

TOWARD A THEORY OF LEGAL NATURALISM*

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INTRODUCTION

In legal philosophy there is perhaps no older, nor deeper, conflict than that which exists between legal positivists and natural law advocates. I use these "catch words" not without a certain trepidation since they have had shifting and divergent meanings. This has resulted in a preoccupation with attempts to define "natural law" or "positivism", rather than examining the underlying dispute.

I do not feel the need, however, to launch into any extensive search for definitions here, for to the extent that I discuss either view, I shall not criticize it. My premise is that within the limits of this discussion, each side is viewing a different, but genuine aspect of law. Though the conclusions of both schools are incompatible, many of their insights are not. My intention is, by uniting certain of these complementary insights, to synthesize a new outlook on law.

THE INSIGHTS OF NATURAL LAW AND LEGAL REALISM

If natural law stands for nothing else, it stands for the proposition that there is some objective standard or "higher law" against which positive (man-made) law can and should be measured. H. L. A. Hart characterized the classical theory of natural law as the view "that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid".^[1] The principal concern of the natural law

theorist is, then, with the substantive content of law. The branches of natural law may extend in many directions and its roots run deep, but this is most certainly its core.

Legal positivism's essence is much harder to pin down. Its melodies are many and varied. A. P. d'Entrèves reduces legal positivism to three basic types:

1. *Imperativism* — On this view, law is seen as the command of a "sovereign" endorsed by the fact of habitual obedience. I shall touch on this "insight" later in this paper.

2. *Normativism* — "According to this theory, law cannot properly be understood except as a set of normative propositions. The 'validity' of each norm hinges on the validity of other norms, and thus leads us back to a 'basic norm', to an 'ultimate rule of recognition' which qualifies every single norm by giving it relevance and connecting it into a system."^[2]

3. It is the third type of positivism, *Legal Realism*, that will be our immediate concern.

Legal Realism carried beneath its banner many different issues and concerns. So diverse were its proponents that even Karl Llewellyn, a founder of the movement, felt the need to list realists and their views in an effort to clarify the realist outlook.^[3] Realists were social reformers, predominantly "left-wing" with what Prof. Lon Fuller has called a "rule phobia".^[4] They shunned general principles in favor of individualized justice.^[5] Focusing on the ideological and psychological motivations of the judiciary, they were deeply concerned with the sociological impact of law. Their attitude resembled that of the historical revisionists. They refused to genuflect before the mystical majesty of the State judicial system, although, like most revisionists, they did not reject statism. Indeed, most of them heartily embraced the State

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judicial system as the proper instrument of social change.¹⁶¹

"[T]he realists were distinctive, however, in their preoccupation with the *processes* of judicial decision, with how law is made."¹⁷¹ This is the salient feature of realism which is of interest here. "Long before this school had a name, its basic assumption had been expressed by Holmes in his famous dictum, that law is the prophecy of what the Courts will do in fact. Law is here taken as a social phenomenon, as a decision or a *process of authoritative decisions*."¹⁸¹

Natural law theorists are mainly concerned with the *substantive* content of positive law and its congruence with morality. Law which does not conform with justice is not properly law at all, but simply naked force. The realists focused on the legal *process*, arguing that it was naive and illegitimate to deal with "principles" of law in a sociological vacuum. Law is a process, a system run by men. We must, they argued, examine the system to see what law was about.¹⁹¹

Each group vehemently opposed and attacked the other. In his book, the *Crisis of Democratic Theory*, Edward A. Purcell, Jr. brilliantly narrates this conflict. Purcell's thesis is that the battle between the "Moral Absolutists" (natural law theorists) and the "Scientific Empiricists" (Legal Realists) in the social sciences and jurisprudence rocked the foundations of democratic theory. At present, although there is an uneasy truce between the two sides, there is no enduring peace. The ultimate issues have yet to be resolved.

Could it be that the conflict is unresolved because both sides are partially right? A search for objective moral standards behind positive law is not, in principle, incompatible with an attention to the nature of the legal process. What is needed is an approach to law which embraces both substance and process. Though it is unlikely to please either side, such an integrating approach might serve as the just mean between two extremes.

THE MORALITY OF THE LEGAL PROCESS

Since I am arguing for a non-positivist theory while at the same time emphasizing the legal

process, it might help to briefly outline what I mean by "process". The legal process is the system by which positive law is determined, applied and enforced. It is a dynamic rather than a static system. That is, it receives feedback from and reacts to the results of its previous actions. Since it is a category of human action, it is subject to the "laws" of economics, e.g. scarcity of resources, price and quality sensitivity of demand, etc. It is, in short, a complex system of transactions between individual actors.¹⁹³

The legal process has one other characteristic. It has a purpose or function.¹⁹⁴ It is this aspect of law which may serve as the link between substance and process. For a comprehensive examination of this purposive aspect of law we need look no further than Lon L. Fuller's book, *The Morality of Law*, though we shall apply his theory in ways which he may not have intended.¹⁹⁵

Fuller argues that there are two sorts of morality: the morality of aspiration and the morality of duty. The morality of aspiration "is the morality of the Good Life, of excellence, of the fullest realization of human powers . . . [A] man might fail to realize his fullest capabilities. . . . But in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing."¹⁹⁶ The morality of duty, on the other hand,

lays down the basic rules without which an ordered society directed toward certain specific goals must fall short of its mark. . . . It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.¹⁹⁷

The substance of the law, argues Fuller, deals only with duty. It must act to enforce certain reciprocal understandings in order to avoid harm to the innocent. It cannot and should not "compel a man to live the life of reason. . . . We can only create the conditions essential for rational human existence. These are the necessary, but not the sufficient conditions for the achievement of that end".¹⁹⁸ The law, then, operates "at the lower levels of human achievement where a defective performance can be recognized, if care is taken, with comparative certainty and formal standards for judging it can be established".¹⁹⁹ It does not reward virtuous acts. This is left to more subjective,

intuitive, and largely informal procedures.

The prime purpose of law, then, is the discernment and enforcement of legal duties and nothing more. This is entirely consistent with the natural rights tradition. On this view, these requisite legal duties are what natural rights are and their very formulation depends on their objective necessity as a condition of rational human existence. The law, therefore, must enforce human rights and nothing more.

To confine the purpose of law to the enforcement of duties is not, however, to minimize either its importance or the difficulties involved. Fuller argues that it is this purpose, however difficult, that determines the nature of the legal enterprise. And he sees the law as exactly that: an enterprise. Those who see the law as essentially a command are wrong. Law is no mere one-way street. It is as much a cooperative project as medicine or carpentry and as such it is governed by certain common sense rules. These rules are not arbitrary. They are and must be consistent with the goal of law: the determination of general rules of behavior to allow rational (or irrational for that matter) men to plan and act.

If these rules of lawmaking are not arbitrary, neither are they precise or absolute. The process of reaching the best possible law is more an art than a science and like all endeavors toward perfection, governed by the morality of aspiration. Fuller gives eight ways to fail to make a law, but he cannot, nor can anyone, say with precision when one factor should be given precedence over another. This decision must be made by the skillful practitioner based on the facts of each instance of law-making, just as a diagnosis of disease and a prescription for its cure can only be made well on an individual basis by a skilled physician.

Fuller lists eight roads to disaster:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an *ad hoc* basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond powers

of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.¹¹⁷¹

The thrust of Fuller's anti-positivism is his contention that to the degree that a law-maker fails to follow any one of these eight directions, he does not simply make "bad law"; he makes something that is not properly called law at all, "except perhaps in the Pickwickian sense in which a void contract can still be said to be a contract".¹¹⁸¹ And while these eight routes to failure point to the indispensable conditions for law on its lowest level, they also serve as "eight kinds of legal excellence toward which a system of rules may strive".¹¹⁹¹ The law, then, "embraces a morality of duty and a morality of aspiration. It . . . confronts us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitied for the lack of it".¹²⁰¹

This then is Fuller's scheme. While it is firmly rooted in a natural law concerned with substance, it has a great deal to say about the legal process as well.¹²¹¹ This puts him in sharp contrast with other theorists concerned with legal substance. Richard Taylor, for example, has said that it "is the ends or purposes of a legal order that are important, not its form".¹²²¹ Taylor claims that there is no reason why a despot could not enunciate a criminal law in faithful adherence to the principle of liberty Taylor outlines. "History certainly suggests that this is not what one should expect from a despotic form of government, but there is nevertheless no reason, *in principle*, why it might not exist."¹²³¹ On the contrary, it is Fuller's point that the shape and nature of a legal process should follow the true nature and purpose of law; that the ends and purposes of a legal order have a great deal to say about its form.

LEGAL NATURALISM: A TEST RUN

The philosophy which I call Legal Naturalism adds to the search for that substantive law which best suits the nature of man, a search for the legal system or systems which best "fits" the

nature of law. Briefly stated the added methodology is thus:

- (1) Determine the nature and purpose of law.
- (2) Craft a legal process (structure, procedure and substance) consistent with that determination.

(I shall add a third step later.)

Compare this approach to the prevalent contemporary attitudes of legal philosophy. Positivism views law as a "fact", a given phenomenon to be studied and analyzed. Legal Naturalism views law as an enterprise, an activity with a purpose. If law has a purpose it is legitimate to ask if a given legal system is successful or unsuccessful. If law has an end, it is appropriate to craft a better means. While most contemporary legal philosophies are descriptive, Legal Naturalism is a normative philosophy. As I shall suggest in the next section, its practitioner attempts to analyze existing legal structures in light of their essential purpose and to judge them thereby.

With this brief sketch in mind it might clarify matters to try out this methodology briefly. But as we proceed, we should remember that the line between legal and political philosophy is a fine one. The State has traditionally been thought of as the main source of law. It may also be the first casualty of Legal Naturalist analysis.

Fuller sees in current legal thinking a persistent error. "This is the assumption that law should be viewed not as the product of an interplay of purposive orientations between the citizen and his government [or law-maker] but as a one-way projection of authority, originating with government and imposing itself upon the citizen."¹²⁴ Fuller feels that these theorists erroneously identify law with the nation-state. Law, he points out, is everywhere around us in forms not imposed from above. International law, tribal law, the rules of private organizations are all "horizontal" forms of law. It is only a "vertical" concept of law which prevents the identification of these systems as legal systems. With examples of "reciprocal" or "horizontal" law abundant in history and the world, Fuller is at a loss to comprehend why contemporary thinkers refuse to see the law in this light. I shall suggest that there is a plausible reason for this

phenomenon and that the explanation rests on Fuller's internal morality of law, or, more precisely, on one of his principles of legal excellence, viz., that a law-maker should itself obey the rules it sets up to govern its citizenry. I conclude that the State is a source of law inconsistent with this principle. We must then examine this, Fuller's eighth principle, in more detail.

The question which gives the positivists the most trouble is, "How can a person, a family, a tribe, or a nation impose law on itself that will control its relations with other persons, families, tribes, or nations?"¹²⁵ The positivists view law as a thing which cannot be self-imposed; it must proceed from a higher authority. Fuller's answer emphasizes his eighth principle: "Now I suggest that all these questions would require radical redefinition if we were to recognize one simple, basic reality, namely, that enacted law itself presupposes a commitment by the governing authority to abide by its own rules in dealing with its subjects."¹²⁶ What Fuller means by this is that the rule-maker must first make rules by which laws are to be passed. It must then abide by these rules because of the justified expectations of the subjects that it will do so. The failure of the positivists to distinguish between the power of the State and the law is their failure to see that the law-maker is constrained by his own rules imposed from below by the justified expectations of the citizenry.¹²⁷ Thus even a State legal system is, to some extent, a two-way system.

I maintain, however, that this does not adequately explain the positivists' erroneous concept of law. Fuller fails in his attempt because he has not followed his own principle far enough. If he did, he would see that a State legal system does not conform to the principle of official congruence with its own rules. It is because the positivists see that the State necessarily violates its own rules that they conclude, in a sense correctly, that State-made law is *sui generis*. This is also why they associate "coercion" with the definition of law, an association which Fuller rejects.¹²⁸ What they are seeing is the *essential* nature of the State, the predominant source of law. An elaboration is obviously called for.

First of all, what do we mean when we speak of the "State"? For these purposes I have no quarrel with Weber's definition as put forth in his book, *The Theory of Social and Economic Organization*:

A compulsory political association with a continuous organization (*politischer Anstaltsbetrieb*) will be called a "state" if and insofar as its administrative staff successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order.¹²⁹¹

Furthermore, it is a central characteristic, if not an essential one, of the State that it claims the power to tax.

Fuller's eighth requirement is that "the governing authority . . . [must] abide by its own rules in dealing with its subjects".¹³⁰¹ I accept this principle as stated by Fuller but would disagree with his interpretation of it. I take this principle to mean that "what's good for the goose is good for the gander" or, more formally, the law-maker must obey the *substance* of his own laws. Instead of committing the law-maker to following *all* of his own rules, Fuller erroneously commits the law-maker to following only those rules which govern how to make a law. Clearly my formulation of this principle is a far more reciprocal one. And actually Fuller fails to give any reason why he limits the principle in the way he does.

If we accept what Fuller says but not his narrow interpretation, it becomes obvious that the State by its nature *must* violate this commitment. For example, the State says that citizens may not take from another by force and against his will that which belongs to another. And yet the State through its power to tax, "legitimately" does just that.¹³¹¹ More essentially, the State says that a person may use force upon another only in self-defense, i.e. only as a defense against another who initiated the use of force. To go beyond one's right of self-defense would be to aggress upon the rights of others, a violation of one's legal duty. And yet the State by its claimed monopoly forcibly imposes its jurisdiction on persons who may have done nothing wrong. By doing so it aggresses against the rights of its citizens, something which its rules say citizens may not do.

The State, in short, may steal where its subjects may not and it may aggress (initiate the

use of force) against its subjects while prohibiting them from exercising the same right. It is to this "social fact" that the positivists look when they say that the law (meaning State-made law) is a one-way, vertical process. It is this that belies any claim of true reciprocity.

Fuller's principle is correct, but he is wrong in applying it only to the law-maker's obligation to follow his own *procedure*. A law-maker fails to act in congruence with its rules and, as a result, fails to achieve the aspiration of a legal system to the extent that it fails to follow *all* of its rules, procedural and substantive alike. To the degree that it does not and cannot do this it is not and cannot be a legal system and its acts are outside the law. The State *qua* State therefore is an illegal system.

While Professor Fuller cannot be expected to agree with this analysis, it is quite plain that he would not be shocked by its conclusion. First, I do not contend that all State-made law is not law. It is a question of degree. Only when and to the degree that the State does not follow its own rules (as well as Fuller's seven other requirements) is it *acting* illegally.¹³²¹ As Fuller states, "both rules of law and legal systems can and do half exist. This condition results when the purposive effort necessary to bring them into full being has been, as it were, only half successful".¹³³¹

What then does this application of Legal Naturalism tell us about the proper source of law? An explication of Fuller's eighth principle reveals that a coercively¹³⁴¹ monopolistic legal system is objectionable. The alternative would be a non-monopolistic or multiple system of law. Such a system is perfectly consistent with Fuller's concept of law. As he himself states, "A possible . . . objection to the view [of law] taken here is that it permits the existence of more than one legal system governing the same population. The answer is, of course, that such multiple systems do exist and have in history been more common than unitary systems."¹³⁵¹

LEGAL NATURALISM : A PRESCRIPTIVE APPROACH

What would such a non-monopolistic system look like? Or, put another way, what process

would be consistent with the true horizontal and reciprocal nature of law? At this point I will offer only a tentative sketch. We would do well, I suggest, to begin by examining Fuller's conditions for the optimum efficacy of the notion of duty mentioned in the *Morality of Law*.

Fuller sees three conditions for the "optimum realization of the notion of duty, the conditions that make a duty most understandable and most palatable to the man who owes it".¹³⁹¹ First, the duty must be created by the parties themselves. The relationship of reciprocity out of which the duty arises must result from a voluntary agreement between the parties immediately affected; they themselves create the duty.¹³⁷¹ Second, the performances required must be in some sense equal in value.¹³⁹¹ The third condition is that "the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I may owe you tomorrow — in other words, the relationship of duty must in theory and in practice be reversible".¹³⁹¹ Fuller feels that without this condition, as a practical matter, people will have no reason to honor their obligations. It is Fuller's first condition (*viz.* that of voluntary agreement) that is of interest here.

To see how this principle might be applied in a non-monopolistic legal process, we might imagine a new legal system. In this system there is a company called Metropolitan Arbitration Services. This company has its offices mainly in large urban areas, usually in big office buildings. Most of the cases it considers are civil, primarily commercial disputes. Another competing company, the American Legal Services Company, is a more decentralized nationwide organization. It handles both civil and larger criminal cases at uniform, reasonable rates. There is also a National Association of Independent Judges (NAIJ). Judges who belong to this organization must meet certain requirements and publish their sources of personal income. There are members of NAIJ in virtually every town in North America. While many NAIJ judges practice alone, most are in "judicial partnerships" with other members. NAIJ is far larger than its competitor, the United Judges' Guild.

Each of the companies has its own legal code. Both Metropolitan and American have a policy of carefully reviewing their judges' decisions to see how closely they are following the intended meaning of their respective codes. For this reason, internal appeals are encouraged at minimal expense. The NAIJ has a code as well, but their judges have a great deal more latitude. Local chapters sometimes have their own codes and the precedents of the most respected member judges carry a great deal of weight. The Guild on the other hand has no uniform code. Each of its judges is free to decide a case however he or she chooses. Though they generally stay close to the other codes (or the Model Legal Code), their decisions are frequently radical and innovative.

There are also hundreds of small firms that compete with the large general organizations by specializing in fields like maritime activities, labor disputes, automobile accidents, etc. They commonly employ "expert juries" composed of persons knowledgeable in the area being litigated.

Though appeals are not common, there is a Unified Appeals System to which virtually every practicing judge belongs. Most company appeals are internal and cases heard before NAIJ or Guild judges are usually reviewed (by advanced agreement) by another member judge.

Generally in commercial cases the parties go to the court specified in the insurance contract covering the loss. Payment of claims is usually conditioned on good faith prosecution and faithful following of all court procedures. Those without insurance can hire an arbitration service or go to the court of the opposing party (thus saving the expense of two proceedings). In criminal law, restitution to victims is the favored sanction.¹⁴⁰¹ As a result crime insurance has been made profitable. Insurance companies, having paid the claim, collect the restitution and generally either prosecute their own cases or assign their right to prosecute to specialized prosecution law firms. As in civil cases, testifying and faithful adherence to court rules is a condition of insurance payments.¹⁴¹¹

If a single judge cannot be agreed on it is customary for each party to name his own judge, those chosen then hear the case as a panel. In

the event there is an even number of parties, the judges choose a single independent judge to join them. To save the cost of a full panel, often the single independent judge will hear the case. This procedure is agreed to by the parties in advance of the naming of the judge. There has evolved an extensive conflicts of law doctrine which is followed by all concerned to determine which legal code applies.^[42] Those in the past who have refused to follow the rules of conflicts have been unable to enforce most judgements against those who subscribe to alternate services and have gone out of business or accepted the rules.

In this system individuals and businesses choose their judge or arbitration company on the basis of reputation, the quality of service (speed, convenience, courtesy, etc.), the cost of service and the substance of the legal code adhered to. An arbitration firm or code is generally specified in all contracts. Though most legal codes in operation are very similar, some localities tend to deviate, as will Guild judges. Those who move so far from the mainstream as to alienate clients or make enforcement of judgments difficult or unpopular have tended to lose patronage. Boycotts have also proved effective.

Disputants, in short, have a direct input in and powerful impact on procedures and substantive legal questions. Those groups who wish to live by their own rules (a husband and wife or commune, perhaps) could bring their disputes to an NAIJ or Guild judge. They would show the judge their code (or he might have it on file) and he would apply it as best he could.

Anti-statists have long had trouble with the concept of law. Because they too have identified law with the institution that traditionally has made it, the State, many have rejected law altogether. Many critics of non-statist philosophy insist that without a State there can be no law. But Fuller has no such trouble. He argues that such theoretical difficulties "can arise only if theory has committed itself to the view that the concept of law requires a neatly defined hierarchy of authority with supreme legislative power at the top that is itself *free from legal restraints*".^[43] Fuller's whole purpose, of course, is to reject this vertical view of law.

As to the practical difficulties of such a system,

Fuller points out that they "can arise when there is a real rub between systems because their boundaries of competence have not been and perhaps cannot be clearly defined".^[44] He points out that one possible solution, a constitutional arrangement, "is useful, but not in all cases indispensable. Historically dual and triple systems have functioned without serious friction, and when conflict has arisen it has often been solved by some kind of voluntary accommodation".^[45]

The legal process outlined above is consistent with the horizontal nature of law. It is non-monopolistic in the Weberian sense and in harmony with Fuller's first condition for optimal efficacy of the notion of duty. The reason for indulging in fantasy was not so much to draw a complete blueprint for a legal system but, rather, to give an example of the application of Legal Naturalist methodology and its ultimate goal: the formulation of a legal system or systems that are most consistent with the nature of the legal process.^[46] Only if we have an ideal^[47] in mind can we know what reforms to make in the present legal system, just as the democratic ideal is supposed to aid us in improving our political system. This suggests a third function of Legal Naturalism. The three together would be:

- (1) Study the nature and purpose of law.
- (2) Craft a system of law consistent with that nature and purpose.
- (3) Place contemporary legal structure next to this ideal and devise ways of moving it in the direction of the ideal, thereby improving it or, as the schoolmen would say, actualizing its potential.

PROCESS AND SUBSTANCE CONJOINED

To this point this essay has focused almost exclusively on legal process. This emphasis results largely from the main thesis I've tried to present: that the natural law concern with substance wrongfully ignored questions of process about which its naturalist methodology had much to say. It would be to miss the point of Legal Naturalism entirely, however, to ignore the interface that should exist between the Naturalist concern with process and its concern

with substance. For the Legal Naturalist approach, as I see it, embraces both areas which, after all — and this again is the insight of the Realists — can never be totally separated.

Nowhere is this conjunction more important than in the above hypothetical description of a multiple legal system. Our response to the substantive outcome of such a system can take one of two directions:

(1) Assuming we have demonstrated or might demonstrate the appropriateness of the process on Naturalist (and, therefore, non-positivist) grounds, we must necessarily accept whatever the process produces; or

(2) While the process is the most consistent with the purpose(s) of the legal enterprise, it is still capable of producing morally unjust results. We must, therefore, scrutinize and judge the results accordingly and if necessary fight any tyranny that arises — even if it arises in accordance with formal principles of legality.

The former choice resembles the version of positivism which I labeled above as Normativism. It closely comports with H. L. A. Hart's approach as presented in *The Concept of Law* except that here our Naturalist defense of the non-monopolistic system does the work of his "rule of recognition". Such a methodology of justifying a legal process by non-positivist means, only to accept whatever outcome may result, might usefully be called "secondary positivism". As such it is clearly inconsistent with a full Naturalist methodology as here described.¹⁴⁸ Legal Naturalism is an *extension* of the natural rights theorists' concern with the proper substance of law. A proper legal process is a necessary but not sufficient requirement for a fully legal order. A just substantive law is also required.

Although I shall not examine here the dispute between a Naturalist approach with its moral realist component and the positivist approach with its moral subjectivist component, it should be noted that Legal Naturalism stands in the mainstream of the growing anti-positivist, anti-subjectivist critique. This trend is nowhere better exemplified than in the recent work of Ronald Dworkin, who, in his book *Taking Rights Seriously*,¹⁴⁹ is sharply critical of moral subjectivism and legal positivism. As

he concludes,

It may be that the supposition that one side may be right and the other wrong is cemented into our habits of thought at a level so deep that we cannot coherently deny that supposition, no matter how skeptical or hard-headed we wish to be in such matters. . . . The "myth" that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth.¹⁵⁰

It is necessary, then, indeed crucial, for the Legal Naturalist to step back and judge the fruits of his labors, that is, to judge the justice or injustice of the laws which an otherwise legal system produces. The Naturalist methodology is intended to apply across the board, else the retreat to subjectivism and positivism is inevitable.¹⁵¹

CONCLUSION: WHY A LEGAL NATURALISM?

Before concluding it might be appropriate to comment on why I call this outlook *Legal Naturalism*. In addition to its obvious association with the substantive concerns of natural law theory, the Naturalist outlook seems to overlap a number of the meanings of the word "nature":

(1) As should be clear, the bedrock of concern is the *nature of law* and the legal process.

(2) The process of crafting a legal process around the nature of law, its purpose and aspiration, is reminiscent of ecological biology which strives to keep man in touch and in *harmony with nature*.

(3) The legal process which emerges from this type of analysis should, once evolved, *function naturally* or to use F. A. Hayek's term, "spontaneously". Spontaneous order is that which "results from the individual elements adapting themselves to circumstances which directly affect only some of them, and which in their totality need not be known to anyone . . . [and therefore such an order] may extend to circumstances so complex that no mind can comprehend them all."¹⁵²

Social scientists are partial to thinking of society as a living organism and yet most of them wish to have its complex operation directed by some segment of the whole. Legal Naturalism is a truly organic theory of law. By

tempering the moral concerns of the natural law theorists with the insights of the reformist Legal Realist movement, the Legal Naturalist may obtain a better understanding of the dynamic system we call law.¹⁵³ Only from an accurate conception of law can a truly just legal system evolve. It is with a deep hope for such an evolution that I urge a movement toward a theory of Legal Naturalism.

NOTES

1. H. L. A. Hart, *The Concept of Law*. (Oxford: Oxford University Press, 1961), p. 182.
2. A. P. d'Entrèves, *Natural Law*, 2nd Revised Edition (London: Hutchins & Co., 1970), p. 175.
3. Karl Llewellyn, "Some Realism About Realism — Responding to Dean Pound", *Harvard Law Review*, 44 (June, 1931): 1222–1264.
4. Lon L. Fuller, "American Legal Realism", *University of Pennsylvania Law Review*, 82 (1934): 444.
5. *Ibid.*, pp. 429–462.
6. A great deal of what the realist movement stood for will not be discussed in this paper. For those interested in a brief discussion of Legal Realism I suggest Yosaf Rogat, "Legal Realism", *The Encyclopedia of Philosophy*, (New York: Macmillan and Free Press, 1967), 4: 420–421. For a highly entertaining retrospective introduction to Realism I recommend Grant Gilmore, "Legal Realism: Its Cause and Cure", *Yale Law Journal*, 70 (June, 1961), 1037–1048. For a more scholarly examination and criticism of the movement as well as additional references see Fuller, "American Legal Realism", pp. 429–462, and Edward A. Purcell, *The Crisis of Democratic Theory* (Lexington, Kentucky: University Press of Kentucky, 1973).
7. Rogat, "Legal Realism", p. 421 (emphasis added).
8. d'Entrèves, *Natural Law*, p. 175 (emphasis added).
9. An example of a concern with *substance* is the debate over the legality of abortion. Should abortions be permitted or prohibited? A concern with *process*, on the other hand, would consider how the decision should be made, who should make it and how it should be applied, etc.
10. I distinguish between "process" and "procedure". Procedures are rules within a system which govern the manner in which certain actions are performed and decisions made. Thus, the notion of a legislative process is a broader concept than legislative procedure which might include, for example, a "majority vote" requirement for passage of a statute. Although Fuller used the term "procedural", it is clear that his meaning is not inconsistent with the one adopted here. "What I have called the internal morality of law is . . . a procedural [as distinguished from a substantive] version of law, though to avoid misunderstanding the word procedural should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. The term procedural is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be." (*The Morality of Law*, Revised Edition, [New Haven and London: Yale University Press, 1969], pp. 96–97). I would further suggest that while legal process is to be judged in the manner set out in this paper below, legal procedures should be judged by utilitarian considerations, provided that they violate no moral side-constraints. See my "Whither Anarchy? Has Robert Nozick Justified the State?" *Journal of Libertarian Studies* 1, No. 1 (Winter, 1977): 15–21; and see also Robert Nozick, *Anarchy, State & Utopia* (New York: Basic Books, 1974), pp. 28–33.
11. Although I shall adopt Fuller's use of "purpose" I acknowledge that others feel that "function" is the more appropriate term. See e.g. F. A. Hayek, *Law, Legislation and Liberty*, vol. 1 (Chicago: University of Chicago Press, 1973), pp. 38–39. Hayek draws the distinction when describing his theory of "spontaneous order". I would argue that in some significant sense the legal process is or should be spontaneous, in which case the use of "purposive" is "a sort of 'teleological shorthand' . . . [meaning] merely that the elements have acquired regularities of conduct conducive to the maintenance of the order". (Hayek, p. 39). In another sense the legal process is "purposive" insofar as this implies "an awareness of purpose" (Hayek, p. 39) on the part of the "elements", in which case the legal process is not spontaneous. Fuller's use of the term "purposive" seems to embrace both meanings and, thus, both aspects of the legal process.
12. Although I shall rely heavily on Fuller's analysis throughout this paper, I do not agree with every part of his theory. Nor do I pretend to have rigorously demonstrated his view. This brief exposition cannot possibly match his own defense as presented in *The Morality of Law*. I urge interested readers to examine it for themselves.
13. Fuller, *The Morality of Law*, p. 5.
14. *Ibid.*, pp. 5–6.
15. *Ibid.*, p. 9.
16. *Ibid.*, p. 31.
17. *Ibid.*, p. 39.
18. *Ibid.*, p.
19. *Ibid.*, p. 41.
20. *Ibid.*, p. 42.
21. A. P. d'Entrèves criticizes Fuller for his "technological notion of natural law" whose "primary concern is with the means aspect of the means–end relation". *Natural Law*, p. 149. I agree that Fuller's approach is not sufficiently "ontological" (though he has moved a great distance in that direction since the article d'Entrèves refers to was published in 1954) and I will have reason to note below that this may lead to an incomplete anti-positivist position. For my present purpose, however, this is beside the point, since what I am searching for is a link between a substantive concern (which might be "ontologically" grounded — see e.g. Henry B. Veatch, *For An Ontology of Morals* [Evanston, Ill.: Northwestern University Press, 1971]) and the insight of the Legal Realists with regard to legal process. Fuller's scheme seems to fit the bill, "technological" or not. To be fair, it must be noted that Fuller does take up certain substantive considerations in his excellent outline of "The

- Substantive Aims of Law" (*The Morality of Law*, pp. 152-186).
22. Richard Taylor, *Freedom, Anarchy and the Law* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), p. 129.
 23. *Ibid.*, p. 128 (emphasis added).
 24. Fuller, *The Morality of Law*, p. 204.
 25. *Ibid.*, p. 233.
 26. *Ibid.* To fully understand and defend the principle would require a discussion far more extensive than would be appropriate here. See Fuller's discussion in *The Morality of Law*, especially pp. 215-224, 232-241.
 27. "[I]t is safe to say that the tacit expectations that make up customary law will always enter into any practical realization of the ideal of legality. Fidelity to the Rule of Law demands not only that a government abide by its verbalized and publicized rules, but also that it respect the justified expectations created by its treatment of situations not controlled by explicitly announced rules. Even more plainly it requires that government apply written rules in accordance with any generally accepted gloss written into those rules in the course of their administration. Taking all these complications into account will, of course, embarrass the construction of neat juristic theories. But it will ease the transition of legal thought from state-imposed codes to the somewhat messier seeming manifestations of law exemplified in international and customary law." Fuller, *The Morality of Law*, p. 234.
 28. Fuller, *The Morality of Law*, pp. 108-118.
 29. Max Weber, *The Theory of Social and Economic Organization*, ed., Talcott Parsons, trans. A. M. Henderson and Talcott Parsons (New York: The Free Press, 1964), p. 154, as it appears in Jeffrey H. Reiman, *In Defense of Political Philosophy* (New York: Harper Torchbooks, 1972), p. 20 (emphasis in the original). I do not propose, however, to become embroiled in a debate over the definition of the State. The inevitable result of such semantic disputes is that one is urged either to broaden the definition so that we see "States" everywhere or to narrow it to show that there is really no such thing as a State. Such entreaties are illegitimate. Since the State exists, we need only define it so as to distinguish it from other organizations which are not States by picking out its essential features and then proceed with the discussion.
 30. Fuller, *The Morality of Law*, p. 233.
 31. Any reason for or justification of State taxation is not relevant to this discussion. I am dealing only with the fact that this action is incongruent with the State's rules for its citizens.
 32. The discussion at this point is concerned only with the *legality* of State actions and the State rule-making system. I do not consider here the *morality* of State actions and the State rule-making system (although obviously the subjects are related). I will argue below that the Legal Naturalist methodology embraces both aspects of law, though it does so at separate states of analysis.
 33. Fuller, *The Morality of Law*, p. 122. The rest of this passage is also interesting: "The truth that there are degrees of success in this effort is obscured by the conventions of ordinary legal language. These conventions arise from a laudable desire not to build into our ways of speech a pervasive encouragement to anarchy. It is probably well that our legal vocabulary treats a judge as a judge, though of some particular holder of the judicial office. I may quite truthfully say to a fellow lawyer, 'He's no judge'. 'The tacit restraints that exclude from our ordinary ways of talking about law a recognition of imperfections and shades of gray have their place and function. They have no place or function in any attempt to analyze the fundamental problems that must be solved in creating and administering a system of legal rules.'"
 34. The word coercion has many radically different meanings. See Robert Nozick, "Coercion", *Philosophy, Science and Method* eds. S. Morgenbesser, et al. (New York: St. Martin's Press, 1969), pp. 440-472. A coercively monopolistic legal system, as I use the word, is one that sustains its monopoly by the use of physical force or the threat of physical force.
 35. Fuller, *The Morality of Law*, p. 123.
 36. *Ibid.*, pp. 23-24. These must be sharply distinguished from those characteristics that determine formally what a law is and its substantive validity.
 37. *Ibid.*, p. 23.
 38. Here I must disagree. Fuller searches for some measure of value to apply to things which are different in kind. Such a search will prove as fruitless as the medieval search for a "just price" and for the same reason. The subjective valuations of the parties (the only standard of relevance in a *voluntary* exchange) are incommensurable by virtue of their subjectivity and the lack of an *objective* measure of subjective values. What Fuller may be searching for (as his later reliance on the concept of marginal utility reveals) is a notion of an *ex ante* desire of each party for that thing held by the other. Only if such a condition exists is a free exchange possible, else why exchange? Fuller points out that "we cannot here speak of an exact identity, for it makes no sense at all to exchange, say, a book or idea in return for exactly the same book or idea". (*The Morality of Law*, p. 23). We leave to the parties the determination of the "fairness" of the exchange. Surely this satisfies Fuller's second condition of a situation which makes "a strong appeal to the sense of justice". (*Ibid.*, p. 23).
 39. Fuller, *The Morality of Law*, p. 23. The principle of "equality before the law" as a precondition of the rule of law, is a reflection of this concern.
 40. I have considered the possible use of restitution to victims of crime in "Restitution: A New Paradigm of Criminal Justice", *Ethics* 87, no. 4 (July, 1977): 279-301 and with John Hagell II in *Assessing the Criminal: Restitution, Retribution and the Legal Process*. (Cambridge, Mass.: Ballinger Publishing Co., 1977), pp. 1-31.
 41. At this point I ask the thoughtful reader's indulgence. There are many practical problems which I shall not consider. I would suggest, however, that virtually all of them are *economic*. That is, they concern the economic feasibility of a criminal justice system which receives no income from taxation. Those who favor tax supported prosecution and criminal judicial proceedings might imagine a voucher plan of some kind. What is of concern here is the free-choice, multiple legal code aspect of such a system.
 42. There is, of course, a currently existing body of law which attempts to solve similar problems. "What is the subject matter of the conflict of laws? A fairly neutral definition . . . is that the conflict of laws is the

- study of whether or not and, if so, in what way, the answer to a legal problem will be affected because the elements of the problem have contacts with more than one jurisdiction." Russell J. Weintraub, *Commentary on the Conflicts of Laws* (Mineola, New York: Foundation Press, 1971), p. 1. For a discussion of various policies to be weighed in a consideration of choice of law problems see Elliot Cheatham and Willis Rease, "Choice of the Applicable Law", *Columbia Law Review* 52 (1952): 959-982.
43. Fuller, *The Morality of Law*, p. 124. (emphasis added).
 44. The problem of multiple jurisdictions and its impact on the individual, while genuine, is certainly non-unique: "If the defendant does not want to submit to the jurisdiction of the court, he plainly would not authorize his attorney to enter a general appearance. If he is confident that jurisdiction over his person is lacking, he may, in theory at least, simply ignore the lawsuit entirely. To illustrate: *P* commences an action against *D* in State *X* for an alleged tort committed by *D* in State *Y*, seeking money for damages. *D* resides in State *Y* and has never set foot in nor had any connection with State *X* and has no property there. *P* delivers process to *D* in State *Y*. State *X* has not acquired jurisdiction over *D*'s person. If judgment on *D*'s default is entered against him, and an attempt made to enforce the judgment in State *Y* or elsewhere by an action in which proper service is made upon *D*, he can then set up the invalidity of the judgment. But *D* may wish to contest State *X*'s jurisdiction over his person in the courts of that State; he may be in genuine doubt whether State *X* has acquired jurisdiction over him, or he may not relish the prospect of an over-hanging judgment against him even though he is convinced it is invalid . . . (in which case) the defendant would file a notice that he was appearing solely for the purpose of challenging jurisdiction and/or submitting generally to the jurisdiction of the court." Richard H. Field and Benjamin Kaplan, *Civil Procedure*, 3rd edition (Mineola, New York: Foundation Press, 1973), pp. 199-200.
 45. Fuller, *The Morality of Law*, p. 124.
 46. It is legitimate to ask, at this point, to what extent my thesis rests on Fuller's. If you reject Fuller's thesis are you, thereby, forced to reject Legal Naturalism? The answer is a qualified no. The methodology of Legal Naturalism can be employed even if you were to substitute a positivist concept of law in step (1). The only question is why you would be interested in such an approach if you did not view law as a purposive enterprise.
 47. I use the term "ideal" as a standard of perfection to be striven toward. While it does not and might never exist, there is no reason, in principle, why it could not come about. A "utopia", on the other hand, is a pleasant fantasy which would require for its existence some basic change in the nature of reality. Serious confusion can arise by using either term and failing to adequately draw this distinction.
 48. Since my purpose is to outline the Legal Naturalist methodology I will not here strictly scrutinize a secondary positivist position. It is interesting to observe that Robert Nozick in his discussion of distributive justice does not, contrary to appearances, fall into this error, while David Friedman's *The Machinery of Freedom* (New York: Harper & Row, 1973) seems to be a good example of such a position.
 49. (Cambridge, Mass.: Harvard University Press, 1977.)
 50. *Ibid.*, p. 290.
 51. The two-pronged characteristic of Legal Naturalist methodology may account for two flawed versions of a "free" society. The first (e.g. David Friedman) rejects the State as a proper law-maker (the process aspect of Legal Naturalism), but fails to judge the results of a non-monopolistic legal system (the substantive concern of Naturalism). The second variant (e.g. Ayn Rand) reverses the error by proposing to scrutinize substantively all acts of the law-maker, while accepting a monopoly State as the only proper source of law.
 52. Hayek, *Law, Legislation and Liberty*, p. 41.
 53. As Fuller puts it: "In the philosophy of science the reorientation associated with the names of Michael Polanyi and Thomas Kuhn has been marked by a shift of interest away from the conceptualization and logical analysis of scientific verification and toward a study of the actual processes by which scientific discoveries are made. Perhaps in time legal philosophers will cease to be preoccupied with building conceptual models to represent legal phenomena, will give up their endless debates about definitions, and will turn instead to an analysis of the social processes that constitute the reality of law." Fuller, *The Morality of Law*, p. 242.