JUS NATURALISM, LEGAL POSITIVISM AND PERSPECTIVAL CONFUSION: THE FULLER-HART DEBATE REVISITED

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The persistent opposition between jus naturalism and legal positivism, which goes back at least to Sophocles's *Antigone* (ca. 440 B.C.),[1] poses numerous issues which are complex, changing, and confounding. Nothing more aptly exemplifies this fact than the celebrated debate from 1957 to 1969 between Professors Lon Fuller and Herbert Hart.[2] Despite the lucidity of their arguments, their debate ended when they agreed that they were fated never to understand why the other defined the concept of law the way he did. Their interests and starting points in doing jurisprudence were so different that they eventually recognized that further discussion by them about the nature of law was no longer profitable.[3]

Thus the Fuller-Hart debate raises a disturbing possibility. Is the reason for the persistent opposition over defining the nature of law the impossibility of avoiding perspectival confusion? Are jus naturalism and legal positivism so different in the view each takes of the common reality of law that intelligible thinking cannot exceed the partial vision of each? Are those who seek an understanding of law from different standpoints doomed to misunderstand each other? Does the reality of law so vary according to the angle of vision by

1 Antigone refused to obey King Creon's edict not to bury her treatsonous brother because she had the divine and moral duty to bury him. Socrates, of course, represents the earliest example of a philosophical analysis of the problem of obeying immoral rules which a legal system certifies as law. His moral duty was to continue to teach the truth to the young contrary to the positive law, but like Antigone that moral duty did not justify evading punishment. Unlike Antigone, however, Socrates could not be certain of divine reward. Jus naturalism since has justified not only disobedience of unjust or immoral laws, but, in its version of natural rights, revolution, as exemplified by the American Declaration of Independence (1776).

2 Fuller reviews the history of his debate with Hart and others in his *The Morality of Law* 188 (rev. ed. 1969).

3 Hart, Book Review, 78 *Harv. L. Rev.* 1281 (1965); Fuller, *supra* note 2 at 189.

which it is seen that intelligent deliberation is possible only among those who share a common perspective?

While a brief paper cannot comprehensively treat the perspectival problem, it can outline the factors which confirm its importance for clarifying the opposition between jus naturalism and legal positivism. Reducing that opposition to a mere matter of starting points puts in doubt the very legitimacy of the enterprise of jurisprudence. To some extent it is always useful to clarify the tacit assumptions of any analysis. But to make the definition of law turn on clarifying arbitrary preferences among starting points tends to covert what should be a collaborative effort of reasoned discourse into sheer polemics. Thus it is important to ask whether choosing different starting points for understanding the same social phenomenon such as law makes perspectival confusion unavoidable as the Fuller-Hart debate suggests. If perspectival barriers to reasoned discussion cannot be avoided, then it follows that those starting from the different standpoints of jus naturalism and legal positivism must recognize and anticipate that at some point they will have nothing comprehensible or insightful to say to each other. It is obviously more in the interest of the jurisprudential enterprise that not be the case.

Before turning to an analysis of the debate, it will be useful to put it in context. Both Fuller and Hart, it should be stressed, avoid the extremes of the classic opposition. Their difference in perspective is clearly not theological, political, or cultural. Even philosophically each agrees with much in the opposing view. Before the debate, Fuller made it clear that he rejected what he called the "doctrine of natural law". For reasons shared by legal positivism, natural law cannot be the subject of authoritative pronouncement, concrete application like a written code, or the manifestation of a "higher law" transending human concerns for measuring the validity of positive laws.[4] Fuller was even prepared to go so far as to abandon that which is fundamental traditionally in the jus naturalist position, the idea that an unjust or immoral law cannot be true law for the purpose of the obligation to obey law. As he put it in 1940, "the natural-law philosopher may admit the authority of the state even to the extent of conceding the validity of enacted law which is obviously 'bad' according to his principles. . ."[5]

Hart, in turn, is more than accommodating to the jus naturalist

4 Fuller, "A Rejoinder to Professor Nagel," 3 *Natural Law Forum* 83, (1958); Fuller, *supra* note 2 at 96.

5 Fuller, *The Law in Quest of Itself*, 6 (1940, 1966).

position. He rejects, of course, the confusion between its descriptive and prescriptive senses, exemplified respectively by the law of gravity and the Ten Commandments, and thus concludes that human reason is unable to discover any principles of human conduct that measure the validity of manmade law.[6] But he concedes the empirical good sense of the accommodating version or minimum content of natural law. Quoting Hume, Hart agrees that legal positivism has to accept the fact that "Human nature cannot by any means subsist without the association of individuals: and that association never could have place were no regard paid to the laws of equity and justice". But such a fact is not a metaphysical necessity fixed in the nature of man as his proper goal or end. It is merely a contingency which could be otherwise but in our present experience is not.[7]

Compared to the five traditional senses of jus naturalism, therefore, Hart and Fuller agree to reject two, to accept two and to disagree only on one. They reject jus naturalism as the method of discovering perfect law or as the manifestation of the content of perfect law deducible by reason. They accept jus naturalism as the source of ideals for guiding or influencing the administration and development of law and as specifying the empirically necessary conditions for the survival of a legal system. They disagree, however, on whether law is necessarily connected to morality. But even in this respect, as noted, Fuller concedes that an immoral or unjust law is not necessarily invalid in the sense that it must always be disobeyed.[8] The mere fact of formal certification as law may justify respect in some cases for following immoral rules of conduct.

Moreover, the Hartian version of legal positivism is not only accommodating in conceding what is valuable and necessary from its perspective in jus naturalism. It is also accommodating in rejecting the extremes of its own vision against which Fuller had for decades been the chief critic. Hart clearly rejects the Austinian version that the key to understanding law is to define it as the commands of an habitually-obeyed personal sovereign. It was Hart's intent to correct and improve that idea. He is also explicit in disagreeing with the behavioral version of legal realism which reduces rules to the causes and predictions of what officials and judges do. And he makes no defense of the comfortable view that judicial decisions can be logically deduced from fixed rules without reference to policy or morality. Moreover, Hart never goes so far as to claim that reasoned argument on moral judg-

6 Hart, *The Concept of Law*, 182ff (1961).
7 Hart, *supra* note 6 at 187-88.
8 Fuller, *supra*, note 5.

ments, because values cannot be logically or factually proven, is futile or nonsensical. He is too much a utilitarian to believe that. Finally, even though he asserts the necessity of conceptual analysis of law for the purpose of clear thinking, he does not arrogantly claim that it could usefully proceed in Kelsenian fashion free of all reference to values and facts.

In light of such philosophical consensus on the severe limitations of jus naturalism and legal positivism, limitations which a classic jus naturalist and legal positivist could justifiably reject as impairing the integrity of their positions, why then did Fuller and Hart vigorously oppose each other's concept of law to the point where mutual confusion of the other's vision made further discussion unprofitable? More specifically, why did Fuller insist to the end that even an attenuated jus naturalism was better than an accommodating legal positivism for understanding the nature or "essence" of law?

The first step in approaching an answer to that question is to have before us Hart's view of the "essence" of law. It is best to let Hart speak for himself on this point:

> We have found it necessary, in order to elucidate features destinctive of law as a means of social control, to introduce elements which cannot be constructed out of the ideas of an order, a threat, obedience, habits, and generality. Too much that is characteristic of law is distorted by the effort to explain it in these simple terms. Thus we found it necessary to distinguish from the idea of a general habit that of a social rule, and to emphasize the internal aspect of a rules manifested in their use as guiding and critical standards of conduct. We then distinguished among rules between primary rules of obligation and secondary rules of recognition, change, and adjudication. The main theme of this book is that so many of the distinctive operations of the law, and so many of the ideas which constitute the framework of legal thought, require for their elucidation reference to one or both of these two types of rule, that their union may be justly regarded as the "essence" of law, though they may not always be found together wherever the word "law" is correctly used. Our justification for assigning to the union of primary and secondary rules this central place is not that they will there do the work of a "dictionary", but that they have great explanatory power.[9]

To this summary may be added the emphasis Hart places on his "rule of recognition" as the key feature in his concept of law. Without joining a rule of recognition to primary rules, there could be no system of rules or change or interpretation of them.

Having elucidated his concept, Hart then tries to anticipate the jus

9 Hart, *supra* note 6 at 151.

naturalist objections to it which see as the "essence" of law the necessary connection between law and morality. He concedes that his advance in changing the positivist starting point for understanding law from Austinian "orders backed by threats" to the "union of primary and secondary rules" may prove insufficient to overcome the naturalist vision of moral "essence", primarily because his concept of law would permit legal systems which, with out justice, are but "robber-bands enlarged".[10] For him, the conceptual problem is the reasoned choice between his wider concept of law and the narrower concept of jus naturalism which would exclude the validity of immoral laws.[11] Such narrowing would be improper for two reasons.

The first has to do with theoretical inquiry for understanding law as a social phenomenon. It is likely that any legal system will contain rules which some or many regard as immoral. To exclude them from the study of law would falsify reality if such rules are in fact certified as law. A truly scientific study of how law is used in society must include a study of its possible abuse.

The other reason relates to moral deliberation. Here also the wider concept of law is better than the narrower concept of excluding immoral laws. The narrow concept makes moral criticism of laws improper since its validity criteria for certifying a rule as law must imply that the rule is moral. In addition, if the validity criteria instead permit immoral rules to be law, then denying the rules the status of law in the name of morality permits each individual to become the final authority on what is law, and, moreover, confuses the moral judgment whether in some cases obeying an immoral law may be morally right to avoid worse consequences such as anarchy.

For Hart, therefore, it is desirable that the concept of law permit the invalidity of laws to be distinguished from their immorality.[12] Otherwise, persons who, like legislators and voters, have the authority to make laws would not be amenable to moral arguments for changing or resisting immoral laws.

It does not, however, appear that Fuller disagrees with the need for the clear distinction between positive law and morality. It is needed for the purpose of studying the abuse of law and for clarifying moral judgments on disobeying immoral laws. His position is rather that there is more to the social phenomenon of law that the one-way projection of authority from the lawmaker to the subject

10 Hart, *supra* note 6 at 152.
11 Hart, *supra* note 6 at 204-05.
12 Hart, *supra* note 6 at 207.

and the possible moral resistance of the subject to that authority. Not only is there something more, but that something more is really the "essence" of law, and failing to include it in the concept of law falsifies the reality the concept purports to describe. This something more is the inner morality of law and the natural affinity of the coherence it fosters in law with external morality or goodness.[13]

It is at this point that Hart has difficulty following Fuller's arguments. He agrees that the eight demands of the inner morality of law are sensible. A legal system will be more effective if its rules are general, promulgated, prospective, clear, noncontradictory, not impossible to obey, not too frequently changed and congruent with official action.[14] But a lawmaker who carefully follows the eight canons is not for that reason alone moral. In fact, he may comply with the eight demands and still do great iniquity in the name of law. The inner morality of law is really, like Fuller's own analogy, no different from the morally neutral "natural laws" of carpentry which if not met risk collapse of the building. The eight canons in fact are neutral as to good and evil and do not pose any special incompatibility between them and immorality. They apply equally to the poisoner and the lawmaker to the degree each intends to do his job efficiently.[15] Thus, Fuller has not made his case that there is a necessary connection between law and morality which the concept of law must reflect if it is not to distort reality.

Nor does Hart consider that Fuller's jus naturalism has even joined issue with the positivist claim that clear thinking necessitates distinguishing between positive law and morality. For Hart, two questions are equally important, but they must be asked and answered separately: "Is this a valid law?" and "Is this (valid law) so morally iniquitous that I must withdraw my recognition of the authority of those who made it?"[16] If a rule of conduct is not valid law, it would only confuse to ask the latter question, or to assume that the invalid rule is law.

Had Fuller joined issue on the positivist claim of clarity, he would have attacked the positive law-morality distinction by claiming that it is both unintelligible and unimportant to distinguish "the general

13 See on Fuller's belief in the affinity of coherence and goodness, R.C.L. Moffat, "Method or Madness: Lon Fuller.s Quest for Natural Law", a paper presented to the Jurisprudence Section of the American Association of Law Schools at its Annual Program Meeting, January 3, 1981, San Antonio, Texas, to be published in the *American Journal of Jurisprudence*.

14 Hart, *supra* note 3 at 1283-84.

15 Hart, *supra* note 3 at 1286.

16 Hart, *supra* note 3 at 1294.

acceptance of the legally ultimate rule of a system of law which specifies the criteria of legal validity" from "whatever moral principles or rules individuals act upon in deciding whether and to what extent they are morally bound to obey the law". In Hart's view, Fuller attacked neither claim in his book, *The Morality of Law* (1964), at least not by the frontal and detailed attack that would be needed.[17]

Nonetheless, in the spirit of collaborative effort, Hart admits that his positive law-morality distinction may be wrong, and, moreover, that Fuller's claim may be right that "any recognition of legal authority contains implicitly moral limitations."[18] At this point in the debate, an opening for the two classic perspectives to find common ground for posing determinative issues was apparent. Avoidance of perspectival confusion by further analysis was still a possibility.

But Fuller, in his "A Reply to Critics (1969)",[19] which ended the debate, chose not to make direct and full use of the opportunity. Instead, he attacked the assumptions tacitly made by those who adopted the positivist perspective, which included others besides Hart. For Fuller, the key issue is not the relation of law to authority and morality, which Hart had suggested might be the vulnerable point of legal positivism, but rather the explanation why legal positivists choose to view the social phenomenon of law from an angle which reinforces their delusion that purposive arrangements such as a legal system can be treated as if they served no purpose.[20]

Fuller's explanation is perceptive, relevant and convincing in showing that from his jus naturalist perspective of tolerating a confusion of fact and value, of "law that is" and "law that ought to be", the positivist concept of law is too narrow faithfully to reflect the reality it purports to describe. He sees five basic aspects to the "starting point" that shapes the positivist creed. The first four closely relate to law as a one-way projection of authority from the lawmaker on top to the subjects below. In such a vision, there is no interest in the "moral" limitations of the role of lawmaker, for the reason that such an idea would severely restrict his authority which for the sake of the intellectual commitments of positivism must be unlimited.[21]

It is the fifth aspect of the positivist creed that is fundamental to Fuller's opposition to that way of thinking and to his affinity for the

17 Hart, *supra* note 3 at 1294.

18 Hart, *supra* note 3 at 1294.

19 Fuller, *supra* note 2 at 187. Note that the "Reply" was first added in the revised edition in 1969 while the original date of publication was 1964.

20 Fuller, *supra* note 2 at 190.

21 Fuller, *supra* note 2 at 191-93.

naturalist perspective.[22] For him it is not a necessity of nature, mind or anything else that clear thinking is impossible unless the "purposive effort that goes into the making of law" is neatly separated from "the law that in fact emerges from that effort". In fact, that separation, while useful in some contexts, ends in confusing reality when held dogmatically. For the reality of law must include both its process and product, and inescapably the making and being of law constantly interact. Parceling out a fragile reality to permit its isolated viewing as a one-way projection of authority or managerial direction, which can be related to morality only by the projection on it of utilitarian aims by an "outside moralistic observer",[23] distorts the reality of law as a whole. It is simply not true that the whole of that reality can be reduced to "the fact of an established lawmaking authority"[24] who may only be disobeyed on moral grounds which can have nothing to do with what is expected of the lawmaker *qua* lawmaker. Such a distortion falsely fosters the notion that the eight principles of legality or inner morality are merely matters of utilitarian expediency and efficacy rather than moral compulsion. For Fuller the crucial point in distinguishing law from managerial direction, and hence jus naturalism from legal positivism, "lies in a commitment by the legal authority to abide by its own announced rules in judging the actions of the legal subject. I can find no recognition of this basic notion in *The Concept of Law*".[25]

In general, perspectival confusion arises not so much from what is explicitly said or not said as from what is left partly unsaid. In his final reply, Fuller could easily have joined issue with Hart on the question of authority had he focused on its relation to law and morality in making the following four points clear: that managerial direction in no circumstance is entitled to the name of "law"; that the commitment of "the legal authority" which distinguishes law from managerial direction is a "moral" commitment and not simply a social expectation; that that "moral" commitment is adequately accounted for by the eight principles of inner morality or their equivalent;[26] and, more importantly, that "the legal authority" has in fact the authority to govern only by virtue of his interaction with the governed and their

22 Fuller, *supra* note 2 at 194.
23 Fuller, *supra* note 2 at 218.
24 Fuller, *supra* note 2 at 147-48.
25 Fuller, *supra* note 2 at 216.
26 It should be noted that Fuller does not claim that his eight principles are categorically separate; rather they are instances or means of seeking a single principle. Fuller, *supra* note 2 at 104.

moral claims on him independently of any formal criteria of validity or rule of recognition which at most marks the authority to govern as having legal rather than charismatic or traditional form.[27]

But Fuller, although making the phenomenon of authority an integral part of what he found distorting in the positivist perspective, at best leaves the relation of it to law and morality on the periphery of his perspective. At worst, he reduces the authority to govern to irrelevancy by separating the "deference to constituted authority", which he links to bad regimes like South Africa, from "fidelity to law" which he uncritically assumes finds its vitality and force solely in a morality of law unconnected to the authority to govern.[28]

In conclusion, a few general remarks on "starting points" may be in order. The remarks must, of course, be *obiter dicta* strictly since it must be affirmed, if only as an article of faith, that jurisprudence should deal mainly with the merits of opposing views and not end up psychoanalyzing the opposition. Clarifying tacit assumptions, or "can't helps" as Justice Oliver W. Holmes, Jr., put it, should only be done by one to help him to get on with the business of further analysis of important phenomena.

It should be recalled in connection with starting pints that Hart is in the Austinian tradition, and John Austin did not write jurisprudence for other scholars. He write for students. His publications were solely the outline of his course and his lectures.[29] He did jurisprudence to clarify law dogmatically for pedagogical purposes, not, like his mentor, Jeremy Bentham, to reform the law by clarifying it critically. Thus, Austin's starting point was likely influenced by the fact that he had to teach law to young students who were probably less than 18 years of age. At that age, not even much "blackletter law" can be usefully taught, much less the conceptual perplexities of jurisprudence, as Austin's short tenure in teaching suggests.[30]

While Hart does write jurisprudence for other scholars, the traditional influence of English law teaching on him is evident. The primary need in jurisprudence is an "easy explanation of what law is". This is not to say that his jurisprudential writing is so easy it lacks profundity. But his orientation toward analytic clarity is plainly basic to his thinking. For him it appears that easy explanation in clear conceptual from is the hallmark of good jurisprudence as it is of good thinking

27 Fuller is fully aware of Max Weber's typology of authority or legitimacy. Fuller, *supra* note 2 at 143.

28 Fuller, *supra* note 2 at 160.

29 E.W. Patterson, *Jurisprudence* 85 (1953).

30 Patterson, *supra* note 29 at 85.

generally, and particularly in teaching young minds. Thus we may have a behavioral explanation why Hart rejects an account of authority as central to his concept of law. He views the difficulty of clearly explaining authority too great an obstacle to "any easy explanation of what law is. . .", and for that reason authority cannot profitably be used in the elucidation of law.[31]

Yet, the case may be made that the key reality behind Austin's notion of a personal sovereign commanding those who in bulk habitually obey him, which is Hart's starting point, is in fact the social phenomenon of the authority to govern. That authority put in legal form is capable, typically under a recognized constitution whether written or not, of unifying for peace, protection and progress a large country and population with diverse values. This is remarkably a modern phenomenon of the last two centuries. We thus have no difficulty today, as Austin's contemporaries likely had, of calling such an authority "law" and defending and deferring to it largely without question.

But more importantly, we have Hart's perceptive insight against self-interest, which as previously noted he made at the end of the debate, that Fuller may be right in thinking that "any recognition of legal authority contains implicitly moral limitations".[32] This admission clearly reveals Hart's awareness that legal positivism as a starting point for jurisprudential thinking may be mistaken in excluding a full account of authority in the explanation of what law is.

Fuller, in sharp contrast, was well known for his congenial disposition toward marginal obscurity in concepts. When reality was complex and confusing, conceptual representation of it should reflect that fact. Analysis should remain faithful to reality whatever may be the cost in easy explanation or comfortable teaching. Clear analysis abstracted from the way things really are should not be reified so that the analysis can pass itself off as the reality which it can in fact only represent or interpret. Conceptual models should never be mistaken for the social processes which actually exist. Thus, if the social phenomenon of law proves to be, on empirical investigation, the complex interaction of expectancies in which value and fact cannot be neatly separated except in abstracted analysis, then that reality should not be dismissed or obscured simply because it cannot be neatly captured by easy explanation and tidy concepts.

Consequently, the behavioral explanation why Fuller did not attend

31 Hart, *supra* note 6 at 20.
32 Hart, *supra* note 6 at 1294.

fully and explicitly to the relation of law and authority as social phenomena cannot be the same as for Hart. Indeed, it is difficult to see why Fuller did not take the easy step for him and treat the relation systematically. In his part of the debate, he often eluded to authority quite naturally, but only in passing.[33] There can be much speculation why his starting point also neglected what may well be the key reality of law which both an attenuated jus naturalism and an accommodating legal positivism tend to neglect. Fuller may have sensed and feared that once authority is the focus for conceptualizing law its mystical or nonrational component would predominate over law as a purposive enterprise, or over the need for law to push reason as far as it can go.[34] Indeed, Fuller may have further sensed and feared that a focal awareness on authority as the key reality of law might favor the unacceptable versions of jus naturalism which try to make contact with absolute or metaphysical values.[35]

But all that is psychoanalytic *dicta* relevant only for reinforcing the point that Fuller did not reorient his starting point from an acceptable version of jus naturalism to a careful account of authority of relation to law and morality. He did not do this even in his last reply after Hart had suggested that such an account may make Fuller's case decisive by showing that authority necessarily connects law to morality. But whether or not Fuller would have succeeded in such a challenge, the chance to meet it was an open door not entered that could have made further communication possible for overcoming or postponing the perspectival confusion that ended his debate with Hart unprofitably.

As a larger thesis, it may be that avoiding or breaking down the barriers to rational discussion which the two classic perspectives erect may require taking altogether a different starting point the perspective on law. That raises the different behavioral question, which could well be at the botton of the persistent opposition between jus naturalism and legal positivism historically, whether those who have made large intellectual investments in one or the other starting point are prepared, in true scholarly spirit, to suffer the losses a new intellectual investment entails. To his credit Hart embraced the scholarly

33 Interestingly, while Hart has several references to authority in his index, *supra* note 6, Fuller has none, *supra* note 2.

34 For Fuller's early commitment to the use of reason, and his choice of jus naturalism over legal positivism as the better "illusion" for this purpose, see *supra* note 5 at 109, and generally, "Reason and Fiat in Case Law," 59 *Harv. L. Rev.* 376 (1946).

35 Fuller, *supra* note 2 at 241.

spirit.[36] He was prepared to consider whether simply the fact of recognizing the authority of law necessarily limited law by morality, even though such a question appears difficult to ask within the wide but not unlimited vision of legal positivism. Whether that question can be accounted for by the just-naturalist perspective, or compels a third perspective altogether is precisely the question the celebrated debate could have elucidated, but, as a result of avoidable perspectival confusion, did not.

[36] Fuller also was not oblivious of this point, but he tended to believe that jus naturalism was more congenial to scholarly humility than legal positivism and its skeptical attitude: see *supra* note 34 at 394-95: ". . .(There is a positivist) philosophy which by depriving law and ethics of the reason branch of the antimony of reason and fiat leaves them with only the branch of fiat to stand on. I know that there are those who sincerely believe that this skeptical philosophy makes for tolerance and facilitates compromise. I can only express my conviction that it does not work out that way. The man who believes that there is a natural order that has something to say about our social structure can admit, without great loss of face, that he has mistaken the demands of this order. No such graceful way out is open to the man who asserts that his social philosophy is merely the expression of personal predilections, or is the product of his own peculiar 'world-view.' Before such a man can change his opinion, he has to admit that he is changing himself, which is the last thing most of us are willing to do. It is not difficult to confess a mistake concerning external fact. It requires more courage than is possessed by the bulk of mankind to confess an inner perversity. For this reason I think that a return to what I have called the whole view of law will not only help in leading us toward a right solution of our problems, but will make for the spirit of compromise and tolerance without which democratic society is impossible." It is unclear to what extent Fuller would have applied this notion to Hart.