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On the Moral Authority and Value of Law: The Province of Jurisprudence Undetermined

Harry M. Clor*

"[I]n the very definition of the term 'law' there inheres the idea and principle of choosing what is just and true."

—Cicero, De Legibus

"Law and justice are two different concepts. Law as distinguished from justice is positive law."

—Hans Kelsen

"[T]hat most difficult of all tasks: the achievement of justice between man and man, between man and state, through reason called law."

—Felix Frankfurter

I. INTRODUCTION

The three above quotations are typical of the debate over the nature of law. The first and last represent the traditional understanding of law; the second is characteristic of the positivist viewpoint. In the author's judgment, this weighting in favor of the traditional understanding represents the proper balance of the alternative perspectives.

The old issues concerning the nature of law are still very much alive; they continue to be confronted and debated.¹ It is important to consider why this is so. Legal positivism, in its Austinian formulation and its Kelsenian reformulation was a massive, systemic effort to settle such issues conclusively by developing a science of law. However, the human activity called "law" is a many-sided activity. It has a variety of dimensions and, therefore, can be approached from different directions. When approached from one direction, the law presents itself as a

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¹ See Is Law Dead? (E. Rostow ed. 1971); New York University Institute of Philosophy, Law and Philosophy (S. Hook ed. 1984); Political and Legal Obligation (NOMOS Series No. 12, J. Pennock & J. Chapman eds. 1970); The Rule of Law (R. Wolff ed. 1971); and, of course, the writings of Ronald Dworkin, Lon L. Fuller, H.L.A. Hart and others.
political phenomenon belonging to a state or political society and serving the policies thereof. From other perspectives, it can appear as a body of principles and concepts transcending political considerations, as a system of utilitarian devices for resolving disputes, or as a phenomenon of custom and tradition whose distinguishing feature is its stabilizing influence. Finally, it can appear either as something essentially coercive or as something essentially rational. Since there is much room for disagreement about the relative importance of these dimensions, it is probable that conceptions of law will always be influenced by social and political philosophies. This is made more probable by the fact that the question "What is law?" is frequently asked in order to determine its human and social value, and thereby to determine one's moral relation to it. Thus questions about "the nature of law" will always arise and invite debate for much the same reasons as do questions about the nature of man and human society.

There are, however, other and more practical reasons for the continuation of this rather theoretical enterprise. In recent years, the law has been under an attack of sufficient proportions to induce some commentators to speak of a "crisis of law." The massive law defiance of the sixties and the current disclosures of large scale law violation by government officials, including many lawyers, are serious indicators that the law is in trouble. But equally important is the growth of more-or-less explicitly antinomian doctrines advanced by influential thinkers. With increasing frequency, the authority of law and the value of the rule of law are challenged on philosophical, ethical and sociological grounds.

Some theorists argue that the authority of law is destructive of individual moral autonomy and that it is the latter rather than the former which makes human life human. One variant of this viewpoint indicts all legal institutions and procedures as dehumanizing in that they impose systems of artificial rules and forms which undermine human spontaneity. Other radical critics denigrate the rule of law as an elaborate device and facade for the protection of existing social institutions and relations with all their inequities. The law, which pretends to preserve "order," is in fact a system of constraints for maintaining the order preferred by the governing establishment

3. Much is heard of this from the "counter-culture" and its intellectual defenders, but they are not alone in this attitude.
at the expense of those who desire a different kind of order. As Edgar Friedenberg reminds one, "[p]rivate property, the family, the armed services, the schools, would all take a very different form and in some cases sag into nothingness if not supported by the corset of existing legislation." Finally, it is sometimes suggested that social and technological changes may be rendering law obsolete as a way of solving problems in vital areas of social life. From this standpoint, the law is regarded as a historically relative tool, useful in one historical period but susceptible to obsolescence and replacement in another. Thus, pervasive challenges to the rule of law are advanced—sometimes on behalf of individual autonomy or spontaneity and sometimes on behalf of equality or progress. Underlying many of them, one can discern a common theme and attitude: an animus against the conduct of human affairs by means of rules. These challenges should be taken seriously by those interested in the welfare of the law since they are arguments from principle, employing some principles widely shared in the intellectual community. Because they attack the philosophic foundations of a regime of law, they can be adequately answered only by argument on the level of legal and political philosophy. Yet one need not be a radical antinomian to see a problem in the idea that law, as such, is deserving of respect. The law presents itself to the citizen in imperative terms; it claims to "bind" or obligate him. The citizen is periodically invited to view the law as an edifice of imposing dignity, an order of principles and ideals legitimately transcending his momentary desires and interests. In these skeptical times, however, myths of all sorts are relentlessly debunked and eroded. It is now almost universally recognized that human beings make the law


5. This denigration of rules is prominent in the currently popular "situation ethics." See J. Fletcher, SITUATION ETHICS (1966) (particularly at 55, 67, 130, 142-44).

6. Of course, these challenges do not go entirely unanswered, but few of the answers involve sustained, systematic analysis of the qualities of law itself which entitle it to respect. Most of the answers focus on considerations external to the law. Eugene V. Rostow argues that obedience to the laws of "a society of consent" is obligatory because necessary for maintenance of this good form of society. See Rostow, The Rightful Limits of Freedom in a Liberal Democratic Society, in Is LAW DEAD?, supra note 1, at 45-46. Other thinkers justify an obligation to obey the laws as derivative from the moral obligation to keep promises.
and can unmake it whenever they please. Furthermore, for two
generations, realistic legal scholars have been teaching Ameri-
cans to see the law primarily as a collection of pragmatic instru-
ments and contrivances for the achievement of whatever ends
men may wish to achieve. A person may genuinely wonder,
then, why he should be "bound" and why the dictates of a col-
clection of tools should take precedence over his present desires,
interests or political commitments. Yet the American tradition
of respect for the law remains alive, albeit precariously alive.

These considerations constitute an appropriate background
for an exploration of what is at stake in the controversy between
the proponents and opponents of legal positivism.

II. LIMITS OF LEGAL POSITIVISM

If one can identify a few key points on which the great pos-
tivist thinkers do not fully resolve persistent questions, there
will be room for an alternative approach.

Legal positivism appears to be an effort to understand the
law as a morally neutral entity. Its main proposition can be
stated in several forms: that law in general can be defined, and
is appropriately defined, without any reference to ethical prin-
ciples or ideas of justice; that claims of legal validity can be de-
determined without any reliance upon considerations of what the
law ought to be; and that the grounds for obedience or allegi-
ance to law are not, or need not be, moral grounds. In the terse
language of John Austin: "The existence of law is one thing;
its merit or demerit is another."

Theories undertaking to establish these propositions encoun-
ter four types of obstacles. First, it is almost universally ac-
nowledged that the concepts of "authority" and "obligation" are

7. This instrumentalist view of the law reached its utmost logical

8. Perhaps the politically motivated law violators associated with

9. J. Austin, The Province of Jurisprudence Determined 184 (1964) [hereinafter cited as Austin].
inherent in the very idea of law. Positivists must show how these phenomena are understandable in wholly non-moral terms. Second, it must be explained why judges and others who have legal functions so often find it necessary to appeal to standards of right and justice. Third, there is the question of the purpose of law—the human ends and social functions to be served by it. It may be fruitless to define the institution of law without any reference to the reasons why this institution exists, and these reasons might not be understandable in morally neutral terms. At the least, a true positivist should be required to demonstrate why the name of “law” should be given to a system of edicts which does not serve any of the values of justice, welfare, security or freedom. Finally, the idea of law is almost inevitably associated with certain norms such as the “rule of law” and “due process of law,” which, as applied both in theory and practice, have moral overtones. With the possible exception of antinomian critics, persons concerned with law do not usually think of these as morally neutral factors which could as easily produce evil as good. It is difficult to show why the term “legal system” could be appropriately applied to a body of edicts with no ingredients whatever of “due process of law.”

The first obstacle is the one to which positivist thinkers have given their most systematic attention. Two kinds of solutions arise from the two basic forms of legal positivism, which can be termed “command” positivism and “rule” positivism or elementary and sophisticated positivism. Elementary positivism views the law as the will of those who hold supreme power in the state—a will expressed in the form of commands or orders. In the Austinian formulation, these commands are obligatory or binding upon the citizen because the sovereign has at its disposal the effective means of coercion. Sophisticated positivists have shown that neither legal obligation nor the idea of a legitimate authority can be explained as mere corollaries of commands and the capacity to coerce. These facets of legal life necessarily imply the existence of norms or “oughts” and thus

10. In addition to standards of fair procedure, courts often employ substantive principles such as these: that contracts for immoral purposes or involving deception are presumptively invalid; that a person should not profit from his own wrong; and that there are precious rights of personal and domestic privacy (“a man’s home is his castle”). Such principles are frequently employed by judges before they are enacted by legislatures.

11. For Austin, command, obligation and sanction are correlative terms. Obligation means that there is a command and threatened sanction. See Austin, supra note 9, at 13-18.
cannot be explained without reference to a body of normative standards.

Having demonstrated that the legal imperative cannot be comprehended simply as the will of a sovereign or legislature, Kelsen proceeds to define law as a hierarchical system of norms directing officials to apply sanctions under stipulated conditions. This system, however, is to be sharply distinguished from an ethical system since its "oughts" are not in any respect moral oughts. Rather, they are formal and procedural oughts; they designate the persons and procedures by which norms may be legitimately created and thereby establish the distinction between legitimate exercises of authority and mere force. Thus, a person is legitimately in jail if the policeman who put him there has acted in accordance with norms prescribed by a judicial decision. The judicial decision is valid and binding if it is made in accordance with norms established in criminal statutes. The statutes are valid and binding if they have been enacted by the agency and in the manner prescribed by the constitution. If one asks why the constitution ought to be regarded as authoritative, he is referred to a basic norm which authorizes those who made the constitution. The basic norm, which is presupposed ("postulated"), affirms that the authors of the original constitution are to be regarded as creators of binding norms for the whole society.

This basic norm cannot be validated, but if someone were to persist in asking why it should be accepted, two possible answers are derivable from Kelsen: (1) If it is not accepted, there would be no normative and, hence, no legal system, only an aggregate of unjustified coercive acts. (2) It is in fact accepted if the coercive order in which one lives is regarded as a legal order; why it should be accepted is no concern of a science of law.

Every rule of a legal system derives its authority ultimately from the foundations of the system. At the foundations of the system one finds a tautology: the constitution is respected because one presupposes its normative character; its normative character must be presupposed if one wants to live under constituted norms. The reasons why anyone should want to live under constituted norms (that is, under laws) belong to the

13. Id. at 110-17.
realm of "value judgments" which, for Kelsen, are not reasons at all but subjective preferences.\textsuperscript{15}

Professor H.L.A. Hart has adopted some of the essential features of Kelsen's system while introducing modifications designed to purify positivism of its remaining defects.\textsuperscript{16} He accepts Kelsen's powerful argument for the need to view the law as a hierarchically normative structure. In Hart's theory, the "norms" become "rules" and the basic norm becomes a "rule of recognition" which provides the criteria for identification of valid law. Hart rejects Kelsen's emphasis on the coercive element (the sanction) as an essential element of any legal norm. He demonstrates that there are important categories of legal rules whose nature is distorted when one tries to represent them as sanction-imposing rules. This is particularly true of fundamental or constitutional law.

However, the coercive element does remain important in Hart's theory of a legal system. For Hart, the core of a legal system is a "combination of primary rules of obligation with secondary rules of recognition, change and adjudication."\textsuperscript{17} In his view, "[r]ules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear on those who deviate or threaten to deviate is great."\textsuperscript{18} Laws, then, are primary rules of obligation which have met the criteria specified in the society's rules of recognition and have, therefore, been authoritatively identified as rules of the society which will be enforced.

The character of legal obligation still remains a puzzling problem, however. Hart has done what Kelsen emphatically refused to do; he has imported into legal theory a sociological concept of obligation. A person is obliged by a rule when social pressures on its behalf reach a certain degree of intensity, and presumably, he is legally obligated when this primary rule has been officially recognized in accordance with the prevailing secondary rules. This concept does not account for any obligation one may have to resist social pressures, although people frequently assume such an obligation. In so doing, they do not justify themselves simply by reference to competing social pres-

\textsuperscript{15} See H. Kelsen, What is Justice?, in WHAT IS JUSTICE?, supra note 14, at 1-24.
\textsuperscript{17} Id. at 95.
\textsuperscript{18} Id. at 84.
sures. On such occasions, an appeal is made to some overriding standard of right. No doubt many people will feel obligated as a result of the causes Hart describes, but the thoughtful citizen will want to know if he is obligated. It may not be a sufficient answer to direct his attention to two ethically neutral facts—the fact of social pressures and the fact that there exists a formal rule, for example, that what the Parliament enacts is law. Precisely because he takes his legal duties seriously, this citizen will doubt that this combination of pressure and a pressure-sanctioning rule has the kind of claim upon him which is inevitably implied when terms like “obligation” are used.

Hart might well reply that this argument makes too much of such terms. To make so much of the idea of legal duty is to engage in “an enormous overevaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question ‘ought this rule of law to be obeyed?’” The “bare fact” that something is a valid rule of law (and, hence, entails a legal obligation) need not be conclusive as to the moral question of obedience, but many citizens believe it ought to have some bearing on that question. In light of Professor Hart’s teaching, it is necessary to ask whether a legal obligation has any moral force at all and whether law, as such, has any claim whatever upon the individual’s allegiance or respect. If the issue is actually one of respect rather than one of strict obligation to obey, it is necessary to inquire whether there is anything in the character of legally valid processes which endows them with even the smallest prima facie respectability. These issues are difficult to address on the basis of Hart’s legal philosophy. His answer seems to be “no” to both of them, but one hesitates to give this answer since Hart himself appears to believe that law should have some effective authority and that there is a need for legal obligations to be taken seriously in some sense.

The questions just raised would not be so perplexing if the rule of recognition was, in whole or in part, a moral rule. If the basic rules embodied concepts of justice, it would be easier

19. Hart points out that these facts will be normative for those who take “the internal point of view” toward them. Id. at 86-88. This does little for the thoughtful citizen who is perplexed about whether to take the internal point of view.


21. Id. at 626.
to see why the law presents itself as something authoritative and deserving of respect. Professor Hart says that the rules of recognition can be very complex and may “explicitly incorporate principles of justice or substantive moral values” as in the American Constitution.  

It is not clear how much Professor Hart means to concede here, but his overall theory makes it very doubtful that the rule of recognition could be a concept of justice in a sense that would require the sustained exercise of ethical judgment in identifying and interpreting the rule. If the most fundamental applications of the rule require ethical evaluation and insight, the positivist distinction between what the law is and what it ought to be would be fatally blurred. While Hart’s theory could perhaps allow for a few legal systems of that sort, it could not accommodate the possibility that the ultimate principles of validity in most constitutional regimes involve a subtle combination of legal, political and ethical elements. Whether there have been more constitutional regimes of the sort Hart’s theory describes than of the sort suggested here may be largely an empirical issue. Since no one has yet produced a rigorously empirical solution—and perhaps none is possible—the matter remains open to inquiry and argument, particularly argument about the nature of constitutional law.

Professor Hart’s theory has been called “limited positivism” because of its scrupulous acknowledgement of a number of connections between law and morality. It is appropriate to examine the implications of these concessions with a view to determining how much of the positivist thesis is eroded by them.

Hart would like to argue that a legal system may, but need not, rest on a sense of moral obligation or a conviction of its moral worth. He acknowledges, however, that “the system will be most stable” when it rests on this kind of foundation. He also acknowledges that there are a variety of ways in which laws incorporate and courts appeal to ethical principles and that “the stability of legal systems depends in part upon such types of correspondence with morals.” Hart does not explain exactly what he means by “stability.” An unstable legal system could be either one which encounters much disobedience or one which is constantly changing. In either case, it is arguable that

22. Concept of Law, supra note 16, at 199.
23. See sections III and V infra.
25. Id. at 200.
these are defects which make a system less of a legal system than a stable order of rules regularly obeyed.

Hart says that the health and even the existence of a legal system requires that its ultimate rules of validity "must be effectively accepted as common public standards of official behaviour by its officials." The officials must feel bound by these standards and be disposed to criticize lapses from them. However, their acceptance and criticism would be of a highly unusual sort if it did not involve any moral attitudes. A legal system might be quite unstable if its officials felt no moral allegiance to its constitutional rules. In fact, evidences of this kind of allegiance are found to pervade constitutional polities, and demands for it arise when it is thought to be lacking.

Regarding the role of justice in the judicial process, Hart goes considerably beyond his positivist predecessors in recognition of certain "characteristic judicial virtues" which include "impartiality and neutrality in surveying the alternatives" and "a concern to deploy some acceptable general principle as a reasoned basis for decision." It is necessary to consider why these and other virtues are so widely held to be characteristics of the judge's function. Hart is quick to remind the reader "that the same principles have been honoured nearly as much in the breach as in the observance." Whether this is really the case is open to argument, but it is more instructive to observe how men evaluate judges who grossly violate the standards of impartiality and neutrality. They are generally held to be bad judges, not merely bad men. A consistent positivism would require one to say that what these judges are doing may be unethical but that it is no less lawful than what impartial judges employing reasoned principles are doing. A non-positivist can say that these judges fail in their legal as well as their moral responsibilities; that it is not only the functions of morality but also the functions of law which are ill-served by their unethical doings.

This discussion leads back to the question concerning the ends which are served by law. Here too, Hart has gone beyond

26. Id. at 112-13.
27. Political life provides many indications that there is such a thing as constitutional morality and immorality. Suppose a British Prime Minister refuses to respond in the constitutionally appropriate way to a major vote of no confidence. The predictable response could hardly be characterized as criticism with no ingredient of moral indignation. President Nixon has been criticized in both moral and legal terms for refusing to spend congressionally appropriated funds.
29. Id. at 201.
his positivist predecessors in his willingness to entertain the idea that the definition of law must include reference to the social purposes it is designed to promote.\(^3\) Hart recognizes that “some minimum forms of protection for persons, property and promises . . . are . . . indispensable features of municipal law.”\(^3\) These are also universal features of social morality since “the survival of any society” requires rules “forbidding, or at least restricting, the free use of violence, rules requiring certain forms of honesty and truthfulness in dealings with others, and rules forbidding the destruction of tangible things or their seizure from others.”\(^3\) Hart calls these requirements, both moral and legal, “the minimum content of natural law,”\(^3\) because beings constituted as humans are could not survive without them, and survival is the only natural end or natural good which can be universally ascribed to man. “To raise this or any other question concerning how men should live together, we must assume that their aim, generally speaking, is to live.”\(^3\)

Human societies differ vastly in the kind and degree of protection they provide for “persons, property and promises,” but Hart would refuse to admit that a system which protects these interests very poorly is less of a legal order than one which does so very effectively. Most important, however, is Hart’s acknowledgement that the aims of human society and the natural strivings of men which shape these aims are relevant to the understanding and definition of law. With this acknowledgement, the old questions are reopened and the great issues of political philosophy are once again confronted.

The adequacy of “the minimum content of natural law” as a statement about human nature can be debated. It is a highly questionable proposition that survival is the only aim that can be universally predicated of man and his societies. Ac-

\(^{30}\) With regard to ultimate ends, Austin was willing to speak only of “general utility.” See Austin, supra note 9, at 294, 301. This did not bear at all upon the determination of what is a law; any “command of the sovereign” is a law regardless of its aims. Kelsen’s theory begins with the pronouncement that legal systems seek a monopoly of coercion to be used for the promotion of social peace. See H. Kelsen, supra note 12, at 21-22. A system of norms which failed utterly to accomplish this could scarcely be considered a legal order. This is just about all one hears of purpose as Kelsen’s theory proceeds to define and describe its subject.

\(^{31}\) Concept of Law, supra note 16, at 195.

\(^{32}\) Id. at 167.

\(^{33}\) Id. at 168.

\(^{34}\) Id. at 168.
cording to an alternative view, the aim of man, generally speaking, is not simply to live but to live well, to live according to some conceptions of a desirable, good or just life. If this is so, civil societies and their laws would always embody men’s con-
ceptions of what is desirable, good and just, as well as their need to survive. This would be a reality to be taken into ac-
count in theories about the character of law.85 Professor Hart recognizes that the laws of all human societies embody moral values transcending the dictates of survival, but, perhaps because these values differ from society to society, he will not allow this fact to affect his theory of what law is. Yet it is not self-evident that the properties of law must be defined with a view only to the lowest common denominators of human and social ends. In addition, Hart’s doctrine of what is universal in human affairs may be incomplete. His rather Lockean under-
standing of man, society and law is not the only plausible understand-
ing.86

For contemporary legal positivism, the rule of law tends to mean the rule of rules. Rules can be good or bad, but they are still rules regardless of their ethical quality. This teaching contains ambiguities at crucial points. Few, if any, positivists have gone so far as to say outright that it makes no ethical dif-
ference whether human affairs are or are not governed by law. Few, if any, are willing to affirm that human development, in-
cluding ethical development, would be equally well served if there were no such thing as a rule of law. Indeed, some themes in the literature of legal positivism suggest that one of its ob-
jectives has been to render the law more authoritative by freeing it of ambiguities and uncertainties.87 If law and morality are inseparable, and if legal claims could never be determined without moral inquiry, then the law would be forever unsettled. In such a state of affairs, one could never say “this is the law even though you disapprove of it.” People would disagree about the mandates of the law whenever they disagreed about right and wrong. It is easy to see how this would constitute a fertile field for civil disobedience. In fact anti-positivist arguments are

85. This theme is elaborated in section III infra.
86. The reader is invited to compare CONCEPT OF LAW, supra note 16, and H.L.A. HART, LAW, LIBERTY AND MORALITY (1966) with J. LOCKE, LETTER ON TOLERATION and J. LOCKE, SECOND TREATISE OF GOVERNMENT. He will find that “persons, property and promises” means almost the same, and rests on the same premises, as “life, liberty and property.”
87. See AUSTIN, supra note 9, at 184–91; Hart, supra note 20, at 593–629.
periodically employed to justify disobedience.\textsuperscript{38}

This situation poses a dilemma. The connection between law and morality or justice may create an unsettled law, but their radical separation removes the most vital grounds of obligation to law. Positivism may support the authority of law by promoting certitude, yet at the very same time it tends to undermine the law by stripping it of those qualities which are the primary basis of its claim to dignity. One is left with unresolved doubts about the kind of "authority" that remains after positivism has done its work. The positivist may have good grounds for believing that the efficacy of law is undermined by the proposition that "nothing can be acknowledged as legally obligatory unless it is accepted as morally obligatory."\textsuperscript{39} He must then explain, however, why he is at all concerned about the efficacy of law. A consistently positivist answer is difficult to formulate.

An answer would not be so difficult if the positivist could make clear his position regarding those values implicit in the expression "due process of law." The status of these values in the law is at the core of the long debate between Professor Hart and Professor Lon Fuller. Fuller's "internal morality of the law" is really a very sensitive explication of some important elements of due process, broadly understood: that there should be clear general rules, reasonably formulated, applied prospectively and obeyed by the lawmakers.\textsuperscript{40} The important questions are whether these elements are moral in character and, if so, whether they are so inherent in the enterprise of law that it cannot reasonably be defined without them. Fuller responds to both questions in the affirmative; it is not so easy to identify Hart's answer to either one. Hart's writings contain acknowledgements that some of these elements are properties of law and that they have a modicum of ethical value.\textsuperscript{41} On the other hand, his critique of Fuller represents the ingredients of legality as efficient instruments, neither good nor bad in themselves but merely means which can serve any end, including very unethi-


\textsuperscript{39} \textit{Concept of Law, supra} note 16, at 199.

\textsuperscript{40} L. FULLER, THE MORALITY OF LAW Ch. II (1969).

\textsuperscript{41} See \textit{Concept of Law, supra} note 16, at 200-02; Hart, \textit{supra} note 20, at 624-25.
If Hart’s arguments on this issue are not free of ambiguities and fully satisfying, neither are Fuller’s arguments. One result of Fuller’s view is that law exists wherever there is due process in the making and application of rules. Thus, the rules of colleges, labor unions, fraternities and social clubs can be law every bit as much as acts of Congress and decisions of the Supreme Court. Surely the positivist is correct in assigning a special status and authority to the fundamental rules of a political society. On this matter, he adopts the common sense perspective of the ordinary citizen.

The ordinary citizen, however, continues to use the words “lawful” and “lawless” in unpositivistic ways. When he speaks of a lawless person or lawless behavior, he does not usually intend to make a morally neutral statement. Language embodies men’s experience. If a connection between lawless and bad is inherent in the language, a theory which does not account for this cannot claim to have the last word. Although positivists have contributed much to the clarification of legal thinking, there is need and opportunity for other thoughts.

III. THE LAW AND THE REGIME

Among the various perspectives from which it is possible to view the law, two attitudes stand out as strikingly pervasive. The law is seen as the authoritative decision of a political community and it is seen as a certain rational procedure for judging the conflicting claims of human beings. These are perspectives of the ordinary citizen and public official, and they provide (in one form or another) the most persistent themes in the history of legal philosophy. The citizen thinks of the law as the official enactments of his society, but he is also inclined to think of law as an institution of general worth and dignity because it involves principles and impartial judgments—a kind of justice.

When the first viewpoint is elaborated, the law is discovered to be an agency at the service of the aims and values of a particular community; it enforces the interests and maintains the values of the established regime. When the second viewpoint is elaborated, the law appears as a judge and possible modifier of the interests and values of regimes. The first standpoint,

43. See L. Fuller, supra note 40, at 124-29.
unmodified by the second and taken to its utmost logical conclusion, can result in legal positivism. The second standpoint, unqualified by the first and taken to its utmost conclusion, can result in the worship of a disembodied law which forgets the political and ideological roots of legal arrangements and treats them with the reverence due to pure reason or pure justice. Men have never been satisfied for long with one or the other of these extreme perspectives. The reverential teachings of the Blackstonian tradition gave rise to the hardheaded reaction of Austin; Austin was modified by Kelsen; Kelsen was modified by Hart; Hart was answered by Fuller who also can be answered. Perhaps the citizen is right. Perhaps both of these understandings of law are indispensable because they both incorporate vital aspects of legal reality.

This insight into the dual character of law can be found in the oldest western philosophy, the writings of Plato and Aristotle. In his Politics, Aristotle lists and evaluates the various claimants for supremacy in the polity—the property holders, the majority, the intelligent citizens and the morally excellent citizens. In the process of evaluating their claims to power, he introduces another claimant—the law. He states the familiar argument that no persons or body of persons should rule but, instead, law should rule. Aristotle, however, rejects this solution as inadequate on the grounds that the law is determined and biased by the character of the political regime. For example, democratic regimes will make egalitarian laws on behalf of the unwealthy majority and will call it justice; oligarchic regimes will make laws protecting property on behalf of the well-to-do and call that justice.

Two observations follow from this analysis. First, there cannot be a literal “rule of law.” The law cannot actually rule because the law is not the prime mover of political life. Laws are what they are because of the character of the political regimes that make them, and regimes are what they are because of the purposes, interests and ethics of the classes or groups

44. See Plato, Apology; Crito; Minos; Statesman. It is a great oversimplification, and hence a mistake, to classify the ideas of Plato and Aristotle on this subject simply as “natural law doctrine.” The mistake results from uncritically superimposing the doctrines of Thomas Aquinas on Plato and Aristotle.

45. All references to and quotations from Aristotle are taken from The Politics of Aristotle (E. Barker transl. 1946) [hereinafter cited as Politics]. The Barker translation has defects, but it is probably the best among the generally accessible translations of the Politics.

46. Politics, Bk. III, at 1281a, 1282b.
which hold authority in the polity. Second, laws will only have such moral worth as the regime has. As the regimes to which they belong are good or bad, just or unjust, so “laws must be good or bad, just or unjust.”\textsuperscript{47} This last point comes close to the assertion that law is (in one sense) morally neutral; its goodness or badness is dependent on the ends for which it is used.

That is not Aristotle's last word on the subject. Later in the \textit{Politics}, he raises the question again. This time the answer is in favor of the law: even the best of statesmen should be governed by laws in all cases where that is possible. This is necessary because “appetite . . . and high spirit pervert the holders of office, even when they are the best of men. Law may thus be defined as 'reason free from all passion,'” and “to seek for justice is to seek for a neutral authority and law is a neutral authority.”\textsuperscript{48} Here the law appears as a rational enterprise, and its neutrality is not moral neutrality; it is a neutrality connected with justice. In this case, the law is presented not as a product of the particular ends of particular regimes but as something which transcends the biases of regimes.

One should hesitate before accusing Aristotle of self-contradiction, especially when so many find it necessary to acknowledge the two dimensions of law with which he deals. Self-contradiction is one thing; recognition of diverse sides of a complex phenomenon is quite another. It is true that there is a problem here if the development of a coherent theory of the law is desired. The problem caused by these two seemingly contradictory sides of the law is, or ought to be, a central issue for legal philosophy.\textsuperscript{49} Both sides of the law have an important bearing on its authority. The remainder of this section of this Article is concerned with the political side of the law. The following section is concerned with its procedural side and with the idea of the rule of law.

\textsuperscript{47} \textit{Id.} Bk. III, at 1282b.
\textsuperscript{48} \textit{Id.} Bk. III, at 1287a-1287b.
\textsuperscript{49} There are some tempting resolutions. One could attempt to resolve the apparent tension between these two aspects of law by relegating the first to the legislative process and the second to the judicial process. Legislatures and courts are surely involved (though in differing degrees) in both, however, and the constitution, which stands over the legislature and the courts, frequently combines both dimensions of law. It could be said that this is a distinction between the substantive and the formal aspects of law, but this merely restates the problem as a problem of accounting for the relations between form and substance.
Since a theory of the law presupposes a concept of the polity, it is desirable that one's concept be made as explicit as possible. In classical thought, and in much ordinary political experiences as well, the regime is the fundamental fact of political life. Different regimes are based, in part, on different conceptions of justice and the common good. For illustrative purposes, one may think of three very different kinds of regimes: American liberal democracy, the various communist regimes and the old British regime defended by Edmund Burke. No doubt there are various factors which can be said to distinguish these polities from each other, but decisive among them is the fact that differing human types or classes prevail and that these classes act on behalf of very different ideas or beliefs about what is a just or good social life. It makes a significant difference whether a community looks up to the principles of "life, liberty and the pursuit of happiness," or to the principles of "from each according to his ability, to each according to his needs," or to some aristocratic idea of distributive justice. Political communities are communities by virtue of commonly respected public standards of justice and social happiness. These are ethical and political opinions which refer to moral issues concerning equality, liberty, fraternity, property and authority. They also encompass some shared attitudes about the conditions of a worthy human life, and therefore, they touch upon education, marriage, sex, commercial activities and the proper balance between individual freedom and moral restraint.

A political community especially needs some common public standards of justice and freedom. To the extent that men have agreed-upon criteria by which to determine how the burdens and benefits of social life shall be distributed, social friendship is possible. Among persons with fundamentally conflicting opinions of what is just and unjust, a community can scarcely be said to exist. Consider a hypothetical society half of whose members believe that justice means equality of opportunity with reward based upon merit while the other half believes that justice requires equality of results and that merit deserves no un-

50. See E. Burke, Reflections on the Revolution in France (1790).
equal rewards. This society is in trouble. Its members will not be able to cooperate, and they will dislike each other very much, unless they can achieve a measure of agreement on standards of distributive justice—unless they can develop a regime.\textsuperscript{53}

In the total absence of a regime involving consensus on certain moral fundamentals, it is doubtful that law can be said to exist. Among a people with no consensus about justice, there may be constituted authorities who issue rulings, but it is extremely unlikely that these will be authoritative on any matters of vital controversy. Further, this "community" could hardly agree on rules of recognition for the settlement of vital concerns.\textsuperscript{54}

If a polity is primarily characterized by its regime, its laws will be permeated by the regime's standards of justice, freedom and social well being.\textsuperscript{55} In this regard, the law serves two functions. It is the primary process by which such standards are articulated and formally declared,\textsuperscript{56} and it is the primary means by which the most imperative standards are enforced.\textsuperscript{57} The importance of the first function should not be slighted by an over-emphasis upon the second. A polity uses its law to define and announce its principles as well as to compel obedience. This combination of declaration and enforcement constitutes an educational process, not simply a coercive one.\textsuperscript{58}

\textsuperscript{53} The concept of the regime advanced here does not suppose that all citizens will believe exactly the same things about what is fair and in the public interest. It does suppose the existence of commonly respected and authoritative public standards to which disagreements are referrable. Such standards need not be wholly discoverable in public opinion polls. They need not be in the forefront of everyone's consciousness; by many they will be taken for granted. Nonetheless, they will form the moral and intellectual horizons of political controversy and policy-making. One who wishes to deny the existence of public standards of this sort must either deny that the polity is a community or explain what he means when he speaks of community standards or American principles.

\textsuperscript{54} This has a bearing on the status of international law.

\textsuperscript{55} A regime may have bad standards about these things, but that is not the present concern here.

\textsuperscript{56} It is not the only such process; education is another, but education is affected by law.

\textsuperscript{57} Public opinion is another such means, but public opinion is influenced by law and education.

\textsuperscript{58} On this aspect of the criminal law see H. Packer, The Limits of the Criminal Sanction 42-44, 262 (1968).

For illustration of the influence of regime standards on the laws, one may consider constitutional provisions concerning the franchise, election and appointment to public offices, the arrangement and powers of public offices, and the relative weights given to considerations of
Thus, when the law is explored on its political side, its authority cannot be understood wholly, or even primarily, in formal and procedural terms. Law is the authoritative decision of a political community, but it is such not only because it is a decision made by the properly constituted organs under formal rules of recognition. The authority of the law is more fundamentally derived from the regime's conceptions of justice—it is the authority of the political ethics which stands at the foundation of and permeates the law. The law is respected and deferred to because it serves the community's ideas of what is fair and right. Americans tell each other again and again that they are obliged to obey the law because it makes equal justice and personal liberty possible. Other peoples are also taught to respect their law because it promotes the values of their way of life. The authority of the law, then, is also the authority of what is "our own"; it is grounded in a people's love for what belongs particularly to them and binds them together. It is not the authority of an abstraction or a mechanism called "the state."

It follows from this concept of the polity that there are several ways in which law and morality are connected. First, the ground of allegiance to law is, in large part, an ethical ground, and legal obligation has a moral element. To respect liberty, equality, property, public order and public morality. One may also think of laws concerning education, taxation, contracts, labor-management relations and even the family. Legal movements on these latter subjects have apparently reflected the movement of the American regime in an egalitarian direction in the twentieth century.

Many of the great American legal cases are cases in which disagreements about regime principles, or about their applications, have been fought out. Examples of this are the "contract clause" cases under Marshall, the Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) decision, Plessy v. Ferguson, 163 U.S. 537 (1896), Brown v. Board of Education, 347 U.S. 483 (1954), the cases leading up to and following President Roosevelt's conflict with the Court, and the Reapportionment Cases. Baker v. Carr, Reynolds v. Sims and Lucas v. Colorado Gen. Assembly constitute an extended controversy about the scope and relative weight of the American principle of equality as it applies to representation. It was a battle between egalitarian democrats and democrats willing to qualify the principle of equality with a principle of pluralism. See Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 741, 744 (1964) (Clark & Stewart, JJ., dissenting); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting). For an interpretation of the Supreme Court's function at least partly in accord with what is presented here see A. Bickel, The Least Dangerous Branch Chs. I, II (1962).

59. This argument may be accused of mixing together two distinct meanings of the word "authority." Whether or not these meanings are so distinct is precisely what is at issue between the positivist and some of his opponents.
the law is to respect the constitutive principles of one's community. To have a legal obligation is not to be confronted simply with a morally neutral fact to which one may respond in any manner one chooses. Legal obligation involves the moral claim that the citizen ought to abide by the terms that make the communal bond. This moral claim can be overridden by a stronger one, but it is a moral claim. Second, the important functions of law include ethical functions such as the articulation, declaration and enforcement of a community's political morality. In this sense, all civil societies "enforce morality" by law. This is an important fact about the nature of law, even though the standards of right which the law is called upon to maintain may differ widely from society to society. Finally, a legal system's rules of validity will have a more intimate connection with the regime's standards of justice (and other norms) than positivism is able to acknowledge. More precisely, it will be difficult to distinguish and separate those aspects of the constitution which function simply to recognize valid law from those aspects which declare and implement the ethics of the polity.

The concept of the polity from which these conclusions follow is associated with a view of the human community alternative to that implicit in Hart's "minimum content of natural law." Hart's understanding of social morality may be summarized in this way: since "the proper [natural] end of human activity is survival," all societies aim at providing such protections for "persons, property and promises" as are conducive thereto; in addition, human societies believe in a variety of other values which are not derived from any natural ends of man, and some of these are enforced by law. Thus, for Hart, these additional values and their legal enforcement are merely contingent facts serving no natural human needs.

According to the viewpoint offered here, all human communities advanced enough to be called civil societies or polities aim at considerably more than the conditions of survival, and it is not a mere contingency or accident that they do so. Organized societies are not only associations for the sake of life and security; they are also associations for the sake of social friendship and with a view to achieving a form of life which is believed to be humanly valuable. None of the regimes referred to in this es-

60. It is possible to exaggerate such differences. Even conflicting ideas of justice have some things in common.
62. Id. at 187.
say have been dedicated simply to the protection of life and physical security. They have all been activated by opinions about equality, liberty, fraternity, property and authority; that is to say, about the conditions of a desirable social life. Since any desirable social life requires some consensus about the rightful distribution of goods, honors and authority, it is not a fortuitous occurrence that polities aim at some form of justice.

The considerations of justice and some of the other moral considerations in political life which transcend the dictates of survival appear to be more deeply rooted in man's natural dispositions and needs than Hart's theory allows. If this is so, the law which embodies these considerations is not adequately comprehended in the light of positivist perspectives alone. Hart's "minimum content of natural law" is too minimal to account for the moral role of law in promoting the development of the distinctively human qualities and ambitions.63

The proposition that the law functions, in part, to declare and maintain a way of life has two further implications deserving mention. It now becomes possible to speak more than metaphorically of "the spirit of the laws" (in Montesquieu's phrase) and "the philosophy of the constitution." The laws belong to a regime, and every regime incorporates (implicitly if not explicitly) answers to some fundamental human questions. It would seem, then, that the full meaning of the law is not to be found only in what is written down but also in the principles which have informed the writing. On this premise, one can appreciate the ancient understanding of the law as a teacher, an embodiment of ideas and standards from which citizens can take their moral bearings in the world. This premise also creates a problem in determining the boundaries of the law. For example, it becomes a difficult task to distinguish principles of American liberal democracy which definitely belong to its law from those which definitely do not.64

63. Hart's theory recognizes as "natural" only such dispositions as are most obviously universal and clearly agreed upon by everyone. It would follow from this that there are no natural human needs for family life, affection, friendship, education or any kind of self development because all men do not pursue these things with the obvious intensity with which survival is pursued and because different societies are discovered to have different arrangements for these things. It would take more argument than Hart has provided to show that his test for what is "natural" is an adequate one.

64. This problem will be confronted, though not fully resolved, in section V infra.
The other implication deserving mention recalls the radical's indictment of the law as an instrument of "the establishment." On this point, the radical is in possession of an important truth, but his utopian expectations about human affairs lead him to distort that truth. A regime is clearly an "establishment." It is an established order of values, institutions and leadership, and, as such, it naturally supports certain social arrangements at the expense of others. For example, the laws of our polity still prefer the monogamous family to homosexual or group "marriages." If the radical is incensed by this because he believes that society should not have any established or authoritative preferences about "life styles," he has insufficiently reflected on what it means to have a community.

In reply, the radical will emphasize the fact that there are many bad establishments in the world. In this, the legal positivist will join him and will point out that this author has been dealing only with the relations between "positive morality" and law. He will remind the reader that some of the positive standards of justice which diverse regimes have enforced by law have been very inequitable. Since there are both good and bad laws and legal systems, the positivist can argue that the most important part of his doctrine, the lack of any necessary connection between law and what is right, remains intact. A small inroad has been made upon this part of the positivist doctrine. The classical tradition teaches that the major alternative versions of justice all have something to be said for them since each one lays hold of some aspects of what is right in social relations. The trouble with them is their one-sidedness. The pure democrat overemphasizes equality and neglects standards of merit. The oligarch overemphasizes wealth and property because, for him, this is the conclusive standard of merit. Similar statements can be made about the limitations of the liberal-democratic and the socialist ideas of justice. Nevertheless, it does not follow that these conflicting principles have no hold upon what is humanly good or that human communities would be as well off if they were organized without reference to any standards of justice at all. At the least, ideas of justice are requisite for binding a community together and making social

65. An example is the doctrine that justice requires the rule of a superior race or ethnic group.

66. See Politica, supra note 45, at Bk. III, 1280a, 1281b. Although Aristotle holds that there is something valid in all the major alternative versions of justice, he does not hold that they are equally valid.
cooperation possible. They also tend to introduce an element of principle into what otherwise might well be an unrelieved struggle of passions and interests. If these are moral desiderata, then the law which is indispensable for their promotion is a moral desideratum.

If a moderate positivist wishes to say that these conclusions carry one only a small distance toward the reunion of law and right, this author would not disagree. When the law is viewed as part of a regime, the judgment of its worth certainly should be influenced by the worth of the regime. A broader case for the moral authority and value of law cannot be made without a discussion of that other side of the law which is referred to in expressions like "reason without passion" and "neutral authority."

IV. LAWFULNESS

The classical view of law can be summarized in the form of a paradox: the law derives from the substantive values of regimes, but there are more and less lawful regimes and the more lawful ones are preferable to the less. This paradox is not unfathomable. The law is a certain procedure for effectuating social and political goals. It is a procedure requiring that these goals be articulated in patterns of general principles and rules, and it requires, at minimum, that such patterns be taken seriously as guides and constraints to the action of government and citizens.

Aristotle analyzes several forms of oligarchy and several forms of democracy. The worst form of oligarchy is that called a "junta" or "dynasty" in which "instead of the rule of law, there is a system of personal rule."67 The worst form of democracy is that in which "popular decrees are sovereign instead of the law."68 For reasons already presented, Aristotle cannot mean that the law is literally ruling and literally sovereign in the more lawful oligarchies and democracies. The propertied interests predominate in oligarchies, and the majority or "demos" predominates in democracies. The laws must reflect the characteristic disposition of these classes. The distinction here is between an oligarchy whose members guide themselves by an established pattern of oligarchic law and one in which they act simply in accordance with their individual interests

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67. Id. Bk. IV, at 1292b.
68. Id. Bk. IV, at 1292a.
and passions. Similarly, the distinction is between a democ-

racy in which issues are decided in accordance with an estab-
lished pattern of egalitarian and libertarian rules and one in
which issues are put directly to the people for decision as they
please. Obviously, this is a matter of degree, allowing for gra-
dations of more or less lawfulness. Where there is scarcely any
of it, one can hardly speak of a regime at all, for there is no
“establishment”; there is no constituted order of values, institu-
tions and leadership.

The distinction explicated here has made sense to many
thinkers, and it seems to make common sense. If he cannot
avoid living in an oligarchy, the citizen will instinctively prefer
to be governed by an oligarchic constitution rather than by the
day-to-day impulses and objectives of the particular oligarchs.
The basis for this preference is not as easy to formulate as it is
to feel, and it is not formulated in the same way by everyone.

For illustrative purposes, consider the following model of a
lawful oligarchy. The constitution (written or unwritten) would
define legitimate public functions, establish the powers and
terms of public offices, provide certain property qualifications
for office-holders and electors and establish some rules of en-
tail and primogenitor to ensure that large estates remain in-
tact. The laws would define property and other rights, specify
what shall constitute crimes and civil wrongs, and, no doubt,
provide for the strict enforcement of contracts. The norms de-
signed to effect these arrangements would be regarded as bind-
ing, and special tribunals would be established and charged
with the coherent interpretation and impartial application of the
norms. The judges should not be influenced by their personal
wants or preferences and would be expected to articulate gen-
eral precepts and concepts to guide judgment in problematic
cases. In short, there would exist a system of established public
principles and rules with a rational method for ensuring
that they do in fact guide behavior.

The aim of this inquiry is to consider what values in addi-
tion to the oligarchic ones would be served by this system of
law. Before addressing that question directly, it is desirable to
call attention to several distinctive features and probable con-
sequences of the system: (1) The members of the propertied class,
whether in public office or not, would be unable to act exactly
as they please. Their conduct would be limited and given direc-
tion by public standards. In public office, they must abide by
the constituted definitions of their powers, and in private life, they must keep their contracts, recognize the property rights of others and control their estates in ways dictated by considerations broader than simple personal desire. They would live under an order of principles which, though oligarchic, would constitute a kind of discipline. (2) The individual citizens, whether or not members of the predominant class, would be in a position to know what is expected of them and what they can expect from others. If the government acts within the limits of its standing laws, the individual could know the conditions under which official coercion would and would not be used against him and plan his life accordingly. If the laws are effective, the individual could also count on certain behavior from other persons and plan his affairs accordingly. (3) A deliberative element would be introduced into public life. A part of the public authority would be charged with the duty of exercising dispassionate judgment on the basis of articulated criteria. Arguments would have to be made before this tribunal, claims and counter-claims would have to be rendered broadly intelligible and conclusions would have to be justified by argument. (4) Professional standards of rectitude would develop in connection with this judgmental process. Some forms of bias would be precluded as incompatible with the process and labelled unfair. (5) A legal tradition would develop. Some norms would have to be long-standing; laws would be subject to change but the changes would usually be gradual. There would be a measure of respect for old principles and decisions. Thus, one of the effects of this system of law would be to promote a continuity with the past.

Similar consequences could be expected in a democracy devoted to the achievement of its substantive goals through a rule of law. “The people” would not be able to do just what they wished whenever they wished. There would be known boundaries delimiting the action of government and citizens; deliberation about the applications of general principles would become a more-or-less prominent feature of public affairs. Some sort of balanced judgment would be held up as the ideal to be aimed at in such deliberation, and a legal tradition would moderate political and social change.

The human values promoted by the rule of law can be discussed under the categories of freedom, justice and the reasonable or civilized life. Recent literature on the subject devotes
by far the most attention to the first of these goods and the least attention to the last. This is an imbalance which one may try to correct without denigrating the contribution of law to liberty.

The citizens of the lawful oligarchy described above are in possession of a significant liberty in that governmental coercion can be used against them only in accordance with general and prospective rules binding on the whole society. In the language of Locke, when all citizens have "a standing rule to live by," they are not "subject to the inconstant, uncertain, arbitrary will of another man." The emphasis here is upon freedom from arbitrary, unpredictable interventions in private lives and freedom from subjection to anyone's mere will which is the very definition of bondage. Where people are under the threat of unpredictable coercive interventions in their lives, they cannot make plans for the future or choose and direct the course of their lives. Further, a restraint is felt to be less oppressive when it follows from a rule rather than a specific command and the rule applies to everyone or has as its purpose the good of the whole community. Accordingly, the citizen is freer under the mandates of a valid act of Congress than under the orders of a bureaucrat acting without statutory direction.

These forms of liberty depend upon the generality and prospectivity of law, but they also depend upon other qualities of law. An enactment which is excessively general—highly abstract and imprecise—scarcely deserves the name of law, for it cannot guide conduct. As a result, the citizen does not know what is expected of him, and he will probably end up being told what to do by an official rather than by a rule. Thus, the requirements of reasonable clarity and precision protect personal liberty and also belong to the definition of legality.

It is an identifying feature of legal proceedings, as distinguished from moral judgments and political proceedings, that they involve a high degree of exactitude and attention to detail in the formulation of standards, the articulation of concepts and the definition of terms. Such proceedings also involve a scrupulous attention to ascertaining the facts to which the standards apply. This is necessary to determine whether rules are be-

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69. See, e.g., F. HAYEK, THE CONSTITUTION OF LIBERTY (1960); H. PACKER, supra note 58, especially at 55-56, 72; J. RAWLS, supra note 52, at 235-40.

70. J. LOCKE, SECOND TREATISE OF GOVERNMENT § 22, at 13 (J. Gough ed. 1946).

71. This is the germ of Rousseau's idea of "the general will." See THE SOCIAL CONTRACT, supra note 51, at Bk. I.
ing obeyed or disobeyed and to ensure that sanctions are applied only to such persons and in such amounts as the rules dictate. To accomplish this, it is imperative to have some regular method for ensuring that both sides of a dispute are heard.

There is yet another prerequisite for the maintenance of this rule of law. Locke speaks of "a standing rule."72 This means something more than prospectivity; it means that some of the laws and legal principles must be long-standing. Imagine a system in which the constitution, the major commercial and criminal laws and the canons of interpretation are to be changed every year (perhaps in order to "adjust to social change"). This arrangement might conceivably "survive" in some meaning of that term, but it could not survive as a rule of law. Rules of recognition which change every year would not be respected or taken seriously. It would make no sense to say "X is binding law because of its conformity to rule Y" when it is known that rule Y was invented last month and that it can be abolished virtually at will. No habitual disposition to compliance with any particular constitutional provisions or legal mandates could be developed here. Neither the courts nor anyone else could learn how to reason systematically or develop prudential wisdom in the interpretation of such ever-changing laws. Further, the citizen would not know how to arrange his affairs for more than a year in advance. Finally, the citizen would rightly conclude that laws are not governing at all. He would conclude that this system was not really one of rules but rather a system of case-by-case decisions of men temporarily put forward in the form of rules.

Similar, if less sweeping, results could be expected from an alteration of the fundamental laws every decade or every generation. Rules must have time to take hold. To be actually under the guidance of rules means to be under the guidance of some old rules. It is on this basis that a traditionalist bias informs the law; the old is respected and precedents guide decision in the law.

When confronted with a coherent body of public rules, a rational and painstakingly detailed procedure for their interpretation and application, and a respect for old principles, there is reason to believe that one is in the legal world. That legal world makes a contribution to the liberty of the individual. It is a considerable oversimplification, however, to regard this

72. J. Locke, supra note 70.
whole legal world solely in the light of its services to personal liberty. It also serves justice, civility and reasonableness in human affairs.

The most obvious consequence of any rule of law is that standards of action and decision precede actions and decisions in particular circumstances. The standard may be a precise rule prescribing or proscribing a definite class of acts such as the Miranda rules concerning custodial interrogation of persons suspected of crime; it may be a more general rule requiring discretionary interpretation such as the mandate of the Wagner Labor Relations Act that management must bargain collectively in good faith; or it may be a principle which furnishes outer limits and mandatory starting points for deliberation such as the principles of “Separation of Powers” and “no establishment of religion.” In the first case, the rule tells one, more or less explicitly, what to do or avoid. In the last case, the principle does not specify what is to be done or avoided but requires one to reason to a conclusion and provides him with bases and sources for this reasoning. None of these cases leaves the citizen or government official at liberty to do simply what his present inclinations and immediate calculations dictate. Actions in particular circumstances and with regard to specific persons are guided by standards which have been established well in advance of those circumstances and which know nothing of those persons. In these qualities of law lie the rudiments of its capacity to promote justice.

It is true that laws reflect policies which have ideological and group-interest biases. However, because of their generality and prospectivity, the laws cannot be aimed at particular individuals in specific circumstances and rarely name specific groups or organizations. Therefore, they are devoid of that element of passion which affects most human beings when they confront their adversaries in political, social and economic controversy. The labor laws may be biased in favor of management or labor, but, if they are laws, they are likely to be less biased than the employer and the labor leader in the heat of a conflict. It is well known that men have difficulty in judging fairly when they are judges in their own case and in the cases of those with

75. There is no intent here to bias the inquiry by using as examples only such rules as everyone thinks just. Everyone does not find the Miranda rules just, and some people think separation of church and state can be carried too far. People can hold different views on the substantive merits and still acknowledge the point made here.
whom they closely identify. As a result, the law does not allow a man to be the final judge in his own case and his friends' cases. It is in this way that laws can be described as dispassionate. They are much less influenced by passion than the individual is in those instances where his vital interests or opinions are engaged.

Whatever else justice may be, it is at least a demand that the claims of others be weighed by criteria transcending one's own desires and preferences; it is a demand for a measure of dispassionate judgment. This is also a requirement of legality. Lawmakers are impelled to act in this manner when they must formulate general rules affecting unknown people in a distant future, and persons who have to apply laws are impelled to act similarly to some degree. A law is always in some measure a generalized judgment. To be required to generalize one's judgments is to be required to rise above one's self-preferences and special loves and hates. In these ways, the dispositions fostered by law coincide with the minimum conditions of justice. Perhaps this is the basis of the linguistic usage which identifies "lawlessness" and "badness." A lawless man is a man who will not generalize his judgments or who will not submit his actions to the guidance of any general rules transcending his loves and hates.

References have already been made to various connections between the rule of law and rationality. The argument that the rule of law is a protection of liberty can also be used to show that the rule of law helps to make possible the rational ordering of men's lives. The standing rules which protect one from arbitrary government also assure that some features of the social environment will be enduring and predictable enough to permit the planning of a coherent life. A system of laws will promote a certain regularity and consistency in social relations which makes planning for the future possible. The argument that there is a connection between law and justice can hardly be stated without reference to the relatively rational character of legal rules and judgments.

Law tends to introduce long-range, abstract and principled considerations into the conduct of social affairs. When rules

76. Thomas Aquinas has stated the point succinctly: "[L]awgivers judge in the abstract and of future events, whereas those who sit in judgment judge of things present, toward which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted." T. Aquinas, The Political Ideas of St. Thomas Aquinas 57 (D. Bigongiari transl. 1953).
and guidelines must be established which are to be applied in a
distant future and in unpredictable situations, one's judgment
cannot safely be determined entirely by the pressures of im-
mediate exigency. The lawmaker must deliberate about the rel-
atively distant consequences of alternative courses of action. In
such deliberation, he is impelled to resort for guidance to long-
term principles and ideas. The clearest paradigm of this is a
constitutional convention. The convention must attempt to dis-
tinguish what is fundamental and comparatively permanent
from what is ephemeral and temporary in that society and in
human affairs. It must make use of ideas about what is funda-
mental, and it has to deliberate about the implications of those
ideas. Political and moral theory is thus called upon as an aid
to understanding.

While a constitutional convention may be the clearest ex-
ample, the same tendencies are at work where judges deliber-
ate about the apportionment of legislatures, freedom of expres-
sion, the obligations of contract or the criminal law, and where
politicians and citizens debate the scope of the executive pow-
ers in their form of government. The judges, politicians and cit-
izens may not be wise, but they are compelled to reason be-
cause standards exist, or are supposed to exist, in the light of
which they must justify their conclusions. Legal inquiries and
arguments require a measure of intellectual discipline and a
disposition to abide by the results of principled deliberation even
when one does not like the results in the instant case. These
inquiries and arguments tend to enlarge one's intellectual hor-
izons as appeal is made to concepts transcending ordinary, day-
to-day affairs. These effects should not be exaggerated since
considerations of long-range principle do not obliterate pas-
sions and narrow views. Nevertheless, men are usually less
governed by temporary views and narrow passions when they
calculate under the influence of such considerations than when
they calculate without them. The generalization of judgment
which law involves requires and tends to promote some of the
components of reasoned judgment.77

Law makes men think of the future, but, as has been ob-
erved above, it also ties men to the past. Where there is law,
old principles will have some authority, and precedents will in-

77. The foregoing arguments may explicate some of the ideas Fe-
lix Frankfurter had in mind when he spoke of "educational influences"
flowing "from the almost unconsciously transforming actualities of liv-
fluence decision and limit innovation. Radicals disapprove of this feature of the law. Among those who approve of it, it is frequently represented as nothing more than a contribution to “stability” or “order.” These terms do not convey all that is of value in the conservative bias of the law. Where old standards and rules are respected, patterns of mutual expectations develop which may be relied upon for long periods of time. When the individual can be confident in his expectations of others, mutual trust is promoted. Mutual trust is threatened when there is no reason to believe that the people one encounters will act as they have in the past, and it is abolished when anything can happen. This is more than a contribution of law to “order”; it is a contribution to community and civility in human relations.

The law’s conservatism in relation to its rationality appears to pose another paradox. On the one hand, the former supports the latter. If long-term principles foster a kind of rationality, this rationality cannot exist if men will not abide by any of these principles. On the other hand, commitment to old principles and guidance by precedent restricts the free use of rational judgment in present concerns and in unique situations. Intelligence will not be entirely free to deal with these concerns and situations “on their merits.”

The law resolves this paradox by compromises and sometimes by fictions. The compromise may be in favor of continuity with the past at the expense of an innovation desirable in itself. The fiction may represent a reasonably desired innovation as something mandated by the founding fathers or a long line of precedents. When the compromises and fictions are built into a system, the law can appear to an observer as a fabric of highly artificial rules and forms which is distant from experience, is insensitive to the uniqueness of the particular situation, and stands in the way of desirable change. The observer perceives something inherent in the character of law, but he does not see the reasons for it and does not consider the alternatives to it.

The rule of law includes an ingredient of “artificial reason,” but the probable alternative to this is not the rule of pure reason or the virtuous self-rule of autonomous individuals. The probable alternative is an oligarchy or a democracy considerably less reasonable and less just. This is the second of the two major

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78 See B. Cardozo, The Nature of the Judicial Process Ch. I (1921).
grounds for the moral authority of law.79

The relative reasonableness of the legal method as against other ways of conducting society's affairs is, finally, the most important desideratum. It is almost a tautology to say that the deliberate determination of social ends by legislation and adjudication makes much greater provision for the exercise of intelligence than does their determination by custom and ritual. The emergence of legal communities out of wholly customary ones is part of a process by which man begins to make decisions about the character of his community and moves from tribal membership to citizenship.80 The regulation of people's conduct by legal rules is a procedure more respectful of their rationality than is any form of behavioral conditioning, including the deliberate behavioral conditioning advocated by some contemporary psychologists. A general rule addresses itself to a rational being by addressing the mind and calling for a conscious compliance. The behavioral control advocated by Skinner and others will shape behavior without addressing the mind.81

In the final analysis, the morality of the legal method derives from its rationality. The reasonable man hears both sides of a question because he is interested in the truth. The reasonable man wishes to bring to his judgments broad principles which are the results of reflection transcending the partial demands upon which he is called to make judgment. He is disposed to abide by the rational consequences of such principles even if the consequences do not suit his preference at the moment. If a judge does not do these things, he is not judging. There is a heavy burden of proof on the positivist to show that one who is not judging is fulfilling the functions of law as much as the judge who is judging.82 A lawful decision is a reasoned decision.

79. The first ground is the authority of the political regime and its substantive ethic, as discussed in section III supra.
80. See F. de Coulanges, The Ancient City (1960). Professor Hart seems to recognize this point in those passages explaining the superiority of a system including rules of recognition, change and adjudication to a system bound only by primary rules of obligation or custom. See Concept of Law, supra note 16, at 89-96. These passages certainly imply that a deliberative element is inherent in the concept of law. Yet Hart's theory makes very little of this.
81. See B. Skinner, Beyond Freedom and Dignity (1971).
82. If this be Platonism, then Platonism is not so easy to avoid. This proposition about the nature of judging is also affirmed by Alexander Bickel and Herbert Wechsler. See A. Bickel, supra note 58, at Chs. I, II; A. Bickel, The Supreme Court and the Idea of Progress 81-87 (1970); Wechsler, The Nature of Judicial Reasoning, in Law and Philosophy, supra note 1, at 290-99; H. Wechsler, Toward Neutral Prin-
which appeals to articulated criteria and defensible ideas. It is on this basis that one can still maintain the traditional proposition that what is irrational is not law.

V. IMPLICATIONS AND DILEMMAS

Law is the authoritative decision of a civil community, articulated in a system of general principles and rules in accordance with that community's political ethics and in accordance with a procedure which is rational and mindful of precedent. This definition has resulted from an effort to show that man's relation to law is a moral relation deriving from two sources: a man's moral relation to his community and the respect he owes to what is rational. This concept poses some problems; indeed it seems to exacerbate some of the problems with which legal theory is concerned.

It might be said that the argument offered in this Article requires the acceptance of the proposition that “nothing can be acknowledged as legally obligatory unless it is accepted as morally obligatory.” The argument does not require that every legal rule which can legitimately obligate the citizen must be a moral rule or a morally right rule. A set of detailed legal requirements for the making and keeping of contracts may be simply a set of practical arrangements which is, in itself, morally neutral. Many legal rules are of this sort; they are practical devices or compromises among competing utilitarian interests. The most important considerations bearing upon one's obligation to such rules concern the character of the legal system to which they belong, especially the principles at the foundation of that legal system. The vital questions are whether the legal order as a whole embodies standards of justice which are the standards of the community and whether the system is a coherent body of rules rationally articulated and fairly applied. If so, then a particular rule belonging to the system imposes a prima facie obligation—not necessarily because of its own character but because it is part of a whole which imposes obliga-

83. See note 35 supra and accompanying text.
tions. On the other hand, if the community is so divided that there is no consensus about justice, and if what purports to be a legal system is merely a collection of arbitrary decrees, then the individual is not legally obligated. In this situation, there would exist neither communal principles nor a rational law-making procedure which would bind the individual. This would be true even if official organs existed which issued the decrees and even if some genuine rules impartially administered could occasionally be found among these decrees. A person cannot be legally bound by a rule which is not part of a system of law.

The case just put is an extreme one. Short of this extreme situation, there are degrees of legality in the same sense as there are degrees of community and rationality. There would be a prima facie obligation to the rules of a system which incorporates some communal ethical consensus and some of the features of lawful procedure.

The conclusion that there are degrees of legal obligation is not without problems, but it is better to wrestle with these problems than to rest with a wholly formalistic definition describing an obligation which does not oblige.84 The non-positivist attributes varying degrees of moral authority to law as such. The consistent positivist attributes no moral authority whatever to law as such. It may be asked which approach better serves the rule of law.

The positivist can respond with one of his strongest arguments: laws cannot rule if the citizen does not know what the laws are, and he will be forever uncertain about this if, to find out, he must always be inquiring into what is just and reasonable. Perhaps this problem is not wholly soluble, but the non-positivist must attempt an answer. The non-positivist must acknowledge that wherever there is a political community with general rules promulgated by its constituted organs and a modicum of judicial procedure, the minimum requisites of law are met. Law in this rudimentary form is what positivism usually talks about, but only a non-positivist can show why even this law has a presumptive claim to respect. In this minimum sense, law can be ascertained with a measure of certitude sufficient for ordinary public affairs in all but the most badly constituted polities.

Like the idea of degrees of obligation, the idea of law in its minimal condition and law in its maximal condition is trouble-

84. See the discussion of Kelsen and Hart in section II supra.
This idea would make it possible for the American polity to have two kinds of law—that which Congress enacts and the courts affirm, and that which would be dictated by the most reasonable interpretation of fundamental principles. If so, statesmen and citizens might be able to appeal from the former to the latter. Troublesome as this is, one can argue that it is the condition which actually exists, especially in the area of constitutional law. As an example, consider whether the doctrine of the Separation of Powers (including the principles associated with it) is law, and, if so, in what sense it is law. Congress and the executive periodically pronounce upon it and frequently disagree about it. From time to time the courts make decisions declarative of some of its mandates, but the Separation of Powers is not whatever the Supreme Court says it is. If the Supreme Court would decide that the President is protected from any and all congressional and judicial demands for information, many citizens would think it had made a mistake about the Separation of Powers. They would be tempted to say that this interpretation is American law only in the most minimal sense and would work for a reinterpretation in the light of a more comprehensive understanding of American law (as Lincoln did with regard to the *Dred Scott* decision).

Austin would say that, insofar as it is a principle applicable to the whole government, the Separation of Powers cannot be law since it is not the command of any sovereign. Therefore, it must be a feature of political morality. Hart's theory teaches that it is to be regarded as a rule of recognition. Yet, it is surely a very complex combination of both.

As a feature of political morality, the Separation of Powers is part of a system of arrangements, including "checks and balances," a bicameral legislature, and different modes and times for election to different branches, which was designed to maintain a certain kind of democracy. These arrangements were to serve several functions. The most obvious intent was to prevent excessive concentration of power, but they were also aimed at fostering debate, deliberation and compromise by requiring the agreement of independent branches and modifying majority rule by requiring majorities to capture at least two and possibly three independent branches before they could have

86. "[A]gainst a sovereign body in its collegiate and sovereign capacity, constitutional law is positive morality merely, or is enforced merely by moral sanctions." *Austin*, supra note 9, at 259.
unimpeded control. If an impetuous majority captures the Congress, minority interests could hold out in the executive branch and possibly force a compromise. This continual necessity of compromise tends to promote moderation. The framers wanted a moderated democracy which they thought would be more just than an oligarchy or an unqualified democracy.  

The Separation of Powers is also treated as law. American politicians debate it in legal terms, and courts will appeal to it as a body of criteria which they can use to determine what actions are legal and illegal. However, when its legal requirements are considered, one must inquire into its purposes and the functions it is designed to perform. This is to say that the Separation of Powers can hardly be used as law without any thought of the regime values it serves. The legal applications of the doctrine will depend, in part, upon judgments about certain enduring elements of the country's political morality. This is often the situation when great constitutional principles are at issue. Any significant determination of the legal meaning of "equal protection of the laws" or "freedom of speech and press" will always involve a consideration of regime principles. For example, under the equal protection clause it is often necessary to decide how far the principle of equality shall be pressed at the possible expense of privacy or liberty of association. This requires reflection on the meaning of American equality and the boundary between the public and the private spheres in this polity. To determine whether obscenity is constitutionally censorable, one must reflect on the relative roles of freedom of expression and public morality in the polity.

Although a rule of recognition says that what the courts decide about these matters is law, it is also recognized that they may decide wrongly. In such a case, it will be plausible to assert that the decision is law in one way but not in another, for it is contrary to the intentions, the spirit or the philosophy of the Constitution. The "intentions," "spirit" and "philosophy" of the Constitution are expressions which call attention to the connection between the law and the regime. It is because of this connection that the boundaries of constitutional law must remain open and unsettled. A measure of uncertainty about

the constitutional law of privacy, equality and freedom of expression must be tolerated because their meaning as legal principles will always depend somewhat on their meaning as political and ethical principles of the regime. This measure of uncertainty is tolerable. It will be a limited uncertainty if enduring regime standards really do exist to support and guide legal judgment.\textsuperscript{88} It can be rendered more tolerable by various strategies, including useful fictions which make the law appear more settled than it really is.

The question of obedience and disobedience still remains. It follows from the position taken here in behalf of the law that enactments of constituted authorities will have more or less of the quality of law. This conclusion, however, is not presented as a standing invitation for every citizen to decide these questions of legal validity for himself. How far individuals should be encouraged to decide for themselves is a separate issue which would require further inquiry. At any rate, the inquiry undertaken in this Article provides no aid and comfort whatever to the Thoreauvian view that “conscience” is always ethically superior to the law and that each person should be guided by his conscience rather than the law.\textsuperscript{89} The laws may very well be wiser than an individual's conscience, especially if that means his private opinions, values and ideological dispositions.

The idea of lawfulness presented here does offer standpoints to which one can appeal from the enactments of the constituted authorities. These, however, are standpoints close to the law. They are not universal moral ideals as these may be held by someone with no interest in the law. A person seeking to judge the laws from these standpoints will have to consider the authoritative values of his own community, and he will have to employ standards of rationality appropriate to the operations of law.

The case for the dignity of law rests finally upon a certain comprehension of human nature. It is grounded on the understanding that man is a rational creature but that he is also a self-interested and passionate creature whose reason is in need of support. Therefore, human beings are wise enough to make

\textsuperscript{88} Thoroughgoing pragmatists and nominalists will deny the existence of such an entity as “the regime.” In this writer's judgment, the concept of the regime is essential for an adequate understanding of constitutional law. One of the defects of legal realism is that it totally lacks this concept.

\textsuperscript{89} See H. Thoreau, Civil Disobedience; H. Thoreau, Slavery in Massachusetts.
authoritative rules for their common affairs and improve themselves by living under such rules; they are not wise or virtuous enough to live without rules at all. In the absence of rules of law a few persons might autonomously exercise a superior wisdom and virtue. It is highly probable, however, that most people would be governed by self-interested desires and prejudiced opinions to a much greater extent than occurs under the guidance of law. The antinomian should be required to refute this common presumption and the philosophy of man and society that lies behind it.

This essay has not disproved legal positivism. Some part of the controversy is a disagreement about the most desirable use of a very influential political word: "law." A disagreement of that sort is not susceptible of any definitive, once-and-for-all resolution. Legal positivism will survive efforts to prove that it is wrong, but there are sound reasons for adherence to the older and alternative view that law civilizes.