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The internal morality of law

I

The distinctive doctrine of Natural Law theory often seems to be that an unjust law is not a law at all. An unjust law is like counterfeit currency, which causes trouble because it so closely resembles and may be taken for the real thing. But unjust law is not genuine law. And thus it deserves no respect.

Unfortunately, law can be, and much too often is, bad or unjust. What seems distinctive about Natural Law, therefore, is false – but so plainly false that the doctrine deserves a new reading.

Other ways of understanding natural law may be inferred from the obvious concerns of many Natural Lawyers. One is that law be subject to moral assessment. This turns the doctrine around. Laws are not necessarily right or morally neutral but can be good or bad, just or unjust. There are moral standards independent of the law that can be applied to judge it. Another concern is that the obligation to obey the law be recognized as having limitations. Natural Lawyers may be taken as saying that no one has any valid and binding obligation to obey an unjust law. But views like these, while avoiding the paradox, also seem to lack the spirit of Natural Law. For they do not imply that law and morals are essentially connected in a special way.

Perhaps Natural Lawyers have really wanted to press only such claims on us – none that would seem philosophically unrespectable to-day. What has gone under the label "Natural Law", indeed, is not always controversial or even clearly philosophical. Nevertheless, one might ask: Is there any sort of philosophic view that captures the spirit, without the blatant paradox, of Natural Law?

I shall construct and consider one such view. I call it Natural Law because it maintains that moral standards are implicit in or intrinsic to the law (in a sense to be explained). It is suggested by passages in Lon

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Fuller's book, *The Morality of Law;*[1] though the argument I shall construct cannot safely be attributed to him, and it shall not employ all the interesting suggestions he makes. The general idea I find in Fuller is that one need not go beyond the law itself to find the basis for assessing it. One need not appeal to principles that have no necessary connexion with the law. But we are not required to say that unjust law somehow fails to exist. We may say instead that concepts of the law itself imply principles to be used in calling the law good or bad, just or unjust. When we understand what the law is then we see – not that all law is necessarily good and just – but *how to judge it*. The law thus carries within it principles for its own evaluation.

This Natural Law theory is more modest than its putative ancestors; but that is what any plausible theory must be. Indeed, following Fuller, our theory shall be even more modest. The argument shall not concern what might be called the main substance of the law – the particulars of what the law requires or allows and of how its straightforward application would affect the interests of individuals. It shall concern what Fuller calls "procedural" aspects of a legal system. Let us suppose for the moment that the law is a system of rules, or laws, that are administered, applied and enforced by public officials. We can then draw upon the common-sense distinction between the justice of a law and of its application or enforcement. Our theory shall not concern the "substantive" justice of the legal rules themselves. It shall be limited to "procedural" justice in the administration of the law.

There are various reasons for considering this type of view. One is that it might make some distinctive sense out of the Natural Law tradition. It might explain what does not seem implausible to suppose, that there are significant conceptual connexions between law and morals, connexions manifested, for example, in their shared vocabulary of rights and obligations, responsibility and justice. Another reason is that this "procedural" Natural Law could be a common ground for Natural Lawyers and their traditional opponents. For this type of theory does not threaten what many critics of Natural Law have sought to defend. It allows the standard distinctions between law and morals and between "law as it is" and "law as it ought to be". It does not imply that moral standards necessarily determine the content of existing legal rules. It leaves room for moral criticism of "positive" law.

It should be noted, however, that these virtues have nothing to do with our restriction of the theory to "procedural" questions. They result from the sort of connexion claimed between law and morals. One might be

[1] New Haven and London: Yale University Press, 1964.

more ambitious and claim that all the applicable principles of justice, including those concerning the "substance" of the law, are implicit in the law in the same sense. And a theory of this type could avoid the paradox of traditional Natural Law. But I shall not attempt to do this, for I do not know how to make a reasonably tempting argument with so strong a conclusion – and also because I think the more modest version we shall consider is itself mistaken.

II

Let us begin by assembling some of Fuller's claims. He says that public officials, those who make and enforce the law, are committed to ideals of legal excellence – eight ideals concerning not the substance of the law but whether its requirements can be understood, followed, and met, and how they are to be applied. There ought to be general rules, first of all, and these ought to be clear, consistent, publicized, prospective, satisfiable, constant, and "scrupulously" enforced.[2]

It is not entirely clear, however, why we should suppose that there is such a commitment. One reason that sometimes is suggested by Fuller does not yield the sort of view we seek and so must be discarded. In accepting positions "of public trust" (as we say), public officials may be construed as tacitly promising to behave properly. But if the commitment of public officials is explained in terms of promising, we are led away from problems of justice. For the breakings of promises are not necessarily acts of injustice, which violations of procedural justice should be. Moreover, why should we suppose that such a promise is a necessary consequence of making and enforcing the law? Could there be no legal system without it? And, if so, does the necessity of the tacit promise follow from the nature of law itself? These two questions require affirmative answers for our purposes, but we as yet have no grounds for so deciding. Finally, even granting that public officials make some such promise, its content remains indeterminate. To what specific standards do public officials commit themselves? Are they always, and necessarily, the same? Why should they include the particular ones listed by Fuller?

We need a different way of understanding the commitment by public officials to such ideals of legal excellence.

Fuller also writes: "To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults".[3]

[2] *Op. cit.*, chapter II. [3] *Op. cit.*, p. 162.

This passage is suggestive, though it hardly solves our problem. Why should we say there is this commitment? And what has it got to do with justice? I shall not try to say what Fuller really means. I shall sketch an argument designed to show that certain principles to be used in assessing the law are implicit in it. I shall concentrate my attention on the claim that the law ought to consist of rules that can be understood, followed, and met, and that only these ought to be applied. Later I shall say a word about Fuller's interesting but difficult suggestion that making and enforcing the law commits one to the view that man is or can become "a responsible agent".

III

Fuller lists eight kinds of legal defect corresponding to the eight kinds of legal excellence. These include, a failure to make general rules; rules that cannot be understood, that are inconsistent, not made known to the parties affected, retroactive, or frequently changed; rules that "require conduct beyond the power of the affected party"; and "a failure of congruence between the rules as announced and their actual administration".[4] Of what interest are such factors to us?

The defects listed (to which others could probably be added) may be divided into several types. It should be noted first that some have moral significance beyond the scope of the present argument. For example, the last factor listed – a failure to apply the rules faithfully, equally, uniformly and impartially – is often thought to constitute a special kind of injustice, sometimes called "formal". This is closely related to the "procedural" kind we shall consider, even in the respect that it could be construed, along similar lines, as a branch of Natural Law. But formal justice deserves separate treatment and I shall say no more about it here.* For our purposes, we are interested in the last factor listed by Fuller only as it affects the *followability* of legal rules and requirements. If officials administer rules erratically, a person to whom they apply might find it difficult to know what they require of him. He may be unable to use the rules in deciding what to do and to know when he runs the risk of legal sanctions.

Several of the factors listed by Fuller are significant in this way. They make it difficult to learn or be reasonably certain what the law requires, as when rules are secret (or difficult to discover) and frequently changed. Two things may be true in this first type of case that are not true in the others: At the time of behaviour for which one is later penalized the legal

[4] *Op. cit.*, p. 39. * See Chapter 2 in this volume, "On Formal Justice."

requirement actually exists; and it requires something one is able to do. The trouble is that the law makes it difficult for a person to know what is required of him and that he runs a greater risk of penalties for acting one way rather than another. And to the degree that the law is responsible for this, it is *unfair* to penalize him for failing to meet the legal requirements.

A second type of case is that in which the law "requires" something one can't do. The requirement may be clear and determinate and known, but this is little help. For the law is impossible to satisfy and can't be used in the appropriate way for deciding what to do. It seems unfair when the law penalizes a person for failing to meet such a requirement too. A third type of factor is found in Fuller's list. When there are gaps in the law or rules that are unclear, inconsistent or retroactive, no relevant legal requirement may exist at the time of behaviour for which one is later penalized. Failing special circumstances, one cannot learn what the law – as it shall later say – now "requires" of him. There is, in fact, no requirement for him to be guided by. Again, it seems unfair to penalize someone in these circumstances.

Allowing for the special character of the third type of case, we could summarize by saying that the defects listed by Fuller are cases in which the putative requirements of the law are not followable. And it is unjust to penalize a person for failing to meet unfollowable requirements.

But sometimes the law is like that. It can be difficult or even impossible to do what the law requires or to know what it requires (or what it shall retrospectively "require" by filling in the law, making it determinate, eliminating inconsistencies, and so on). And later the law says, in effect, that one has failed to do what it required – when that really cannot be true, when one could not have known, or when one could not have done it anyway. The law then adds injury to insult by penalizing one for failing to meet its putative requirements, even though it did not provide a fair chance to avoid the penalties. But it seems unfair to punish a person, to make him lose or suffer, even to blame or criticize him, in such a case. And yet this treatment is just what the law dispenses when there are defects of the sort that Fuller lists.

Before we use these materials to construct an argument for Natural Law, one point should be made. The legal defects that interest us are not limited to the criminal (as opposed to the civil) law. In fact, there may sometimes be a great temptation to tolerate such defects in the civil law. The injustice to one person of invoking an unfollowable requirement may be ignored in the desire to compensate another innocent victim for his losses. In any case, the relevant kind of loss, for our purposes, need not

be imposed as punishment but can be, say, in the form of civil damages. This should be kept in mind when I speak of a person's being *penalized,* which covers all types of loss imposed and blame imputed by the law.

IV

Legal rules are characteristically supposed to regulate behaviour; and this seems no accident. The law may do more than this, but it can hardly do less. Part of the very idea of systems of social control like the law is that they set standards and lay down guide-lines for behaviour, which, it is hoped, will be followed by those to whom they apply. Now legal rules can be used for various purposes, but in light of what has just been said, one of their main purposes is to determine legal requirements. And a legal requirement is something that is *supposed* to be followable – something a normal, competent adult, at least, should be capable of meeting and of using to guide his own behaviour. This is not merely to say that the normal point of laying down legal requirements is to provide guidelines for behaviour. It is to say that part of the very concept of a legal requirement is, not that it actually is followable, but that it is supposed to be and may be presumed to be. The idea of law includes that of regulating behaviour in a certain way – by setting standards that people are to follow. And this idea is incorporated in the notion of a legal requirement. If so, from the notion of a legal requirement it might seem to follow that, to the degree a putative legal requirement cannot be used by one to whom it applies to guide his own behaviour, that requirement is *defective.*

Furthermore, someone who makes or enforces the law understands that requirements are supposed to be followable. And since that is built into the very notion of a legal requirement, a public official is logically committed to viewing unfollowable requirements as defective.

This is one way of taking Fuller's claims. There is a necessary connexion between law and principles to be used in criticizing it. From the very concept of a legal requirement – in view of what law essentially is (which is something functional) – we can derive standards for calling putative requirements defective.

However, we have not yet made a clearly moral judgment. One is generated as follows. When a person is penalized for failing to meet an unfollowable requirement, he is treated unjustly. This step of the argument seems uncontroversial (at least with minor qualifications). I have explained it informally already and shall not attempt to prove it.

Let us suppose, then, that it is unjust to penalize a person for failing to meet an unfollowable requirement. This occurs when the law can and should be criticized on grounds that are intrinsic to it – that follow from

what it is for something to be a legal requirement. These grounds show that the putative legal requirement is defective. And this adverse judgment corresponds to the judgment of morality. It is precisely because the requirement is unfollowable and hence defective that penalizing someone for failing to meet it is unjust. So it appears that a moral claim about the injustice of such treatment is warranted by standards implicit in the law.

V

The argument just sketched could, perhaps, be strengthened. My purpose is, in part, to invite such reconstructions. But I think there is an unbridgeable gap within it. Let us consider some complications first.

In some cases, when a person is penalized under an unfollowable rule the result does not appear unjust. This may happen, for example, in war crimes trials where rules are established retroactively. But the rules could have been justified earlier so that they would have had prospective effect, and the agent is thought to have been competent enough to know that he should have acted otherwise. If someone is punished under such conditions the outcome might not be unjust on the whole – although it could be held that there is *some* injustice in the proceeding, due to the unfollowable character of the rules. We can, I think, ignore such complications. But they remind us that the moral judgments we are entitled to make in this context must generally be qualified by "*ceteris paribus*".

The example of retroactive legislation raises more serious questions, however. One might deny that the relevant legal requirements are truly "supposed" to be followable. Unless someone thought we could change our past behaviour, he would not imagine that a rule we call "retroactive" was designed by its creators to serve as guidance for behaviour that retrospectively falls under it. In the relevant cases, then, we could say that any general presumption to the effect that legal rules of the sort that lay down putative requirements are supposed to be followable cannot extend to *ex post facto* laws. As far as the makers and probably the enforcers of such laws are concerned, that presumption is rebutted. Consequently, retroactive laws cannot be criticized for failing to be what they are supposed to be, since they are not supposed to be followable. The defects they have must be explained in other ways.

But if we can go this far we can go much further. The same objection holds for rules that are deliberately made unfollowable in other ways too. And in most of the remaining cases, a judge, say, must realize that the rules or putative requirements could not have been followed by the person subject to the penalties. So the fact that he invokes the penalty is no sure sign he thinks them followable. In most of the cases to which the

argument is intended to apply, then, we find grounds for rebutting the initial presumption that putative legal requirements are supposed to be followable.

I am uncertain what to think of this objection. The problem is whether there is a sense in which we still can say that putative legal requirements, by their very nature, are supposed to be followable. The objection does not seem to exclude this. For the argument we constructed did not turn upon any contingent, actual aims or intentions of law makers and enforcers. It had to do with the nature of the enterprise in which they are engaged and the view of it to which they are logically committed. It is important to see that an argument for Natural Law could not rest upon contingent aims or intentions. An ineffective argument would work like this: "*If* law makers want to lay down guide-lines for behaviour, *then* they are committed to making their requirements followable". The claim seems true enough – trivially so. But it allows the possibility that actual law makers lack that aim and thus are not committed logically to the idea that their requirements are supposed to be followable. An argument for Natural Law must show a necessary connexion between the standards to be used in criticizing the law and the law itself. The supposition of followability must come directly from the enterprise of making or enforcing the law, at least within a limited area.

Our argument claims that the idea of something can incorporate or imply a standard to be used in judging things of that kind, even when things of that kind do not live up to the standard. This much seems quite plausible. One might contend that the idea of a knife implies the standard of efficiency in cutting. From this it does not follow that a knife cannot be misused, that a badly-made knife cannot be used, or even that a knife cannot deliberately be made in such a way that it will not cut well. The argument claims the same sort of thing about legal requirements: they are essentially supposed to be followable, since it is their essential function to give guidelines for behaviour. But this supposition survives the discovery that legal rules or requirements can be made unfollowable, even deliberately.

VI

The more serious difficulty for this attempt to prove a kind of Natural Law must now be considered. If the argument uncovered any standards implicit in a legal system, these warrant calling requirements that can't be followed *defective*. But to say this is not to make a moral judgment. Nor is it, I think, to imply one.

What is it we judge to be unfair or unjust here? In the first instance, it is the way individuals who run afoul of unfollowable requirements are treated. Were they not penalized we would not call their treatment unjust. If we call the rules under which they may be penalized unjust, that is because individuals are, or are likely to be, penalized unjustly under them. But this kind of treatment is not essential to or inevitable in a legal system – not even one that contains defective requirements. (And defective requirements probably cannot be avoided entirely.) From the fact that a legal system contains rules or requirements that cannot be understood or followed or met, it does not follow that anyone *shall* be penalized under them or even that the system requires or *allows* such treatment. Such practices may be so deeply entrenched or rationalized on other grounds that it may be hard to imagine legal systems without them. But nothing logically requires this treatment. And so the judgment that some actual rules or requirements of a system are *defective* to the degree that the law makes them hard to understand or follow or meet is not the same as the judgment that an actual practice of penalizing individuals under such rules or requirements is *unjust*. For there need not be that practice in the system even when the rules or requirements have the relevant defects.

My explanation of this point carries with it a moral plea. The law may not hesitate to penalize a person who is "found" to have failed to meet a requirement that did not exist or was not made known to him or that he could not have met in any case. But we could stop that – and if the practice is unjust we have a good reason to do so. We could deliberately refrain from penalizing in these cases or make adjustments as justice requires. This would involve modifying legal procedures. It would be decided whether the law was followable. If not, punishments and other "penalties" could be waived, and steps could be taken even to compensate those who otherwise would have been penalized unjustly to make sure they suffer no undeserved burdens or losses. We could even apologize and try to remove any lingering stigma. (We could also compensate other parties in civil cases for their undeserved losses by a system of social insurance.) Judges would not make changes in the law without admitting it, pretending to find their newly corrected law in the old. They could make changes as appropriate – by rendering unclear requirements more determinate, eliminating conflicts, and so on – so that others would be better able to follow the law in the future; or they could refer defective portions of the law to legislative bodies for correction. There seems no inconsistency in describing such changes in procedure, so penalizing individuals under unfollowable rules and requirements would not seem

logically inevitable. There may, of course, be obstacles to making these reforms, but there seems a *prima facie* moral case for introducing them.

It must be emphasized that these points apply as well to laws that are deliberately made in such a way as to be unfollowable, including retroactive laws. It is one thing to make such law, another to enforce it. The enactment of such rules does not entail their unjust application. Their application is not logically inevitable. And if it would be unjust, there is a *prima facie* moral case against it.

It seems clear, then, that the judgment that legal requirements are defective is not the same as, and does not entail, a judgment that an actual practice is unjust – since the practice need not exist even when requirements are defective. If so, the principles alleged to be implicit in the law are not principles of justice. They seem, in fact, *a*moral.

It could be argued, however, that the judgment that a requirement is defective entails, not the judgment that an actual practice is unjust, but rather a hypothetical or conditional judgment to the effect that the practice of penalizing persons under the defective requirement *would be* unjust. For this claim seems compatible with the previous objection.

But what ground can we find for saying this? The temptation to suppose that standards of justice are implicit in the law is given by the common coincidence of defective requirements and the unjust practice of penalizing persons for failing to meet them. We were led to suppose that in judging the requirements to be defective we were *thereby* judging the practice of invoking them to be unjust. But we see through this now, and we are left with no further reason for drawing such an inference.

Moreover, the standards that may seem implicit in the law, conceived at least in part as a system of guidelines for human behaviour, would seem to say nothing about what *counts as* an *injustice*. They tell us only that a certain kind of requirement or rule is defective – and only because it is not followable. But this does not tell us that the application of such a rule would be unjust.

Another rebuttal may be suggested by the passage from Fuller in which he claimed that "To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and *answerable for his defaults*". At this juncture one might try to show that the idea of law includes much more than I have been willing to grant. In view of what Fuller says about public officials' being committed to the view that humans are (or can become) responsible agents, answerable for their defaults (as well as capable of understanding and following rules), one might claim that penalties, or at