THE LEGAL PHILOSOPHY OF LON L. FULLER: A NATURAL LAW PERSPECTIVE

K. E. DAWKINS*

Introduction

The legal philosophy of Professor Lon Fuller resists neat categorisation. Fuller has extensively criticised the traditions of both analytical legal positivism and legal realism and he has expressly disavowed identification with classical and neo-classical theories of natural law. His ideology of law has been characterised at various times as "contemporary nonthomis[m]",[1] "modern legal idealism",[2] and "justice- and value-oriented [jurisprudence]",[3] and it has been associated generally with the modern revival of natural law.[4] And, in a juxtaposition that reflects the perennial debate to which he has contributed, Fuller has been described as both "the stepchild of a positivist age"[5] and "perhaps . . . the leading contemporary natural lawyer".[6]

Fuller's contribution to legal philosophy has indeed been wide-ranging. In the words of one of his critics, "[he] has done his share of thinking about such 'staples' of legal philosophy as: the relations between morality and law, the nature of law, judicial reasoning, legal fictions, problems of interpretation, and theories of punishment . . . . He has defined new problems and given new twists to old ones".[7]

This article seeks to bring a modest expository focus to one important aspect of Fuller's philosophy of law – his particular form of natural law. Although, as Fuller has written, "one [no longer] run[s] any serious risk that a rejection of positivism will be taken to imply a pretension that one has established contact with Absolute Truth",[8] the concept of natural law[9]

* B.A., LL.B., Post-Grad. Dip. Law (Otago), LL.M. (Mich.). Lecturer in Law, University of Otago.

1 Golding, *Philosophy of Law* (1975) 31, 33.

2 Gowan, "A Report on the Status of Philosophy of Law in the United States" (1950) 50 Colum. L. Rev. 1086, 1096.

3 Bodenheimer, *Jurisprudence* (rev. ed. 1974) 154.

4 See e.g. Friedmann, *Legal Theory* (5th ed. 1967) 154; Lloyd, *Introduction to Jurisprudence* (3rd ed. 1972) 83.

5 Anastaplo, "Natural Right and the American Lawyer: An Appreciation of Professor Fuller" (1965) Wis. L. Rev. 322, 327.

6 Dias, *Jurisprudence* (4th ed. 1976) 680.

7 Summers, "Professor Fuller on Morality and Law" in Summers (ed.), *More Essays in Legal Philosophy* (1971) 101, 101-102 (footnote citations omitted). This essay is reprinted from (1966) 18 J. Legal Ed. 1.

8 Fuller, *The Morality of Law* (rev. ed. 1969) 241 (hereinafter cited as *Morality*).

9 Notwithstanding the frequently encountered dictum that the "nature of natural law" defies encapsulation in any one description, the following summary is presented as an accurate representation of traditional natural law theory – "Reduced to a minimum number of principles . . . natural law theory directly entails the following assumptions: (i) All things in the universe, including man, have a particular nature or structure which makes the thing itself and not something else. (ii) This nature, ultimately, is to be discovered through the faculty of reason. (iii) Man ought to do only those acts which can be shown by the process

remains for many identified with ideas of "higher law", appeals to immutable principles of human conduct discoverable by reason, and the datum that an unjust law is no law at all. In contrast to "made" law, the work-horse of legal society, it is "non-natural" rather than "natural" – a curious and irritating blend of abstraction and abstruseness that defies reification and purports to offer a theory of law for all seasons. In short, for many, natural law bears little or no relevance to the demands of a contemporary legal order. To borrow from Fuller again, "the term 'natural law' still has about it a rich, deep odour of the witches' cauldron, and the mere mention of it suffices to unloose a torrent of emotions and fears".[10]

What then does Fuller's version of natural law offer? Does he deliver natural law from its stereotypical image of a "brooding omnipresence in the skies",[11] and invest it with a relevance to the procedures and institutions of the law as we know them? In what sense can his concept of law be designated a natural law theory and where does it depart from and converge with traditional natural law theory?

Throughout, Fuller's own distinction between procedural and substantive natural law is followed. Since a major part of Fuller's philosophy of law is his concern for institutional design and the procedural complement of legal institutions, attention will be directed to his theory of procedural or institutional natural law. According to Fuller, "[l]egal philosophy has tended to disregard the institutional processes that bring law into being and produce its efficacy in human affairs [and] legal scholars have talked about the rules that emerge from those processes rather than about 'the law' itself".[12] This interest in process and procedure (the emphasis upon means in the means-end continuum) has its final synthesis in the presentation of eight desiderata that are postulated as the minimum necessary conditions for the existence of a legal system.[13]

Equally engaging is the question whether Fuller espouses a form of substantive natural law – "Natural law with capital letters".[14] Here, however, one encounters the twin barriers of explicit disclaimer and muted exposition that arise from Fuller's unqualified repudiation of "higher law" notions and from his presentation of the solitary substantive principle of "communication".[15] For some, Fuller has discarded all attempts to formulate an independent substantive theory of natural law:[16]

> [H]is works over the years . . . clearly reveal that he has considered a substantive theory but has rejected such as epistemologically and generally unworkable; man's reason is not capable of formulating a viable substantive natural-law theory.

of reasoning not to be inconsistent with his own nature and the nature of the universe in which he lives. (iv) The positive law of a community carries an 'intrinsic' obligation and thus is a 'law' only when it requires or permits actions which conform to the nature of things as they are and, in particular, the nature of man." Smith, *Legal Obligation* (1975) 5.

10 Fuller, "Reason and Fiat in Case Law" (1946) 59 Harv. L. Rev. 376, 379 (hereinafter cited as "Reason").

11 Ibid., 379; *Morality*, supra n. 8 at 96.

12 Fuller, *Legal Fictions* (1976) xi.

13 *Morality*, supra n. 8, Ch. II. See infra pp. 78-82.

14 Ibid., 186.

15 Ibid., 185-186. See infra pp. 71-72, 84-85.

16 Savarese, Book Review (1964) 53 Geo. L. J. 250, 257.

Any examination of any aspect of Fuller's legal philosophy must draw largely from his major exegesis on the relationship of law and morality.[17] But, in addition, several earlier discourses[18] should be regarded in surveying the progressive articulation and refinement of his version of natural law. Although not systematically developed, these earlier essays into legal philosophy reveal a number of points of intersection with traditional natural law theory.

Fuller's Concept of Law

Fuller approaches law "not in terms of definitions and authoritative sources, but in terms of problems and functions".[19] Recasting his analogy to scientific discovery, Fuller's aim is "to give the student a vicarious experience in the act of [legal] discovery".[20]

Perhaps it is useful to state what Fuller's conception of law is not. It is not predictive, imperative or hierarchic. It rejects coercion and formal hierarchies of command as the identifying characteristics of law. It does not centre upon the formalistic and analytical bias that "asks of law not what it is or does, but whence it comes",[21] and it finds no place for what has been generically described as the "apex norm"[22]: e.g. Austin's "sovereign one or many enjoying the habit of obedience", Hart's "Rule of Recognition", and Kelsen's "Grundnorm".[23] It does not reflect the image of law as a managerial relationship of order-giver and order-executor. And it does not present law in monistic terms as an enterprise with a life apart from other forms of human endeavour.

Positively stated, law, which Fuller describes as "the enterprise of subjecting human conduct to the governance of rules",[24] is a purposive and collaborative endeavour. Underpinning the primacy of purpose and the collaborative and interactional characterisation of the relationship of law-maker and law-subject is the recognition of a social dimension in the functioning of a legal system. At this point Fuller parts company with the analytical legal positivist.[25] While Fuller sees law as interactional, the analytical positivist embraces a unilateral conception in which law is "a one-way projection of authority . . . [seen] at the point of its dispatch by the lawgiver and again at the point of its impact on the legal subject".[26] In

17 *Morality,* supra n. 8.

18 The most important of these are (subsequent citations in parentheses): *The Law in Quest of Itself* (1940) (*Quest*); *Problems of Jurisprudence* (temp. ed. 1949) (*Problems*); "Reason", supra n. 10; "American Legal Philosophy at Mid-Century" (1954) 6 J. Legal Ed. 457 ("American Legal Philosophy"); "Human Purpose and Natural Law" (1956) 53 J. Phil. 697, (1958) 3 Natural L. F. 68 ("Human Purpose"); "A Rejoinder to Professor Nagel" (1958) 3 Natural L.F. 83 ("Rejoinder"); "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630 ("Positivism").

19 "Reason", supra n. 10 at 382.

20 *Morality,* supra n. 8 at 120.

21 Ibid., 192.

22 Stone, *Legal System and Lawyers' Reasonings* (1964) 104.

23 *Morality,* supra n. 8 at 192.

24 Ibid., 74, 96, 106, 122, 124, 130.

25 Fuller identifies this intellectual structure with Austin and Kelsen and the "New Analytical Jurists", notably H. L. A. Hart, Ronald Dworkin, Robert Summers and Marshall Cohen. Ibid., 190-191.

26 Ibid., 193.

Fuller's terms, the basic articles of faith in the credo of positivism do not acknowledge the "interplay of purposive orientations between the citizen and his government",[27] and his own catechism professes no sympathy for "an intellectual mood that finds more satisfaction in taking things apart than in seeing how they fit and function together".[28]

From this base idea of law as a purposive "enterprise" or "activity" Fuller develops a *working* conception of law. As it is with any purposive activity, so it is with law – one must attend to the procedures that guide this form of human striving and concern oneself critically with the conditions that will facilitate the success of the endeavour. Fuller's commitment is to an evaluative presentation of the "legal process" rather than to a definition of the "law". Stated briefly, the focus is upon "the requirements of a going concern".[29]

Fuller and Traditional Natural Law Theory

Fuller does not present himself as sponsor for any past or current theory of natural law – in particular, the Thomist system of natural law. He expressly disclaims doctrinaire and absolutist notions of "higher law" which purport to derive universal standards of rightness or justice from divine ordinance, the nature of the universe, or the nature of man. For Fuller, law is terrestrial in origin and application.

Specifically, he does not subscribe to any theory that asserts one or more of the following propositions:[30]

(1) that there is a "higher law" transcending human endeavour against which positive law must be measured and to which such law must conform;
(2) that there is something called "*the* natural law" which offers an eternal and immutable "code of conduct" capable of concrete application to the affairs of this life; and
(3) that the moral imperatives of natural law can be the subject of authoritative pronouncement.[31]

27 Ibid., 204.
28 Ibid., 191.
29 Selznick, "Sociology and Natural Law" in Black and Mileski (eds.), *The Social Organisation of Law* (1973) 16, 33. This is a slightly revised version of a paper appearing in (1961) 6 Natural L. F. 51.
30 "Rejoinder", supra n. 18 at 84. Elsewhere, Fuller summarises the "dogmatisms" that have been attributed to the philosophy of natural law as follows: "[R]elieved of caution and discharged of any responsibility to be sensible, the philosophy of natural law would embrace the following beliefs: There is an ideal system of law dictated by God, by the nature of man, or by nature itself. This ideal system is the same for all societies and for all periods of history. Its rules can be discerned by reason and reflection. Enacted laws that run counter to this ideal law are void and can make no moral claim to be obeyed." *Anatomy of the Law* (1968) 116 (hereinafter cited as *Anatomy*).
31 However, as Stone, *Human Law and Human Justice* (1965) 226, suggests, these rejections can be interpreted as indecisive on several critical points. The first denial may mean that Fuller does not believe that there is any "higher law" at all, that he believes there is such a "higher law" but that it does not posit a standard of validity for conflicting positive law, or that he believes there is a "higher law" not transcending human life which declares conflicting positive law invalid. The second rejection does not expressly preclude the possibility of discovery and demonstration of the dictates of natural law. And the third, while refusing to accept that natural law can be applied like a written code, does not expressly disclaim the existence of natural law as a binding order.

Nor does Fuller appear to accept what he describes as the theory of natural law in its "most modest form":[32]

> Its fundamental tenet is an affirmation of the role of human reason in the design and operation of legal institutions. It asserts that there are principles of sound social architecture, objectively given, and that these principles, like those of physical architecture, do not change with every shift in the details of the design toward which they are directed. Those who participate in the enterprise of law must acquire a sense of institutional role and give thought to how that role may most effectively be discharged without transcending its essential restraints.

Fuller's rejection of traditional natural law theory ranges beyond substance to terminology.[33] He renounces such labels as "natural law", "natural justice" and "natural rights" for a number of reasons: they commonly bear metaphysical and romantic colorations; they have frequently acquired theistic and political implications; they are often associated with inflexible standards of morality and validity which have no relevance to the basic demands of social order; and particular terms e.g. "natural rights", have developed a strong flavour of individualism and rationalism.

What merit, then, does Fuller discern in the general tradition of natural law theory? Beyond the diaphanous associations of substantive natural law, he finds a commendable quality in the approach that natural law theories bring to legal philosophy. In the words of an eminent jurist, Fuller's emulation of the natural law tradition extends to "the range of facts and arguments brought into consideration by the natural law jurist".[34] Thus, the identification is with natural law as an expansive dimension of inquiry that reaches to moral as well as legal philosophy and not with natural law as a general ethical theorem. Fuller has described this intellectual commitment as follows:[35]

> The illusion of natural law has at least this presumption in its favour, that it liberates the energies of men's minds and allows them to accomplish as much as they can . . . . The chief value of the older books on natural law for us of the present day does not lie so much in the systems they expound, as in the kind of legal thinking they exemplify.

If natural law as an intellectual tradition has had a liberating influence on legal philosophy it derives largely from its aspirational and purposive conception of man and from the role it has accorded reason rather than the arbitrariness of human will in the government of man. Apart from a philosophical empathy toward the intellectual tradition of natural law, one finds further relationships between that tradition and Fuller's concept of law in the idea of purpose and the importance of reason in the development and administration of legal institutions.

32 *Anatomy,* supra n. 29 at 116.
33 *Problems,* supra n. 18 at 700-701.
34 Stone, supra n. 31 at 222.
35 *Quest,* supra n. 18 at 101-110.

1. Teleological conception of law and man

So pervasive is the idea of purpose in Fuller's concept of law that it provides the very *leitmotif* of his jurisprudence.[36] The goal-directed view that "[t]he essential meaning of a legal rule lies in a purpose, or more commonly, in a congeries of purposes",[37] that a legal system is the product of a sustained purposive effort, is persistently pursued throughout Fuller's writings. Together with the associated themes of collaboration, interaction and reciprocity, the idea of purposiveness is imported into his concept of law under such pregnant rubrics as "the principle of the common need,"[38] "the collaborative articulation of shared purposes"[39] and "collaborative social effort",[40] and "the facilitation of human interaction".[41]

To suggest that legal rules are purposive arrangements for the guidance and regulation of human striving is, as Fuller concedes, a rather modest indulgence in teleology. But his aspirational view of man accommodates a more meaningful teleological dimension. In Fuller's ideology, the central aim of human endeavour is not the Hobbesian notion of self-preservation. Rather, "communication" – man's ability to transmit knowledge to and to reach understanding and coordinate effort with his fellows – is the principle that infuses human aspiration.[42] For Fuller, survival is a necessary though not a sufficient condition for the realisation of other human values. He draws from Aquinas to refute H. L. A. Hart's assertion that survival, "the central indisputable element which gives empirical good sense to the terminology of Natural Law",[43] is the proper end of human striving:[44]

> Hence a captain does not intend as a last end, the preservation of the ship entrusted to him, since a ship is ordained to something else as its end, viz., to navigation.[45]

Communication adds a qualitative element to the mean fact of continued existence. It is a *way* of living that nourishes interaction and collaboration and the transmission of ideas. It is more than "a matter of

36 The pervasiveness of purpose is aptly reflected in one of the headings to the chapter entitled "The Concept of Law" in *Morality,* supra n. 8. As Hart, Book Review (1965) 78 Harv. L. Rev. 1281, 1291, observes, the quotation from Nietzsche – "Das Vergessen der Absichten ist die häufigste Dummheit, die gemacht wird" – translates "Forgetting purposes is the most common form of stupidity". For observations on the role of purpose in Fuller's concept of law see Gottlieb, *The Logic of Choice* (1968) Ch. VII; Lewis, "An Analysis of 'Purposive Activity': Its Relevance to the Relation between Law and Moral Obligation" (1971) 16 Am. J. Juris. 143; Nakhnikian, "Professor Fuller on Legal Rules and Purpose" (1956) 2 Wayne L. Rev. 190.

37 "American Legal Philosophy" supra n. 18 at 470. This article is an extended review of Patterson, *Jurisprudence – Men and Ideas of the Law* (1953).

38 *Problems,* supra n. 19 at 694 et seq.

39 "Human Purpose", supra n. 18 at 73; "Rejoinder", supra n. 18 at 84.

40 Fuller, "Freedom – A Suggested Analysis" (1955) 68 Harv. L. Rev. 1305, 1312. The themes of collaboration, interaction and reciprocity are sustained in *Morality,* supra n. 8, particularly Ch. V, and *Anatomy,* supra n. 30.

41 Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction" (1975) Brigham Young L. Rev. 89. See also Fuller, "Human Interaction and the Law" (1969) 14 Am. J. Juris. 1.

42 *Morality,* supra n. 8 at 185-186.

43 Hart, *The Concept of Law* (1961) 187.

44 *Morality,* supra n. 8 at 185.

45 Aquinas, *Summa Theologica,* Pt. I-II, Q.2, Art. 5.

shipping packages of meaning from one head to another; it involves an effort to initiate in another mind perceptual processes that will as closely as possible match those taking place in the mind of the communicating party".[46]

As Hart suggests, acceptance of survival as a human goal or end "rests on the simple contingent fact that most men most of the time wish to continue in existence".[47] This view of the central aim of human endeavour, from which Hart derives the "simple truisms" of the doctrine of natural law,[48] does not compel a commitment to a final-end theory of nature postulating that man proceeds to a specific state that is both the fulfilment of his nature and a fundamental good. By contrast, Fuller's principle of communication represents much more. His substantive injunction to "[o]pen up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire"[49] is at once a process of human development and, perhaps, a "fundamental good and basic value"[50] in the sense of Aristotle's cultivation of the human intellect and Aquinas' knowledge of God.

2. Natural reason and human fiat

In an early discourse,[51] Fuller has examined what he describes as the "antinomy" of reason and fiat, a theme that he returns to later in his distinction between "made" and "implicit" law.[52] This contrast restates the schism between the extremes of natural law and legal positivism: that law is, or at least can be, the expression of pure reason ("order discovered") or that law is, in its entirety, the product of human fiat ("order imposed").

The one extreme is represented in classical and scholastic formulations of natural law by the idea that a legal order is discoverable by man through the application of his reason and his reflective faculties to the demands of social existence – or, through relevation, where the task exceeds the human faculty. Thus, law is defined as "reason free from all passion",[53] "right reason in agreement with Nature",[54] and "an ordinance of reason for the common good".[55] The other extreme is represented by those theories that have sought to reduce the catalogue of legal rules to those that derive from a determinate and authoritative human source.[56]

46 *Morality*, supra n. 8 at 227.
47 Hart, supra n. 43.
48 Ibid., 189 et seq. Hart sets forth several characteristics of human nature upon which "the minimum content of natural law" rests: human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding and strength of will.
49 *Morality*, supra n. 8 at 186.
50 Sturm, "Lon Fuller's Multidimensional Natural Law Theory" (1966) 18 Stan. L. Rev. 612, 615. Sturm suggests that Fuller does not conceive the ultimate end of man as a condition of static excellence: "Rather the 'supreme end' or 'ultimate destiny' of man is a quality of living, a mode of developing, a character of action that must be rechosen and reactualised again and again in each new moment of living, in each new stage of development, in each new instant of action." Ibid., 619.
51 "Reason", supra n. 10.
52 *Anatomy*, supra n. 30, especially Pt. II.
53 Aristotle, *Politics*, Bk. III, 1287a.
54 Cicero, *De Republica*, Bk. III, xxii.
55 Aquinas, *Summa Theologica*, Pt. II, Q. 90, Art. 4.
56 Fuller refers to Austin, *Lectures on Jurisprudence* (4th ed. 1879); Gray, *Nature and Sources of the Law* (1909); Hearn, *The Theory of Legal Duties and Rights* (1883); Kelsen, *Reine Rechtslehre* (1934); Somlo, *Juristische Grundlehre* (2nd ed. 1927). "Reason", supra n. 10 at 382.

Fuller does not align himself with either extreme. His purpose is to penetrate the distortions that obscure the reality of legal order which is the creature of both human reason and human artifice. Law is compounded of reason and fiat. The positivist who attempts to sever the element of human reason from law obfuscates its true nature for he fails to account for the natural order underlying human society. So also the natural lawyer, equally obdurate in his profession of the capacity of human reason, falsifies the reality of law. As Fuller observes,[57] law must accept an arbitrary element of human fiat in the provision of a principle of authoritative decision and in the area of rights and remedies, the point of legal impact where natural reason cannot provide all the details of a legal design.

So, for Fuller, "[i]f the virtue of the natural law theory has been to keep alive faith in the capacity of human reason, its vice has often been to overstate the role rationality can play in human affairs".[58] Even in its "revolutionary or ameliorative aspect"[59] natural law evidences an exaggerated reliance on the capacity of human reason; a legal system cannot be constructed according to a rationality calculus that will accommodate recurrent "borderline cases" and "peripheral uncertainties"[60] through the application of plastic legal forms to particular social demands. Fuller employs the analogy of language to illustrate how such an undertaking would introduce its own element of arbitrariness and inflexibility:[61]

> One might conceive of an ideal language as one capable of arranging the raw material of experience into an infinity of patterns, each capable of depicting some special aspect of reality that happened to be of interest at the moment. But such an impossibly flexible language would forfeit its fundamental function: communication. Communication demands firm base lines and shared expectations. This means that the distinctions which a given language can express must be limited in number. It may be said of the basic forms of a language that they always reveal one relationship at the cost of obscuring another . . . . Anyone familiar with the problems of translation knows that the forms of a language which show it to good advantage in one context may become an impediment to clear and graceful expression in another.

Natural law has, however, sustained what Fuller terms "the collaborative articulation of shared purposes"[62] by which men, through reflection and consultation, discover and articulate the basic principles that will enable them to achieve an acceptable life in common. This on-going process promotes a better understanding of human purposes and the means for achieving them. It is a familiar pattern of daily personal experience; it marks the search for discovery of natural principles guiding collaborative effort in pre-legal societies;[63] and it endures in developed legal orders – Fuller sees in the history of the common law an example of this collaborative discovery and refinement of rules by many judges over a long period of time.[64]

57 "Reason", supra n. 10 at 378, 382 et seq.; *Anatomy*, supra n. 30 at 116-117.
58 *Anatomy*, supra n. 30 at 116.
59 Ibid., 118.
60 Ibid., 116-117.
61 Ibid., 118.
62 "Human Purpose", supra n. 18 at 73 et seq.; "Rejoinder", supra n. 18 at 84 et seq.
63 "Reason", supra n. 10 at 377-380.
64 "Human Purpose", supra n. 18 at 74; *Anatomy*, supra n. 30 at 84 et seq.

It is to this process that Fuller refers when he states that he shares "one central aim common to all the schools of natural law, that of discovering those principles of social order which will enable men to attain a satisfactory life in common".[65]

3. Coalescence of fact and value

Concurrent with purposiveness in Fuller's concept of law is the evaluative theme. A considerable part of Fuller's earlier writings bears upon a rejection of the dichotomy of fact and value as it relates to purposive activity and his refutation of the "procedural canon of inquiry that the study of fact must be assiduously protected from contamination by the value preference of the observer".[66] Fuller denies the impossibility of deriving what ought to be from what is and the rigid separation of the law as it is and the law as it ought to be. Transferred to the law in practice "his main concern has been to show that the best way for the judge, the lawyer, the law teacher, or the law student to spend his working day is to refuse to distinguish sharply between the law *that is* and the law *that ought to be*".[67]

The separation of the law as it is and the law as it ought to be goes to the heart of Fuller's objections to legal positivism. Not only has the legal positivist, the "apostle of made law",[68] inhibited the spontaneous ordering of human relations by his analytical approach but he has largely ignored the purposiveness of law and has encouraged an ethical neutrality through his blind obedience to the law as it is. Similarly, Fuller's criticisms of American legal realism strike at the positivist spirit that has insisted on a rigid separation of the law as it is and the law as it ought to be, seeking to eliminate recourse to ethical desiderata in the making, administration and study of law.[69] He has suggested that this form of legal realism has given positivist philosophy "modernity and sophistication" and has created "a diversion behind which the positivistic attitude has been able to gain an extension of life".[70]

In refusing to admit the validity of a separation between the law as it is and the law as it ought to be, Fuller shares one tenet common to all theories of natural law:[71]

> [W]hat unites the various schools of natural law, and justifies bringing them under a common rubric, is the fact that in all of them a certain coalescence of the *is* and the *ought* will be found. Though the natural-law philosopher may admit the authority of the state even to the extent of conceding the validity of

65 "Rejoinder", supra n. 18 at 84.
66 Selznick, supra n. 29 at 18.
67 Witherspoon, "The Relation of Philosophy to Jurisprudence" (1958) 3 Natural L. F. 105, 107.
68 *Anatomy*, supra n. 30 at 112.
69 See generally *Quest*, supra n. 18 at 45 et seq.; "American Legal Realism" (1934) 82 U. Pa. L. Rev. 429, (1936) 76 Proc. Am. Phil. Soc. 191. The last mentioned work is a critical evaluation of American legal realism generally, with particular reference to Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika, Eine Spruchauswahl mit Besprechung* (1933). For a response to Fuller's criticism see McDougal, "Fuller v. The American Legal Realists: An Intervention" (1941) 50 Yale L. J. 827.
70 *Quest*, supra n. 18 at 65.
71 Ibid., 5-6.

> enacted law which is obviously "bad" according to his principles, it will be found in the end that he draws no hard and fast line between law and ethics, and that he considers that the "goodness" of his natural law confers on it a kind of reality which may be temporarily eclipsed, but can never be wholly nullified, by the more immediately effective reality of enacted law.

The denial is forcefully presented in a series of lectures delivered in 1940:[72]

> [T]o distinguish sharply between the rule as it is, and the rule as it ought to be, is to resort to an abstraction foreign to the raw data which experience offers us . . . . [I]n the field of purposive human activity, which includes . . . the law, value and being are not too different things, but two aspects of an integral reality.

The theme is sustained in other writings[73] and is clearly identifiable in the later concept of the "internal morality of law" i.e. in the evaluative or normative dimension that inheres in the notion of moral standards intrinsic to the law itself. It is inseparably related to purposiveness. In Fuller's view, a purpose is a fact with a direction-giving quality that furnishes a basis for both factual and normative judgments – "within the limits of its framework a purpose is at once a fact and a standard for judging facts".[74] Thus, in any analysis of purposive action, description and evaluation merge. To understand goal-directed action one must understand the actor's purpose and participate vicariously in the process by which the actor judges whether a particular action is "good" or "bad", "helpful" or "hurtful" in achieving that purpose.

Applied to the concept of law (and perhaps unduly compressed), Fuller's thesis is that the reality of law (what it is) is purpose (what it is for) and purpose cannot be separated from value (what it ought to be). Thus, a judge in deciding what a legal rule is must look to the rule's purpose; and, in order to give effect to that purpose, he interprets the rule in the light of his notions of what it ought to be.

It is not otherwise with a legal order itself since a judgment about its existence cannot be made in non-evaluative terms:[75] "We can also say of something that calls itself a legal order that it is missing that target so woefully that it cannot in any meaningful sense be termed a system of law. It has, if you will, so little 'value' that it has ceased to 'exist'."

Moreover, the dichotomy of is and ought is equally inapplicable to a purposive system. In Fuller's terms, the nature of man[76] is such a system –

72 Ibid., 10-11.

73 See especially the debate with Professor Ernest Nagel: "Human Purpose", supra n. 18, and "Rejoinder", supra n. 18. The first essay, and Professor Nagel's contribution to the exchange – "On the Fusion of Fact and Value: A Reply to Professor Fuller" (1958) 3 Natural L. F. 77 – are the subject of a useful commentary by Witherspoon, supra n. 67. Nagel's rebuttal of Fuller's rejoinder appears in "Fact, Value and Human Purpose" (1959) 4 Natural L. F. 26. Fuller's theory of purpose, fact and value is critically examined by Nakhnikian, supra n. 36.

74 "American Legal Philosophy", supra n. 18 at 470.

75 "Rejoinder", supra n. 18 at 92.

76 Fuller rejects the notion of ethical scepticism that since man can choose his own nature, his nature cannot provide an objective standard for judgments of right and wrong. In his review of Mortimer Adler's *A Dialectic of Morals: Towards the Foundations of Political Philosophy* (1941), (1942) 9 U. Chi. L. Rev. 759, 761, he states: "If there is anything that

an aggregation of interacting purposes, a "striving" or "reaching toward" that is not only a segment of reality but also a standard for making ethical judgments:[77]

> [I]t is to this nature that natural law looks in seeking a standard for passing ethical judgments. That is good which advances man's nature; that is bad which keeps him from realising it . . . . I cannot see what standard there can be for passing ethical judgments if it is not that which is in keeping with man's nature as it would be if it were able to resolve its disharmonies and to surmount its imperfections.

4. Eunomics and natural laws of social order

Because of the ambiguities and confusions invited by the term "natural law", Fuller has introduced his own term – "eunomics"[78] – which he defines as "the science, theory or study of good order and workable arrangements".[79] Although there is no express reference to this concept in Fuller's later writings,[80] it attempts to formalise the theme of procedural integrity – the importance of means in securing ends – that infuses the "internal morality of law". To this extent, it may be seen as a conceptual antecedent, albeit of generalized application, of Fuller's procedural natural law.

In essence, eunomics concerns social manageability. Described by one commentator as a "technological notion of natural law",[81] eunomics focuses on the "natural laws" of social order – "compulsions necessarily contained in certain ways of organising men's relations with one another".[82] Fuller rejects the idea that social arrangements generally are infinitely pliable. In his view, in each form of social organisation directed towards particular ends the available means for achieving those ends are not limitless. Thus, the task of management in business administration is to appraise and select structures and procedures that will enable a business to achieve optimum results; in economics the forms through which particular objectives can be attained are not limitless and a good deal of economic analysis centres upon the study of available forms of economic life; and much of the concern of political science involves an examination of the implications of different forms of political order.

distinguishes our ethical thinking from that of former times, it is the disappearance of the notion of man's nature. This is the missing constant in our thought. It is the lack of it that explains the relativism which inheres in all our ethical judgments . . . ." This belief that man does have a nature which furnishes a standard for ethical judgments is a natural law position; however, Fuller cautions that it has nothing further in common with natural law theories that have attempted to construct "codes of nature". Instead it identifies a constant standard, not yet fully understood, that should be studied alongside advances in the scientific knowledge of human nature. Ibid.; "American Legal Philosophy", supra n. 18 at 472-473.

78 The term appears to derive from the Greek "eunomos" – "well-ordered".

79 "American Legal Philosophy", supra n. 18 at 477.

80 However, Fuller's later writings, in addition to *Morality*, supra n. 8, and *Anatomy*, supra n. 30, develop his thesis on specific forms of social order such as contract and adjudication e.g. "Adjudication and the Rule of Law" (1960) Proc. Am. Soc. Int. L. 1; "Collective Bargaining and the Arbitrator" (1963) Wis. L. Rev. 3; "Some Observations on the Course in Contracts" (1968) 20 J. Legal Ed. 482; "Irrigation and Tyranny" (1965) 17 Stan. L. Rev. 1021.

81 d'Entrèves, "The Case for Natural Law Re-Examined" (1956) 1 Natural L. F. 5, 32.

82 "American Legal Philosophy", supra n. 18 at 476.

In a similar manner, one might expect that the energies of legal philosophers would be turned to an examination of the institutional forms that serve to order legal relations. For Fuller, however, legal philosophy, in an excessive reaction against natural law theory, has developed a myopia toward what he calls "litigational issues" e.g. theories about positive law, the judicial process and statutory interpretation, to the neglect of inquiry into "general principles that will guide choice among the available forms of order".[83]

Clearly, the concept of eunomics shares important points of intersection with traditional natural law theory. Although one may still accept eunomics and "emphatically reject [the standard of 'the nature of man']"[84] as a basis for ethical judgments, eunomics recognises constancies and regularities that persist through changes in social forms, reflecting a degree of constancy in the nature of man himself. Moreover, Fuller's interest converges with the concern of natural law for natural principles ordering human existence:[85]

> There is a common impression that the now unread treatises on natural law that were so much in vogue a hundred and fifty years ago were given over to drawing up immutable codes of moral absolutes. In fact much of their content had to do with what I have . . . defined as eunomics . . . . The great mistake of the natural law school was, however, not to keep the problem of ends in a sufficiently intimate contact with the problem of means. Instead of holding means and ends open for a reciprocal adjustment with respect to each problem, the writer on natural law was apt to reach abstract resolutions on ends and then to trace out the implications of those resolutions for the various branches of the law.

In Fuller's formulation, eunomics involves no commitment to "ultimate ends".[86] This is not to suggest, however, that eunomics is indifferent to ends since the clarification of ends is assisted by analysis of the available means for achieving ends, and, as Fuller has suggested elsewhere, "when we are confronted with the necessity of making an actual decision about a course of action, means and ends no longer arrange themselves in tandem fashion, but move in circles of interaction".[87]

The concept of eunomics appears to stand in close relationship to two further concepts that feature in Fuller's earlier discourses. The first, "the principles of social order",[88] represents the means for resolving conflicts and promoting cooperative action among individuals in society. These principles are those of the "common need", "legitimated power", "adjudication" and "contract".[89] Of them the most basic and indispensible is "the principle of the common need" – the others merely supplement this cardinal principle and provide procedures for implementing it. As Fuller

83 Ibid., 477.
84 Ibid., 480.
85 Ibid., 478-479.
86 Ibid., 480.
87 "Human Purpose", supra n. 18 at 72.
88 *Problems*, supra n. 18, Ch. VI. Fuller's thesis on the necessary principles of social order is presented in four forms: analytical, historical, metaphysical and programmatic.
89 Ibid., 694 et seq.

characterises it, this principle is "[the concept] many writers have . . . in mind when they speak of 'natural law' or a 'law of nature' ",[90] and a just or right ordering of society can be attained only through its recognition and implementation.

At this point, a relationship between eunomics and "the principle of the common need" can be suggested. Since the concept of eunomics centralises on social manageability and workable arrangements, it is concerned with basic principles or forms of social order e.g. the subsidiary principles of "legimated power", "adjudication" and "contract" which seek to implement the "common need". This application of eunomics underscores a second concept that has already been referred to – "the collaborative articulation of shared purposes"[91] by which men reach a better understanding of their own ends and the means for achieving them. In short, reflective collaboration in analysing and discussing available forms of social order will advance man's understanding of the common need and the means for achieving it.[92]

Procedural Natural Law

Fuller's emphasis upon means rather than ends in the presentation of his procedural version of natural law recalls the theme of concern for procedure and process that underlies both eunomics and the principles of social order. Indeed, it is tempting to find a connection between eunomics and the principles of social order on the one hand, and procedural natural law on the other, in the particularisation of the idea of natural laws of social order to the institutional aspects of the law.

Fuller introduces his concept of procedural natural law through the allegory of Rex, an unfortunate and disillusioned monarch who achieves outstanding success in his failure to make law. The object of this parable is to demonstrate how an attempt to create and maintain a system of legal rules may miscarry in eight separate and distinct ways:[93]

> A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.

The routes to legal disaster are:[94] (1) failure to achieve legal rules at all; (2) failure to promulgate rules; (3) abuse of retroactive legislation; (4) failure to make rules understandable; (5) enactment of contradictory rules; (6) enactment of rules that require the impossible; (7) overly frequent change of rules; and (8) failure of congruence between rules as announced and as actually administered.

90 Ibid., 694.
91 Supra n. 62.
92 See Palms, "The Natural Law Philosophy of Lon L. Fuller" (1965) 11 Cath. Law. 94, 115, where the nexus between eunomics, "the principle of the common need", and "the collaborative articulation of shared purposes" is seen as the relationship of means, end and process.
93 *Morality*, supra n. 8 at 39.
94 Ibid.

Corresponding to these "various kinds of shipwreck" are "eight kinds of legal excellence toward which a system of rules may strive".[95] These desiderata constitute the "internal morality of law":[96]

(1) Generality – a legal system should achieve general rules
(2) Promulgation – laws should be published
(3) Prospectivity – laws should generally be prospective
(4) Clarity – laws should be clearly stated and understandable
(5) Compatibility – laws should be compatible with one another
(6) Possibility – laws should not command the impossible
(7) Constancy – laws should not be changed constantly
(8) Congruence – a legal system should evince congruence between the law as declared and as actually administered

Throughout his enquiry into procedural natural law in *The Morality of Law* itself Fuller uses a number of terms to express these eight canons of good legal craftsmanship:[97] "the morality that makes law possible", "the principles of legality", "the special morality of law", "legal morality", "kinds of legal excellence", and "the natural laws of a particular kind of human undertaking".

To the question whether these principles constitute some variety of natural law "[t]he answer is an emphatic, though qualified, yes".[98] However, they have nothing in common with any "brooding omnipresence in the skies" and they are not "higher law":[99] "[I]f any metaphor of elevation is appropriate they should be called 'lower' laws."

Fuller's natural law operates internally and procedurally rather than externally and substantively. He derives the standards for evaluation from the law itself and not from independent sources. As one commentator has recently remarked, Fuller restates the longstanding dispute between natural lawyers and legal positivists as it affects the relationship of law and morality:[2]

> That dispute tends to be seen in terms of legal form, or validity, versus moral content, or legitimacy. Positivists assert that whatever has the valid form of law is law, regardless of the morality or immorality of its content; natural law writers deny that form alone is enough; there must also be morally good or at least not morally bad content. Now, Fuller does not oppose positivism along that line, since in his terms questions about the content of laws have to do with

95 Ibid., 41.
96 Fuller's exposition of these desiderata represents the development of ideas expressed in "American Legal Philosophy", supra n. 18; "Human Purpose", supra n. 18; and in the exchange with H. L. A. Hart in 1958 – "Positivism", supra n. 18. For a commentary on this exchange see Breckenridge, "Legal Positivism and Natural Law: The Controversy between Professor Hart and Professor Fuller" (1965) 18 Vand. L. Rev. 945.
97 Elsewhere, Fuller has employed a variety of expressions to connote the idea of an "internal morality" e.g. "internal requirements" and "intrinsic demands" ("Human Purpose", supra n. 18); "demands of legality" ("American Legal Philosophy", supra n. 18); "implicit laws of lawmaking", "implicit demands of legal decency", and "principles of legal morality" (*Anatomy*, supra n. 30).
98 *Morality*, supra n. 8 at 96.
99 Ibid.
1 Ibid.
2 Nicholson, "The Internal Morality of Law: Fuller and His Critics" (1974) 84 Ethics 307, 311.

> the *external* morality of law . . . . His case concerns a morality internal to the law itself, and is, translated . . . into the familiar terms just used, that form and content are not separable in the way that both sides to the dispute assume, but are necessarily connected: the form of law is itself morally good.

Fuller's legal desiderata are natural in the sense that they partake of the very nature of law. In typical analogical style, Fuller turns to the crafts and professions to illustrate his concept. Both the carpenter[3] and the physical scientist[4] must observe the "distinctive ethos" or "internal morality" of their undertakings if they are to achieve their particular purposes. Law, like any other purposive activity, also has its institutional forms and practices that must be respected if it is to be successful. They are the natural laws of law itself.

In part, the novelty of Fuller's position derives from its quality of self-evidence. As he himself observes,[5] the traditions of both natural law and legal positivism have assigned only incidental attention to the internal demands of the law. Admittedly, to a greater or lesser degree, these demands are contemplated by such familiar expressions as "justice in the administration of law", "procedural fairness", "due process of law" and "natural justice"; but generally, legal philosophers have not felt inclined to expand upon the obvious. For example, the natural lawyer has been primarily attentive to the law's external morality, to its substantive ends. By contrast, Fuller is not addressing the substantive aims or content of law:[6]

> Though these natural laws touch one of the most vital of human activities they obviously do not exhaust the whole of man's moral life. They have nothing to say on such topics as polygamy, the study of Marx, the worship of God, the progressive income tax, or the subjugation of women. If the question be raised whether any of these subjects, or others like them, should be taken as objects of legislation, that question relates to what I have called the external morality of law.

Thus, the distinction between procedural and substantive natural law corresponds to Fuller's differentiation between the internal and external moralities of law. Furthermore, another important distinction bears upon the idea of an internal morality of law. It arises from Fuller's dualist conception of morality and his identification of both a "morality of duty" and a "morality of aspiration".[7] In Fuller's presentation, morality extends over a scale of moral gradation from the basic precepts of social life (the "morality of duty") contained in such injunctions and forbearances as "do not kill" and "do not deceive", to the demands of excellence or the "good life" (the "morality of aspiration") which counsel the fullest realisation of human powers. Although the internal morality of law embodies both, it is characteristically a morality of aspiration since its desiderata establish standards of excellence to be aimed at, and perhaps aspired to, by a legal

3 *Morality*, supra n. 8 at 96.
4 Ibid., 120-121. Fuller refers approvingly to Polanyi, *The Logic of Liberty* (1951); *Personal Knowledge* (1958).
5 Ibid., 97-98.
6 Ibid., 96.
7 Ibid., Ch. I and 41-44.

system. That is to say, the principles of Fuller's procedural natural law establish both minimum conditions for the existence of a legal system (the "morality of duty"), and standards whereby its legal excellence may be measured (the "morality of aspiration").

A legal system which merely "clothes itself with a tinsel of legal form"[8] and wholly fails to observe any one of the eight principles of procedural natural law is not properly called a legal system at all. It would seem, however, that a particular legal rule which departs from one or more of these principles is not to be denied the title of law if the legal system, of which it forms part, itself satisfies the requirement of minimum adherence to the principles. This is consonant with Fuller's refutation of the asumption that "law is like a piece of inert matter – it is there or not there"[9] and his view that the existence of both legal rules and legal systems is a matter of degree.[10]

Fuller does not offer a formal hierarchy whereby the principles of procedural natural law may be ordered. Since they are means to an end their optimum marshalling may change and "the stringency with which the eight desiderata as a whole should be applied, as well as their priority of ranking among themselves, will be affected by the branch of law in question, as well as by the kinds of legal rules that are under consideration".[11] Morever, because tensions and conflicts – "antinomies" – may arise within procedural natural law, something like the economic principle of marginal utility must be deployed for the purpose of compromise and adjustment.[12] The desideratum of constancy through time may have to be balanced against that of possibility where obedience to a particular law is overtaken by rapid circumstantial change – Fuller cites the example of changes attending a time of economic inflation which render obedience to a particular law, once quite easy, increasingly difficult to a point that approaches impossibility.[13] So also, a law which pushes the virtue of clarity to a degree of simplicity that impairs its consistent judicial application, introduces a problem of balance: "In other words, under varying circumstances the elements of legality must be combined and recombined in accordance with something like an economic calculation that will suit them to the instant case."[14]

In what sense are Fuller's "internal" principles "moral"? His critics[15] have contended that Fuller has confused the notions of efficiency for

8 "Positivism", supra n. 18 at 660.

9 *Morality*, supra n. 8 at 123.

10 The problems of marking the boundary of minimum adherence to the principles of procedural natural law and of assessing the existence or not of a legal system create difficulties for the individual confronted with the dilemma of fidelity to the law. The conscientious citizen, faced with the legal excesses and outrages that characterised the Nazi regime, had "no simple principle by which to test [his] obligation of fidelity to law". Ibid., 41. What of the individual in a situation of more subtle, but nevertheless pervasive, forms of legal pathology, such as Fuller discusses in *Anatomy*, supra n. 30, Pt. I? The question of individual obligation to obey the law and its implications for the dispute between natural law and legal positivism are discussed, in the context of Fuller's procedural natural law, by Graham, "Does Law Have an Inner Morality?" (1972) 24 Pol. Sci. 24, 30 et seq.

11 *Morality*, supra n. 8 at 93.

12 Ibid., 44-45, 104.

13 Ibid., 45.

14 Ibid., 104.

15 The major criticisms have crystallised around the idea of a necessary connection between law and morality. A number of critics have preferred to view Fuller's eight principles as

purpose and morality – it is one thing to argue that there are fundamental principles to be observed in the making of law but quite another to assert that these principles express moral demands and that, therefore, law and morality are necessarily connected. Put in another form, the criticism is that Fuller has failed to distinguish between the moral and efficiency senses of "ought".

In his most recent reply to the critics,[16] Fuller responds to two assumptions that, in his view, underlie the rejection of his notion of a morality internal to the law. The first is that the existence or non-existence of law is a matter of moral indifference. For Fuller, law is the *sine qua non* for the realisation of moral objectives:[17]

> [W]hen we speak of "the moral neutrality of law" we cannot mean that the existence and conscientious administration of a legal system are unrelated to a realisation of moral objectives in the affairs of life. If respect for the principles of legality is essential to produce such a system, then certainly it does not seem absurd to suggest that those principles constitute a special morality of role attaching to the office of law-maker and law-administrator.

Fuller's response to the second assumption – that law is a "one-way projection of authority" from law-giver to law-receiver – is developed by an extended contrast of law and "managerial direction".[18] In the managerial relationship of superior and subordinate such principles of procedural natural law as are applicable are indeed "principles of efficacy" – "they are instruments for the achievement of the superior's ends".[19] But with law the situation is quite different. It is distinguishable from managerial direction because its framework is one of interlocking expectations – "intendments" – and not imposed directives. The law-giver and law-receiver live in a relationship of reciprocal obligation and mutual cooperation wherein the principles of procedural natural law represent more than maxims of efficiency. For his part, the law-giver has a commitment or moral obligation to respect the principles of procedural natural law: above all, he must faithfully apply rules that have previously been declared as those to be followed by the law-receiver. In return, the law-receiver has a moral obligation to cooperate with the law-giver by obeying the rules. It is to this commitment implied in lawmaking that Fuller refers when he uses the phrase, the "internal morality of law".

legal criteria, logical conditions, principles of efficiency or efficacy, or criterial standards of law rather than of morality. See especially Cohen, "Law, Morality and Purpose" (1965) 10 Vill. L. Rev. 640; Dworkin, "Philosophy, Morality, and Law – Observations Prompted by Professor Fuller's Novel Claim" (1965) 113 U. Pa. L. Rev. 668; "The Elusive Morality of Law" (1965) 10 Vill. L. Rev. 631; Hart, supra n. 36; Hughes, "Positivists and Natural Lawyers" (1965) 17 Stan. L. Rev. 547; Summers, supra n. 7. The principal criticisms and Fuller's replies to the critics are examined by Nicholson, supra n.2. There has also been a number of discussions of Fuller's internal morality of law outside the mainstream of the controversy e.g. Graham, supra n. 10; Lyons, "The Internal Morality of Law" (1971-72) Proc. Aristotelian Soc. 105.

16 *Morality*, supra n. 8, Ch. V. See also Fuller's earlier response, "A Reply to Professors Cohen and Dworkin" (1965) 10 Vill. L. Rev. 655.

17 *Morality*, supra n. 8 at 206.

18 Ibid., 207 et seq.

19 Ibid., 209.

The Substantive Aims of Law

1. The relationship of procedure and substance

Fuller has reached his formulation of procedural natural law not by reference to any external standards of morality or to the substantive aims of law but by postulating moral desiderata inherent in the law itself. How does he characterise the relationship of procedure and substance, of the internal and external moralities of law?

From the fundamental propositions that a minimum adherence to procedural natural law is essential for the practical efficiency of law and that "law is a precondition of good law",[20] Fuller explores the relationship between the internal and external moralities of law in the language of "interaction". Although procedural natural law may be ethically indifferent over a wide range of substantive aims, not all substantive aims are compatible with its principles e.g. laws which prescribe certain conduct may compromise the principle of congruence if they are unenforceable or unenforced. Nor can procedural natural law be neutral in its view of man himself:[21]

> To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.

Without this basic idea of personal responsibility, the very reason for procedural natural law disappears:[22] "[W]hen the view is accepted that man is incapable of responsible action, legal morality loses its reason for being. To judge his action by unpublished or retrospective laws is no longer an affront, for there is nothing left to affront . . . . "

Fuller has, however, failed to convince the critics of a necessary connection between the form and content of law. Indeed, his assertion that "coherence and goodness have more affinity than coherence and evil",[23] that a deterioration in respect for procedural natural law will almost inevitably produce a deterioration in the sustantive aims of law, appears to rest on an intuitive apprehension rather than a demonstrated connection. Even if one holds to the proposition that "[i]n so far as possible, substantive aims should be achieved procedurally, on the principle that if men are compelled to act in the right way, they will generally do the right things",[24] one cannot deny that an unjust and evil law can be constructed with faithful adherence to the demands of procedural natural law.[25]

20 Ibid., 155, 157.
21 Ibid., 162.
22 Ibid., 162-163.
23 "Positivism", supra n. 18 at 636. See also "A Reply to Professors Cohen and Dworkin", supra n. 16; *Morality*, supra n. 8, especially Ch. IV.
24 "Positivism", supra n. 18 at 643.
25 It would seem that Fuller is prepared to concede that there may be laws and legal systems which, though observant of procedural natural law, are "morally bad" in terms of their substantive aims. Taking the view that Fuller proceeds from the assumption that law is morally good, Nicholson, supra n. 2 at 320, argues that Fuller's admission that there are morally bad laws "does not damage his position, which concerns morality and *the* law, not particular laws . . . . The existence of an evil law counters a thesis that 'all laws are good' but not Fuller's thesis that 'law is good' ". Moreover, since Fuller sees law in terms of degree,

2. Substantive natural law

It has already been observed[26] that in presenting a more meaningful alternative to H. L. A. Hart's "modest aim of survival",[27] Fuller derives one central principle of substantive natural law, "communication", from the "morality of aspiration". Some have expressed disappointment with Fuller's exposition. For example, it has been written that although Fuller extols the value of communication, "little is said either of what is to be done with this communication or of what is to be communicated".[28] Others, noting that the basic principle of communication stands alone without elaboration and appended almost as an afterthought, have concluded that Fuller has discarded all endeavours to construct a theory of substantive natural law.[29] And, on the view that purposiveness and communication are mutually implicative, it has been suggested that Fuller's central principle can be invested with a broader dimension.[30]

Fuller's purpose is not to resurrect "the myth of a lost code of Nature"[31] by setting forth a prescription of abstract resolutions on ends. One is reminded of his observation, in a related context, that "[i]n the social sciences the transition from abstract models to the actualities of social living is not . . . simple . . . . Sometimes . . . the only safe course is to disregard theories derived from abstract models when one is confronted with problems of actual human existence".[32] His point that ends cannot be resolved apart from means is made by a simple analogy in an early essay:[33] "If we are to invent a game, we shall have to start with ends vaguely perceived and held in suspension while we explore the problem of devising a workable system of play." Fuller sees no merit in repeating the mistakes of the "older natural law school" by cataloguing sustantive aims – indeed, he has remarked that the abstract models of natural law theory have been duplicated in modern philosophies that present tables of fundamental "values" or "preferred

a legal system which adheres to procedural natural law but promotes bad aims may be both good and bad: "A legal system which was wholly devoted to evil ends would be bad, but good to the extent that it was a legal system . . . . [I]t would still be good to some degree, because it would necessarily be observing at least some of what [procedural natural law] demands." Ibid., 321.

26 Supra pp. 71-72.

27 Hart, supra n. 43.

28 Anastaplo, supra n. 5 at 326. Perhaps the answer lies, to some extent at least, in Fuller's invocation of Wittgenstein, "The limits of my language are the limits of my world". *Morality*, supra n. 8 at 186. See also Meyer, Book Review (1964) 10 McGill L. J. 380, 382-383: "[O]ne senses that Fuller may be on the brink of some new insight, but unfortunately [*The Morality of Law*] closes without relating the objective of communication to linguistic analysis, the new behavioural science of general semantics, or the use of symbolic logic in legal theory, all areas of great potential development."

29 See Savarese, supra n. 16; Ehrenzweig, *Psychoanalytic Jurisprudence* (1971) 71: "Fuller creditably distinguishes himself from many other 'naturalists' by conceding the sterility of any search for agreement on the 'substantive' contents of morality and justice."

30 Sturm, supra n. 50 at 618: "[T]he most fundamental aspect of substantive natural law in Fuller's legal and moral philosophy is . . . the following postulate: each man is, by virtue of the fact that he is a man, a living, purposing, communicating being and ought to be treated as such, so that so far as possible, without regard to differentiating characteristics, human life is preserved, purposiveness is kept alive, and communication is maintained." In what appears to the present writer as an overdrawn distinction, Sturm differentiates between the dimensions of Fuller's substantive natural law relating to man in his essence, to man in his individuality, and to man in association.

31 *Anatomy*, supra n. 30 at 53.

32 Fuller, "An Afterword: Science and the Judicial Process" (1966) 79 Harv. L. Rev. 1604.

33 "American Legal Philosophy", supra n. 18 at 479.

events".[34] For Fuller, the diversity and variety of the ends of human striving and the changeability of human preferences demand freedom from any immutable "code of nature".[35]

His abjuration of any "higher law" theory flows from his disassociation with any form of positivism.[36] And his philosophy does not embrace "absolutes" if that term is taken to refer to moral imperatives that yield clear principles of decision under all circumstances:[37]

> Human life in this sense as close to an absolute as anything we have, yet it furnishes little guidance to the hospital that has only enough of a scarce drug to cure one patient when three are dying for lack of it.

Throughout *The Morality of Law*, Fuller's focal interest is an examination of the pathology of a system of legal rules. Even the treatment of the substantive aims of law is impressed with his concern for procedural natural law; and the concluding pages of his inquiry purport to be nothing more than "an examination of the extent to which *something like* a substantive 'natural law' may be derived from the morality of aspiration".[38] His attention is directed to the "*minimum* content" and "*one central indisputable* principle"[39] of substantive natural law. In this context, one is better placed to evaluate Fuller's views on substantive natural law. He has suggested one central principle that infuses *all* human aspiration; perhaps, as communication pushes man towards a truer understanding of himself, the morality of aspiration may speak further "in terms fully as imperative as those characteristic of the morality of duty".[40]

Concluding Observations

Fuller does not pursue his enquiries at the level of an inexorably fixed natural order above man and man-made law. Except in the fundamental sense that the morality of aspiration, being a morality of *human* striving, cannot deny the quality of humanity to man, his natural law position does not develop from speculation about absolute moral precepts. Nor does he bring with him a detailed specification of substantive "goodness" or "rightness", an eternal and immutable value system derived from divine ordination or the nature of man.

Nevertheless, Fuller displays a sympathy for the essential aims of natural law theory. While he finds much that is unacceptable to modern intellectual tastes in the literature of natural law he also discovers "practical wisdom applied to problems that may broadly be called those of social architecture";[41] and his concept of eunomics shares common ground with the concern of the natural law tradition for those natural principles that underlie human undertakings. Although he rejects the apotheosis of reason

34 Ibid. Fuller refers specifically to McDougal, "The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order" (1952) 61 Yale L. J. 915.
35 "Rejoinder", supra n. 18 at 101, 104; "American Legal Philosophy", supra n. 18 at 473.
36 "Positivism", supra n. 18 at 660.
37 "American Legal Philosophy", supra n. 18 at 467.
38 *Morality*, supra n. 8 at 4 (emphasis added).
39 Ibid., 184-186 (emphasis added).
40 Ibid., 183.
41 Ibid., 241.

commonly found in classical and scholastic natural law he commends the natural law tradition for keeping alive faith in the capacity of man's reason and in the collaborative search for the basic principles of social order which allow men to attain a satisfactory life in common. And, not least important, his refusal to distinguish between fact and value, between the law as it is and the law as it ought to be, not only bridges the gap between law and morality but asserts a necessary connection between legal and moral obligation.

In a particular sense, his concept of law is aptly characterised as a natural law position in its analysis of the nature of man and basic qualities of the human condition: he adopts a purposive and aspirational conception of man; he professes a belief in the constancy of man's nature, the ultimate ethical standard; and his view of man implicit in the idea of an internal morality of law contemplates the standard of a free, voluntaristic and responsible agent.

His ideology of law illustrates the enduring and adaptive qualities of natural law. Notwithstanding the non-systematic development of some of his earlier writings, Fuller has formulated, in *The Morality of Law,* a version of procedural or institutional natural law that gives a new reading to an old doctrine. Though it builds procedural rather than substantive ideas of "goodness" into the notion of law as good order his formulation is nonetheless a natural law position, albeit "mild" or "modest" alongside its classical analogues.

Fuller has presented an objective normative order composed of observable standards for the institutional assesssment of both the existence and excellence of law. So far from being "supralegal", these natural laws of law are "intralegal" in the sense that one need look no further than the law itself to discover them. It is in this idea of natural and necessary principles of legal order expressed in terms of standards for the rational evaluation of man-made law that one finds Fuller's most valuable contribution to natural law theory. Above all, it is a view that makes good sense of a philosophy which has sustained an insistence on basic ideals in the enterprise of making and administering law.