whose immorality is appreciated by those called in to interpret it. They too can see what the "spirit" of the game they are playing requires in previously unenvisaged cases. More important is this: after all is said and done we must remember how rare in the law is the phenomenon held to justify this way of talking, how exceptional is this feeling that one way of deciding a case is imposed upon us as the only natural or rational elaboration of some rule. Surely it cannot be doubted that, for most cases of interpretation, the language of choice between alternatives, "judicial legislation" or even "fiat" (though not arbitrary fiat), better conveys the realities of the situation.

Within the framework of relatively well-settled law there jostle too many alternatives too nearly equal in attraction between which judge and lawyer must uncertainly pick their way to make appropriate here language which may well describe those experiences which we have in interpreting our own or others' principles of conduct, intention, or wishes, when we are not conscious of exercising a deliberate choice, but rather of recognising something awaiting recognition. To use in the description of the interpretation of laws the suggested terminology of a fusion or inability to separate what is law and ought to be will serve (like earlier stories that judges only find, never make, law) only to conceal the facts, that here if anywhere we live among uncertainties between which we have to choose, and that the existing law imposes only limits on our choice and not the choice itself.

HeinOnline -- 71 Harv. L. Rev. 629 1957