The Mystery of Law: A Critical Analysis of H.L.A Hart's The Concept of Law

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The Mystery of Law: A Critical Analysis of H.L.A Hart’s *The Concept of Law*

By

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A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of the requirements of the Sally McDonnell Barksdale Honors College.

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ABSTRACT
STEPHEN GRAY: The Mystery of Law: A Critical Analysis of H.L.A Hart’s *The Concept of Law*
(Under the direction of Dr. William Berry)

This thesis explores the role of morality in law through a critical examination of the work of one of the most widely cited and renowned judicial scholars, H.L.A. Hart. His modified theory of positivism, which denotes that law and morality are separable and that legal rules may have any content, has had an enduring impact on the landscape of judicial thought in the last century. As Hart’s work has had an indelible hand in shaping analytical jurisprudence and as it exemplifies the antithesis of my argument, it will serve as a theoretical foil. From it, I hope to articulate my own concept.

After critically examining Hart’s conception of the legal system as a construct motivated solely by survival and guided solely by rules, I proffer my own conception of the legal system based upon the teleology of law and the natural conditions of human dignity. With this natural law theory based around human dignity, I hope to introduce a new way of looking at legal systems, not as purely logical concepts but as complex and storied enterprises of human will.

I should note that theorists such as Lon Fuller and Ronald Dworkin have taken great strides in reintroducing moral facts into the concept of law. Below, I will extensively cited Fuller’s detailed critiques of the supremacy of the rule. The principle that he chooses as the central content of natural law is “open communication by which men convey to one another what they perceive, feel, and
This precept, I believe, is not expansive enough to justify all of the moral facts that pervade our system. As we will see in the following sections, I have expanded the principles of substantive natural law under the aegis of human dignity. I have offered a concept of dignity that better fits how we generally think and talk about Law, how embedded moral facts truly are in our legal system, and how morality operates in the day-to-day trenches of judicial interpretation. We have also borrowed the concept of the principle, as it was defined and heralded by Ronald Dworkin. He famously touted judicial interpretation as “moral from the ground up,” just as much a product of principles as of rules. Like Fuller, however, he stops short of introducing a fully fleshed natural content of law. Dworkin primarily cites principles as an interpretive concept and as sources of law. We shall do this too, but we are going further in saying that the law, all of it, satisfies and reproduces some elements of morality. This thesis would surely not be possible without their insight. Along the way, I will explore the essential links between morality and law, the role of moral principles in judicial decision-making, and the shared human values that I believe make law possible.

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1 Lon Fuller, The Morality of Law, (New Haven, Yale, 1964), 186.
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And that is why Justice often seems to be the most excellent of the virtues, with the result that “neither the evening star nor the morning star is so wondrous,” and as the proverb says, “in justice is all virtue summed.”

Aristotle, Nicomachean Ethics

I. Introduction

In the juristic world, positivism has enjoyed an era of unprecedented popularity. The model of rules that endorses the separability of law and morality proffered by H.L.A. Hart in his Concept of Law has served as the locus of analytical jurisprudence for almost a century. Throughout that time, legal theorists have admired or derided the Positivist doctrine, writing extensively to advance it or to dismantle it. One thing is certain; Hart’s work has not yet released its tendrils from the central judicial debates of our time. It will be the contention of this thesis that many of the problems and persistent questions that we now face in the field of jurisprudence owe themselves to legal positivism’s simplistic conception of rules. To represent this position, we are choosing The Concept of Law, as it is the definitive text of positivism and a statement of the central tenets that have defined the doctrine since.

This doctrine has given ammunition to a view of Law that inflates the importance of rules, leading to uninspired semantic arguments about the meaning of the meaning of words. Crucially, it abhors the talk of values that is so crucial to discussions of justice in this country. Further, I believe it gives credence to a mechanistic approach to interpretation that robs the law of its dynamic force. If the law is nothing but a collection of binding legal rules, then as its practitioners,
we have little leverage to say that some rules are better than others. We have no platform in a theory of law as mere social facts, to make judgments of which laws are just or fair or worthy of propagation. Moral facts are the kind, in this nation’s history, that continually light the way towards a more perfect system. These are the facts that light the imagination and enable us to right our legal wrongs. We are seeking to show that interpretation solely within the realm of rules stifles the intellectual craftsmanship that makes law a living, changing phenomena. Though in some cases, these misconstructions bear little resemblance to Hart’s original thesis, they are often symptomatic of a larger theoretical problem. This, I posit, has its roots in the positivist conception.

This theoretical problem contains two propositions. First, the model based around primary and secondary rules and their distinction is too simplistic to accommodate the robust reality of law. Secondly, the separability of law and morality in jurisprudence is not only a mistake, but it belies the true nature of law in practical judicial decision-making.

The landmark hard cases that have defined our system were decided with the very moral facts that Hart seeks to discount. It is no coincidence that legal rights in this country have been continually modified and expanded. This was not merely to suit the moral vogue of the day, but as a result of a system aspiring towards a moral goal, often failing, but always aspiring. This is the function of morality in Law; this is what we are seeking to explain.

I will begin by sketching a skeleton of Hart’s thesis and his model of primary and secondary rules. Then, I shall examine how the distinction raises
more questions than it answers, and in doing so, flesh out Hart’s thesis and its two major theoretical flaws. The final part of this thesis will be an evaluation of the link between morality and interpretation, where we will demonstrate the importance of the moral principle in jurisprudence.

It is important to disclaim that my intention here is rather modest. I do not aim to discredit Hart’s conception of law in whole, but only to chart the blind spots in his central thesis and point to a better avenue for examining law. Hart himself lists his primary aim as “clarification of the general framework of legal thought, rather than a criticism of law or legal policy,”2 and the mere fact that his general framework still ignites debate in the field of analytical jurisprudence is an obvious sign of his success. One might be hesitant to read a clarification of a clarification, but I believe that this is the work of legal philosophy, to inch slowly forward to the brightest truths at the heart of the mysterious force that is law. As we will see, the legal system is one with many aims, and we are poised to achieve a better one if we can identify and acknowledge them.

II. Hart’s Legal Positivism

Because we are beginning by examining Hart’s framework of the law, we shall begin by focusing on its indispensible central aspect: the rule, but first, it would do us well to remind ourselves why we are examining Hart’s framework at all. As briefly mentioned above, it is the most credible explanation of the legal system through social facts alone. Hart does this by proffering a system of rules, which have a very definitive character and function within the framework. I

believe that showing the inconsistencies within this framework and the ways in which explanation by rules alone contradicts what we typically think and say about the law is the most meaningful demonstration of the vital need for moral facts. The problems raised within Hart’s model in this section will give credence and legitimacy to the shift that I will propose in later sections to looking at the legal system as an enterprise of human will with ultimately moral ends.

Now, we will examine the distinction between primary and secondary rules and begin by sketching that model. Hart’s mission here is to list the salient features of a legal system, to determine the minimum characteristics that produce legality. It is important to note that he has already done much to distinguish his own positivism from previous conceptions, by defining what fails to reproduce those salient features. He has strayed from the conception of law as an order backed by threats, as this kind of obligation differs crucially from statutory obligation in applying only to others and not to those who enact the statutes. Further, he has made a preliminary distinction between laws conferring powers and those conferring obligations. Lastly, he has discredited analysis solely in terms of a sovereign, as this fails to account for the modern constitutional state, where the seeming dual-sovereignty of the electorate and of the legislature makes it so the sovereign is unidentifiable. Analysis in these terms has proved too simple to accommodate the vital concept of the rule, which Hart believes any legal system must rely. The most salient feature of a legal system then, is its rules. The essential character of the law, then, is to subject a population to rules. As we shall see, Hart will run afoul of the same criticism that he levels at his forebears.
Analysis in terms of the rule will prove too simple to explain the most vital functions of the law.

(i)  What are rules?

Hart views the rule as the coercive currency of law. Rules impose general obligations by which they aim to maintain conformity. Embedded into this concept of the rule is the sanction, by which deviation from a general obligation meets punishment by the ruling authority. The rule, conceived of in this sense, is the primary rule. These alone cannot constitute a legal system and indeed, they need not even be legal, but any developed legal system will surely contain them. A system composed solely of these kinds of rules, however, which Hart would describe as primitive, suffers the deficiencies of being uncertain, static, and inefficient. ³

For any system to attain legality, it must operate concurrently on another set of rules, which Hart calls secondary rules. These rules are ones that exist above, and govern, primary rules of obligation. The secondary rule alleviates the deficiencies of a solely primary system by designating the ways in which a primary rule is to exist. This multi-faceted concept of the secondary rule gives a system the ability to definitively determine primary rules, change them, and to adjudicate whether they have been broken and which sanctions shall apply. The coalescing of these functions, and the sole determinate of a fully formed legal system, Hart calls the “rule of recognition.” The union of primary and secondary rules, then, becomes “the heart of a legal system,” and “a most powerful tool for

the analysis of legal theory. Legality so defined is a logical quality, achieved only by those systems that maintain a rule of recognition. Though we have only begun to scratch the service of Hart’s thesis, it is fitting that we test the utility of this model as an analytical tool to determine whether rules alone could plausibly serve as the heart of a legal system.

(ii)  *The Unfitting Simplicity of the Primary/Secondary Rule Distinction*

Hart treats the distinction roughly sketched above as a logical necessity of a developed legal system, and any system that exists without distinguishing primary and secondary rules is no legally valid system at all. Lon Fuller illustrates in *The Morality of Law* the over-simplicity of that notion in imagining a ruler “Rex,”⁵ to which all of his subjects have pledged loyalty in writing, a clear invocation of the rule of recognition. Here, this rule of recognition and the distinguishing of primary and secondary rules, however, cannot account for the *tacit* limits on his power.

For example, Rex’s power derives totally from the rule-conferring power in the written declarations of his subjects. Yet, if his subjects depose him for abusing his office, it would not be in nullity of the rule of recognition, but rather a sanction visited upon him for abandoning the *implicit* limits of his power. Plainly stated, the rule of recognition presented in this simple example, the written declaration granting power to Rex, becomes a primary rule, when Rex is overthrown for exceeding the limitations of his kingship. The only way to preserve the neat distinction between primary and secondary rules is to either say

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that there are no tacit limits to Rex’s power, which leaves us with the uneasy notion that his authority cannot be revoked. This would imply that the system that his subjects put up in the place of Rex’s kingship is not legally valid, or at least not in the way that the kingship was. Or, we must admit that the line between primary and secondary rules is ambiguous and that it is possible to withdraw the power granted in a rule of recognition, either expressly or by implication.

The problem with distinguishing primary and secondary rules as starkly as Hart does is that it leaves no room in the equation for tacit limitations on Rex’s power. As a juristic construction, Hart’s model of rules might provide a very neat and orderly conception of law, but it cannot possibly account for the robust reality of any real system with the weight of history behind it. There is an important aspect of the legal system here that Hart’s construction ignores: reciprocity. Any construction of a legal system expressed only in terms of obligation is bound to leave the real world phenomena of reciprocity behind.

Not only is there a gradient of power moving downward, from the given authority to its subjects, but also there is a gradient of power moving up, from the population to the given authority. Bound by the expectation of his subjects that certain rights shall be respected, Rex is only authorized a certain range of authoritative action. Of course, these expectations may be very low, depending upon the political morality of a particular system.

Peasants in 13th century England, for instance, might not have expected full franchise (although the evidence of peasant uprisings certainly indicates that they did), they would have, however, expected a minimal respect for their customs and
ways of life. If these were not respected, and the peasant population had the force to challenge the accepted authorities, then the system would no longer remain viable. The reciprocal relationship between authority and subject need not be one rested on violence, either. In today’s world, reciprocal action against authorities exceeding tacit limitation might include protest, apathy, or outright refusal to participate in the system, all damaging the legitimacy and functionality of the legal system. That a regime might have managed in the past to keep hold of power in spite of abandoning the reciprocity of the power gradient serves only to prove this point further. These regimes rested on the most severe forms of repression, typically lasted only a short time, and always ended in spectacular displays of political purge and violence.

(iii) The Rule of Recognition

When we attempt to apply Hart’s model to a more complex and storied system like our own, the rule of recognition nearly collapses. In fact, “law,” in the sense described by Hart, exists in our own system at thousands of points, subject to thousands of different interpreters, conferring power in thousands of different contexts. Primary rules imposing duties are often contained within power conferring rules and vice versa. Hart only attempts to apply this tool of analysis to the English parliamentary system, but if we are to believe that the rule of recognition is a logical necessity of a developed legal system, his observations should hold across the two cases.

It is worth asking, here, what is the rule of recognition in the United States? The Constitution, which provides the skeleton of our government, confers
powers to the judicial branch to interpret and arbitrate legal disputes, and provides conditions under which a rule proves valid, seems a fitting candidate. If a rule of recognition could be found in this country, it is likely to be there, but the ambiguity and complexity of the Constitution belie Hart’s attempts to condense the rule of recognition to a minimal feature of the system. He concedes that in a case like this one, where “an authoritative text provides the clearest identification of a rule of recognition,” there may be considerable uncertainty as to what constitutes a criterion in identifying a valid rule of the system. This he chalks up to the inherent “open texture” of laws, meaning that they fall to the discretion of its practitioners. He does not, however, list the open texture of laws as a salient feature of a legal system, but only as an interpretive feature. Presumably, a system may endure without such discretion. In any case, Hart does not conjecture a way in which the rule’s practitioners might use that discretion. Still, if practitioners are bound solely by the standards set by the authority, then there is really no discretion to be had. They can only pick apart previous rules, which will bring them no closer to identifying a new, valid rule. If they are not bound solely by the rules of the given authority in identifying valid rules, then it seems that rules have lost the force of obligation and become meaningless.

One of the defining features of Hart’s argument is that it avoids the dreaded trap of claiming that law is purely a matter of force. Hart derides the conception of Law as “orders backed by threats.” This, he says, would render the law no different from a gunman ordering you to surrender your wallet. However, it seems to be his assertion that in the case of England, the rule of recognition may

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Hart, The Concept of Law, 111.
be condensed to the simple statement, “Whatever the Queen enacts in Parliament is law.”

Then are we to believe that in the United States, “Whatever the legislature enacts in accordance with The Constitution” is “an adequate expression of the rule as to the legal competence” of the legislature, and “is accepted as the ultimate criterion for the identification of law?” Of course, there are other sources of Law in our system, and Hart insists that they may be reduced to this simple form. The validity of any source of the law, in any locality, however cumbersome, can be expressed in the form of the statement quoted above. For instance: “Whatever the city council enacts as a regulation in accordance with its charter, in accordance with the state’s constitution, in accordance with the laws of the federal legislature, in accordance with the Constitution is an adequate expression as to the legal competence of the city council and is the ultimate criterion for the identification of law in the city.”

This presents an interesting problem. If a mere statement of social fact is to be the ultimate rule of recognition, by which all the complexities and conventions of our system are absorbed, then we are committed to a rather uninformative, non-descript account of what constitutes law. Thus, the rule of recognition, in casting such a wide arc by which it indicates the sources of law, becomes a tautology. We have then reduced the legal system, in all its brilliant complexity, to “Whatever the supreme lawmaking power designates as valid is law, unless otherwise proved invalid.” To put it simply, the law is the law, because the authority has decreed that it is valid. For all the work that Hart has

7 Fuller, *The Morality of Law*, 145.
done to separate himself from “the gunman situation writ large,” we have arrived at largely the same conclusions. Without sacrificing vital characteristics of our legal system, there cannot be one, neat expression of the rule of recognition.

(iv) Transfer of Power

Now that we have seen that primary and secondary rules are not always distinct and that the rule of recognition cannot be reduced to a single source, it would do us well to explore another way that the rule of recognition fails to adequately describe the complexities of a legal system. According to Hart, embedded within the rule of recognition, along with all the other complexities of a legal system, are the rules for the lawful transfer of power. The rule of recognition recognizes the office, not the regime, so that legally valid transfer of power is always contained within it. Hart calls this the “persistence of law.” The experience of history, however, proves that this is not always the case. Leaving aside instances of coup, the lawful transfer of power is not always facilitated by a rule of recognition and in some cases operates totally beyond it.

One of the saving features of Hart’s concept is its account for the transfer of power, all supposedly baked into the rule of recognition. While this analysis might apply very neatly to a succession of rhetorical “Rexes,” it has very little explanatory power when it comes to a living, fully fleshed system. In the United States, for instance, unique since its inception in its stable transference of power, we have seen instances where presidential elections ignore any secondary rule, let alone a rule of recognition (if there is one to be found).
The Compromise of 1876 presents us with a fascinating case. By informal dealing, Samuel Tilden and the Democratic Party yielded the presidency to Republican Rutherford B. Hayes in exchange for an end to the reconstruction and a full withdrawal of the North from Southern states. What is the rule of recognition by which, on Hart’s account, this transfer of power must be explained as a logical necessity of any legal system? It hardly seems right to say that it is the legal enactments of the legislature, as the campaigns ignored the codified electoral processes. Likewise, it seems equally absurd to say that it was the compromise itself, a handshake agreement reached in backrooms with no regard for the results reached by the supposed rule of recognition.

If we are to treat the rule of recognition as Hart does, as a “most powerful tool of analysis,” it is essential that it accommodates or at the very least indicates these kinds of shifts of power. Fuller diagnoses this central failure of the concept of the rule of recognition as an attempt “to give neat juristic answers to questions that are essentially questions of sociological fact.”\(^8\) Then, we are left with a tool that cannot be used. If the rule of recognition is not the logical necessity that Hart describes, it becomes a simplistic and uninformative construction that does not fit reality.

(v) \textit{Proposals to Save the Rule of Recognition}

Some positivist scholars have tried to save the rule of recognition in this regard, expanding it to nearly ridiculous proportions so that it might fit the myriad complexities of the United States legal system. To show how wide an arc must be

\(^8\) Fuller, \textit{The Morality of Law}, 141.
cast to absorb all the complexities of our system and how unambiguous and uninformative the rule must then be, I will describe one such proposal below.

First, we must abandon the simplistic conception that the legal competence and the supreme authority of determining a valid rule can be reduced to one secondary rule or one bunch of such rules. We must acknowledge that lawmaking bodies change, sometimes slowly and sometimes drastically. Further, we must acknowledge that this change may unknowingly shift the rule of recognition over time, so that in one era it might enshrine some standards of validity and then later, others. Positivists like Kent Greenawalt and Kenneth Hima have tried to revive the rule of recognition as an analytical tool in the United States with little success. They parcel out specific provisions of each article of The Constitution, as some serve as one-time secondary rules and others shifting between rule-types depending on the legal context. They show, at the very least, that the rule of recognition cannot be reduced to the one, elegant statement of social fact. Ultimately, they fall into the familiar trap of being essentially non-informative. These attempts show not only that the rule of recognition cannot exist in the form that Hart proposes, but also that the impulse among legal philosophers to crystallize the complexities of Law into convenient and orderly constructions is pervasive and far-reaching.

If the rule of recognition, as shown above, is insufficient in proving itself a logical necessity of a legal system and the distinction between primary and secondary rules unsatisfactory in describing the realities of law as a living force, then what are to make of Hart’s methodology? He seeks to describe law as a
manifested social fact, in virtue of its minimally salient features, but this question leads to uninformative descriptions and brings us no further than explanation by orders backed by threats. Perhaps, “What is Law?” is not the question that we should be asking.

A more informative methodology may begin by understanding the ends of Law, its objectives, and its significance to those who engage in it. This would lead us not to ask what Law is, but rather what Law aspires to be. To answer this question, it is true that we must examine the nature of rules and their contents, but we could not form a complete answer from these desiderata alone. To answer an aspirational question of this kind, we must look deep into the inner morality of law, from where that morality springs, and the essential links between statutes and their moral content.

Social facts lead us only so far in assessing the functions of law and answering the questions that we have raised above. They paint an incomplete picture, and as we will see, moral facts can fill those gaps. Asking questions about the aspirations of law allows us to examine the moral facts underlying our system, and in so doing, better understand it. Answering the aspirational question will also lead us to the most valuable insight of this thesis, that the natural content of law is profoundly expansive and eludes explanation by social facts alone.

III. Morality and Law

(i) Hart and Morality

While Hart concedes that law and morality intersect at thousands of points, that law is an enterprise with some moral ends, and that it relies upon the
conventional morality of its subjects to supply its justificatory force, he denies the necessary truth “that laws reproduce or satisfy certain demands of morality.” To illuminate the positivist thesis that law and morality are separable, Hart juxtaposes the position of the legal positivist to a convenient foil: classical conceptions of natural law. He reduces those conceptions to this rather neat definition: “that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid.”

According to Hart, the “fatal blow” dealt to the natural law concept is its confusion of law as description and of law as prescription. This concept relies on the Greek notion that every fixture of nature aims at its “telos,” its logical end and optimal state. As natural fixtures aim toward their logical ends, so must humanity’s legal contrivances. This teleological conception presupposes that man-made laws operate in the service of some objective good, aiming to enshrine particular principles of human conduct. In this way, the laws that explain the course of nature exist in the same sense as laws that sanction human behavior. Thus, the central fallacy of natural law is contained in the confusion of the phrases: “You are bound to report for military service,” and “It is bound to freeze if the wind goes round to the north.” The first statement is prescriptive, making a particular demand of human behavior. The second is merely descriptive, based upon observations of the course of nature. According to Hart, the practitioner of natural law is mistaken in assuming that the same kinds of descriptive laws, which

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10 Ibid., 182.
11 Ibid., 183
govern nature, also govern humanity. In other words, it is mistaken to suppose that there is a natural, optimal end at which legal societies aim.

If we are to show that it is a necessary truth that human laws satisfy certain demands of morality, we must meet the hurdle of Hart’s criticisms above and propose a more logically consistent theory of natural law that fits with what we typically think and say about it. The key to meeting this criticism and to answering the question of Law’s aspirations lies in the inherent teleology of our legal system, of which even Hart acknowledges. If we can show that the telos, or end, of law is moral or morally aimed, we should find ourselves in the position of having to admit that laws reproduce and satisfy standards of morality.

(ii) The Teleology of the Legal System

Hart begins by listing what he terms the “minimum content of Natural Law,” adapting certain “obvious truisms” about the connections between law and morality. These minimal criteria must be “universally accepted principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims.” He admits that any viable legal system must aim at maintaining these principles to persist. According to Hart, the telos, or the fundamental end at which law aims, is survival. The natural fact of human fragility is the “reason why…law and morals should include a specific content.”

According to Hart, survival is the central element to human legal society. It is the sole aspect of the human condition, which informs the moral contents of the law. From humanity’s desire to survive, we can extrapolate certain brute facts

\[\text{12} \text{ Hart, The Concept of Law, 189.}\]
\[\text{13} \text{ Ibid., 189.}\]
\[\text{14} \text{ Ibid., 189.}\]
about the state of human life upon which the minimal content of natural law rests. Hart reduces these to five characteristics: human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding or strength of will. For each of these aspects of human life, there are corresponding minimal contents that must be satisfied by laws. He contrasts this Hobbesian view of human striving motivated by survival with the “more grandiose and challengeable constructions”\(^{15}\) which have been proffered under the name of Natural Law.

Let us begin with Hart’s presumption that the minimal natural content of Law is driven solely by humanity’s wish to survive. This very well may have been true in Hobbes’ time, when theocratic monarchies were the height of legality, but in our time, it seems odd to assert that even the basest function of the legal system is to facilitate human survival. A person might say in hard times that they “are struggling to survive,” but it is laughable to suppose that a modern state with the sole constitutional function of saving its subjects from bodily attack would be a viable system at all. In fact, it even seems odd to suppose that even a system that granted “approximate equality” or any other of these minimal contents would remain viable for very long. Beyond this barebones construction, owing to the fragility of human existence, Hart posits that law may have any content, subject to the legislative whims of the authoritative power. In reality, we expect much more from our Courts. In this country, we rely on laws to educate our children, provide healthcare to the sick, and to dispense rights, which we view as an inalienable product of the inherent dignity of human life. These are the criteria we might

\(^{15}\) Hart, *The Concept of Law*, 189.
actually use in determining whether a system has reached a certain degree of legality.

Despite what Hart says, expanding the teleology and the minimal natural content of the Law does not have to come at the cost of the metaphysical speculation that he is so eager to avoid. For example, we do not need to postulate some platonic ideal of a legal system or the existence of some divine governor to suit an expanded view. Some proposals, such as Lon Fuller’s, are rather prudent, but the implications that they hold profoundly change our understanding of the connections between law and morality.

Fuller proposes that the “purpose of the institution of law is a modest and sober one, that of subjecting human conduct to the guidance and control of general rules.”¹⁶ At first blush, this may seem like Hart’s point restated, however it differs crucially from the Positivist view in that the “guidance and general rules” listed here are not the logically necessary constructions Hart supposes. This frees us from concerning ourselves solely with logical validity.

With this simple restatement, valid legal rules are no longer exhaustive of the law. Rather, the “guidance” is the product not only of rules, but also of moral arithmetic, of principles. This grants us the flexibility to better examine law’s natural contents, unencumbered by the analytical problems that we met with Hart’s concept of rules. When we abandon legal analysis in terms of logical validity or as manifested social fact, which we have seen in the previous sections to be a non-informative and dubious tool, we are on new ground, where legality is not all-or-nothing but comes in degrees. A system is neither valid nor invalid, but

¹⁶ Fuller, The Morality of Law, 146.
successful or unsuccessful. This revised teleology might cost us the parsimony and precision of Hart’s construction, but as we shall explore in the next section, it leaves us better poised to explain everything that law does, what it means to those who engage in it, and how it operates in the day-to-day trenches of judicial interpretation.

(iii) A Revised Content of Natural Law

First, we can easily resolve the ambiguity between descriptive and prescriptive laws, which Hart believes is the “fatal blow” to the theory of Natural Law. I suspect that this kind of semantic criticism flows from certain unwarranted assumptions that Hart makes about the universality of human values. According to Hart, humanity’s striving is driven solely by survival, but there is little evidence to support this kind of reductionism. Anthropology has shown us that human beings of all cultures share much more than the desire to survive. As John Finnis indicates in his treatise on natural rights, all human societies show some concern for human life, truth, education, and speculative or theoretical concerns for community, co-operation, and friendship. These are not yet practical moral principles, but “value judgments” shared across all human culture, as a product of our biology.

These descriptive laws of human behavior, for we might observe them in one form or another in all human cultures, are the basis for our revised content of Natural Law. Thus, it is not that the practitioners of natural law are confusing the descriptive and prescriptive senses of Law, but rather they are acknowledging that the descriptive laws that govern humanity reach far beyond the limits that

positivism supposes. They are founded on a shared bedrock of human morality. In this view, the descriptive laws that govern human behavior play a much larger role in prescriptive lawmaking. Now that we have cleared the semantic air, we can explore what kinds of implications come with adapting what we shall call the new natural content of law, and the connections that it springs with morality.

As Hart has done, we have extracted the natural facts of human life to inform our natural content of law. Where Hart’s system is motivated solely by survival, we might say that ours is motivated by dignity. In a very direct way, values concerning knowledge, community, and human life guide humanity’s moral language, structure, and practice. From these pillars of the human experience, we can deduce basic human goods for which in some form all societies strive. Then what we mean by natural law motivated by dignity is that it respects the condition of humanity being capable of “intelligently pursuing a realization” of basic forms of “human goods,”18 tracing back to the universal values common to our species. It is true that from these universal values, societies may derive a vast variety of particular moral principles. It is also true that these basic value judgments are not exhaustive, but they help us to comprise a spectrum of acceptable moral and legal ends. It is not true, however, to assert that law may contain any content. The political values of systems may differ greatly, but they draw from the same spring of unique and shared human experience.

As scholars like Meghan Ryan have noted, dignity is a slippery concept in jurisprudence, especially in the context of the eighth amendment. Despite being cited continually in hard cases since the country’s inception, there have been few

18 Finnis, *Natural Law & Natural Rights*, 83-84.
attempts to precisely define the concept. Before we go any further, we need to outline what exactly is meant by a legal system based in human dignity, how it delimits a certain range of acceptable moral and legal content, and what that means for a legal system overall.

Some such definitions of dignity in legal literature include the individuality endowed to human beings by their divine creator, the respect owed to all human beings based on their rationality, and the concept that no human being ought to ever be used as a means to an end. Dignity is a complex, multifaceted concept. The definition that we have given of dignity above, as the human capacity to strive for goods is certainly not mutually exclusive with the definitions contained in the legal literature. There is, for instance, a dimension of rationality contained within the prospect of human beings actively pursuing goods. It is also evident from our definition that any legal system that uses its subjects as means to ends would be a deficient one, and although it is not necessary, we could postulate that this capacity was a special gift endowed by some divine governor. Meghan Ryan chooses dignity to mean respecting the individuality of offenders and ending utilitarian punishment. This would also be something endorsed by the system we are proposing. At any rate, it is clear that contained in all the myriad definitions there is a uniting thread, and this is roughly, what we mean when we allude to human dignity. To seek a more precise definition will require an examination of human goods, and the natural faculties that drives us toward them.

Biology grants to every human being, in some proportion, the ability to perceive, to learn, and to communicate that learning to his or her fellows. From
these basic biological truths, there are birthed certain goods, from perception, beauty; from learning, knowledge; and from communication, language and society. Certainly, not everyone looks at a painting by Rembrandt or a lily in bloom and feels the sentiment of beauty, but it is preposterous to suppose for that reason that beauty does not exist. From the non-controversial existence of such goods, which are common to all human beings, there comes the freedom to concentrate, commit, or specialize in one or another of these basic goods, to pursue them. This is as Finnis says, “the primary respect in which we can call ourselves both free and responsible.”

It is our reason, or our ability to discern between these goods and select the ones that we hold higher above others, that guides our concentration, commitment, or specialization in goods. It is also what renders us individuals. However unlikely, there could conceivably be some who never strive towards any human good. As with the example of beauty above, this does not disprove the existence of goods. The goods are still universal in that they supply the standards and the language by which we judge our actions. For example, we would have to use the concept of knowledge to describe a person who never strives for it.

Reason is also the basis by which we can determine an acceptable range of moral or legal contents, that is, what a population will allow its authorities to subject it to by laws. Any legal system that is actively offensive to these universal, basic goods or actively prevents a population from exercising its reason to determine which goods to pursue is a deficient one that will survive only by means of repression. As these goods are universal, meaning that we humans all

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have the faculty to detect them, they inevitably serve as the basis for forming particular moral principles. These principles will be the products of determining precisely how we, not only as individuals but as a community of individuals, will bring these goods to bear in shaping our communal worlds. Like a system that does not respect the basic human wish of not living a short, nasty, and brutish life, a system that abhors basic goods, or more often, manipulates those goods to benefit only the reigning few, will inevitably fail. This is what we mean by an acceptable range of moral and legal contents. A legal system could not conceivably order discriminate murder on Sundays or ban acquiring knowledge or making art, without severe human resistance. It is quite literally our nature. This fundamental basis for Law is only a foundation. From it, custom and convention will inevitably form different systems with diverse particulars. A certain finite range of moral propositions, however, will bound this foundation in the following way.

If Law, as a whole, exceeds the boundaries of this scale of accepted morality, it will lose its coercive force and cease to remain viable, except by the severe repression of its subjects. Therefore, to serve as anything more than “the gunman situation writ large,” then it must reproduce and satisfy a certain reasonable range of moral content. Here, we reach the most essential link between morality and law. When meeting legal obligations, we are also, in a fundamental way, meeting moral obligations. The same causal connections that drive human morality direct and inform the ends of law, to bring about conditions that promote human dignity.
We can better illustrate this central function of dignity in the framework that we are proposing by describing the legal system in a more concrete way. To borrow the language of planning used by Scott Shapiro, we might call what we have chosen to call the teleology of the legal system the “master plan” of the law. In this mode of analysis, all legal activity is a product of social planning that occurs incrementally over time. The master plan is simply the first, general plan that sets about the chain of sub-plans that eventually leads to the legal situation of the moment. Using the lay example Shapiro gives, one could be sitting on the couch and realize that they are hungry. They ask themselves if they should eat out or cook at home. They decide on the latter, and they now have formed a plan. Upon realizing there is little food at home, they make an addendum to the master plan or a sub-plan. They must go to the grocery store and buy the ingredients to make dinner, and so on, deliberating as they go, modifying the master plan of eating at home until completion of the meal.

In our own terms, the biological condition of hunger, which was the motivation for, and was satisfied by, the master plan represents the natural conditions of human dignity that drive us to strive for human goods. Then, the master plan would be the teleology of the system, designating that the system itself reproduces conditions favorable to human dignity. The first sub-plans would be particular moral principles, leaving open a wide array of future decisions, which will later be arbitrated by conventions and rules.

Thus, the so-called “master plan” of the legal system is a moral one, derived from the natural moral content of the human condition, and we find
ourselves once again in the position of admitting that Law and morality are inseparable. To look at the arbitrary rules, or sub-plans, that exist within our system, conclude that these are amoral, and therefore that the entire system is so, is denying that law is an institution with an over-arching purpose. If we, as the positivist does, lose ourselves in the sub-plans of the system, we are liable to forget that there is a master rule. In other words, focusing solely upon legal rules blinds us from recognition of the teleology of law and its ultimate purpose.

IV. Morality and Interpretation

We have established a concept of law with dignity at its core, defined as respect for humanity’s capacity to strive towards human goods. From this, societies chart a general territory of moral principles, which will guide their political virtues and shape their legal systems. It should be noted that there are many legal systems today that do not adequately reflect the inherent dignity of human beings. These systems are deficient. It is also true that while a system on the whole might satisfy and reproduce moral contents, there will inevitably be statutes within every system that are unjust. These are subject to change.

In the United States alone, there have been major legal upheavals followed by periods of profound legal change. We can recall the massive protests of black Americans in the 1960s in the South. The state governments who presided over this oppression were only able to maintain the status quo by the most severe means of repression. In that time, we could say that these systems were extremely deficient, borderline lawless. If, in a system, there is no recourse to mend unjust statutes, even incrementally over time, then we need not compare those apples to
oranges. These kinds of authoritarian governments just truly are the gunman situation writ large. As such, systems, rules, and conventions will also change over time, but in a system with dignity at its core, time has proven that the arc of history will bend toward progress.

What this means for the practitioner of law in a country like our own, is that any kind of judicial interpretation will implicitly involve moral interpretation. In fact, we can show what moral principles bring to bear in legal decision making by charting the occasions of interpretation in steps, as legal scholars like Richard Fallon have done. It is not our intention to proffer or endorse a particular interpretive method but merely to show what Fallon has called “the irreducible role of values and judgment” even in disparate methods of interpretation. Although he directs his evaluation at two methods that pay particular lip service to separating judicial decision making from ethics or moral judgment, we can use them to sketch the minimal role that principles play in any interpretive method.

(i) **Occasions for Moral Judgment in Legal Interpretation**

Fallon marks the first occasion for judgment, defined here as bringing values to bear in a decision, at the “interpretive dissonance” of first-blush readings of a statute. This involves asking a question like, “Does the meaning of this statute reflect something that a reasonable legislature would direct?” For example, the interpreter might find the unintended results of the statute to be so immoral or absurd as to warrant a correction or an exemption. This process involves first, accessing one’s personal values to determine what a reasonable legislature would enact. The history of the Supreme Court is rife with disparate conceptions of what
a “reasonable” legislature means and how it should function. There was, for instance, considerable interpretive dissonance in the decision of Riggs v. Palmer, the case deciding whether a man could lawfully receive the inheritance from his grandfather whom he had murdered. Surprisingly, there was disagreement on the bench.

The Opinion found the result of the statute, which allowed Palmer to keep the money, even as he was charged for murder, to be so hideous that they changed the application of the statute. The outcome simply did not fit what they determined would come from a reasonable legislature. To make that judgment, they accessed particular moral principles, one of which has been enshrined in common law since: “One cannot benefit from one’s wrongdoings.”

The second occasion for judgment in interpretation comes with resolving the uncertainties that interpretive dissonance creates. When faced with ambiguity, judges of all methods call upon other resources to contextualize or illuminate a decision. There is wide latitude, however, in how broadly they define that context. Some judges deride any resource beyond the plain meaning of the text as “extra-legal,” and irrelevant. Some, like the pragmatists, have a very loose definition of context that may include sources beyond the text, convention, or precedent. The reality is that there is no hard and fast rule by which we can draw that border. How narrowly or broadly it is drawn will inevitably be the product of judgments of political morality about relevant sources of law, policy purposes, and the standard of rationality that they ascribe to the legislature. What is sure is that this breadth of context serves a vital role in judgment and is yet another way that we
could draw a direct line from the political morality of the interpreter to the judgment.

The third occasion for interpretation, and the most abstract, occurs when the interpreter must determine the root meaning of “reasonableness.” This is not merely conjecture on what a reasonable legislature might have intended in drafting a statute, but establishing what a reasonable interpreter might glean to be the most credible interpretation based upon the breadth of the context. As many judges intend, or pay lip service to, the impartiality of judgment, they will form a construct of what a reasonable interpreter should be as a duty bound emissary of the rule of law. Even this construct will “inevitably reflect judgments about what would be morally, politically, and practically provident or improvident.”

This stage, even more than the others, will access particular moral principles, which trace back to the universal values that inform both our morality and our laws. In this way, we can see how the interpreter begins with the particulars of a statute, winding back into moral principle, and then universal value judgments, and finally into the natural moral contents at the heart of the system. These stages present only the minimal occasions where interpreters access particular moral principles. To render decisions in hard case, practitioners of all legal methods must reach into the realm of moral principles. We still have much to say for principles in law, and as we shall see, the moral principle will show itself to be as important and foundational in a legal system as the rule.

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No discussion of Hart’s positivism would be complete with also discussing his lifelong theoretical adversary, Ronald Dworkin. Dworkin wrote extensively about the ways that principles affect legal rights and obligations. As we have done in this thesis, he expressed skepticism of the Positivist assumption that rules alone are the coercive currency of Law. The criticisms we have raised above of Hart’s model of rules, the distinction of primary and secondary rules, and the rule of recognition bolster and give credence to this use of standards beyond rules in interpretation. The model of principles exemplified in his work is well suited to our system of Natural Law. Here, the concept of the principle will serve as a strong starting point for our examination of how morality operates practically in jurisprudence.

Dworkin generally defines principles as the “whole set of [these] standards other than rules […] that is a requirement of justice or fairness or some other dimension of morality.”21 For our purposes, we need not change this definition very much. We shall define them as the standards of morality derived from the universal value judgments of which all human beings share a capacity. This modest shift from Dworkin’s general definition will not profoundly change the function of principles, but it will carry implications for their source, which we will explore below.

Examples of principles are ubiquitous in legal history; we have already seen the one used in deciding Riggs v. Palmer. As we have shown that any method of interpretation worth its weight must make at least minimal use of moral

principles, we shall now explore the differences between principles and rules, the vital function that they serve, and how they fit within our framework of the natural content of Law driven by human dignity.

First, the function of principles and of rules often overlaps. They may be used concurrently, and frequently are, to justify decisions. As Dworkin writes, “Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give.”\(^{22}\) They differ crucially in the following respect. Where the rule is applicable “in an all or nothing fashion,”\(^{23}\) the application of the principle is nuanced and variable. Rules are either valid or invalid, meaning that if the facts specified in the rule are satisfied, then it applies. There is no room in the application of the rule for exception or modification unless explicitly enumerated within the language of the rule. Principles, on the other hand, are neither valid nor invalid and do not automatically bring about certain consequences when they are respected or broken. As Dworkin demonstrates with the principle listed above, that “one should not profit from one’s own wrongs,” there are many legal avenues by which one actually can profit from one’s own wrongs. However, this does not eliminate the principle as logically invalid, because principles are not necessitated by facts. Rather, they are complex products of moral arithmetic that guide an interpreter’s approach to a particular set of facts.

The hierarchy of rules is also much easier to determine. For example, there are some rules that are functionally more significant than others. The legal rule in the

\(^{22}\) Dworkin, *The Model of Rules*, 25

\(^{23}\) Ibid., 25-26.
United States that the statutes are drafted and enacted by the legislature is more fundamental than more specific rules on Senate term limits, for example. The first rule could not be changed without fundamentally changing the entire system. Principles, however, do not abide by this kind of functional hierarchy. We might say that the loftiest principles enshrined in the Constitution are more vital to the legal system than the principle used in Riggs v. Palmer, but there is no logically necessitated hierarchy among them. Where two or more principles converge, it is to the discretion of the interpreter to decide which is “weightier.” This judgment is relative not only to the facts of a given situation but also to the political morality of the interpreter. It is also evident that many rules contain principled language, so that although they function logically as rules, they may be applied in a way that invokes principles. Some such embedded words of principle are “fair”, “reasonable”, and “just.” Deciding the precise meaning of these words in statutes necessitates occasions for moral interpretation, where there is likely to be interpretive dissonance. This is where particular principles of political morality will be deployed to find reasonable definitions.

As Dworkin illustrates, denying the vital place of the moral principle in judicial decision-making, as positivism has done, makes the decision in Riggs v. Palmer more than wrong; it would render the decision legally invalid. Depriving Palmer of the inheritance is retroactively stripping him of his property. Under Hart’s model, because the Opinion does not base its verdict in an accepted standard of validity, it is therefore operating extra-legally. What was required in Riggs v. Palmer to render a decision that would be by any account just,

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reasonable, and befitting of the dignity of those forced to bear it, was the moral principle.

(iii) The Source of Principles

As we mentioned previously, the system that we have proffered designates the source of these principles in the inherent dignity of human life. This reveals yet another essential character of principles. Because they derive from the basic value judgments that inform the natural contents of Law, they fundamentally precede rules. To explain, we will refer again to Scott Shapiro’s language of planning.

We have designated that dignity is the primary motivator for the master plan of law. The sub-plans that immediately precede this general master rule, which we have dubbed the teleology of Law, will inevitably be more akin to principles than to rules. For example, from the general value judgment of respect for human life there is borne the principle that killing is wrong, unless necessity demands it in defense of life or property. Of course, it was likely never codified in such a legalistic way, but this is generally what is meant by “Thou shall not kill.” This principle was then manifested into a rule, where a list of exemptions was acknowledged and the specific prohibition on murder was sanctioned.

First, there was the value judgment, then the general moral principle, and, only when given authoritative force, was there then a rule. We should note that Hart himself acknowledged this precedence of moral principles. In his model, primary moral rules, which are general moral principles, transform into legal rules once they are validated by a rule of recognition. According to Hart, this is the transition from pre-legal to legal society. He simply ignores their ongoing
influence in legal planning thereafter. Nevertheless, any legal proposition is a sub-plan of those that came before it. They hearken to the chain of sub-plans that inevitably lead us back to moral principles. In turn, these lead us to the master plan, the teleology of the legal system and the universal human values on which it rests. Thus, we have arrived at yet another way that Law and morality are inextricably linked. If the legal system is morally aimed, if it springs from the same natural human conditions that form morality, and if it is preceded and then shaped in practice by moral principles, then we cannot deny that the two phenomena are inseparable.

To conclude this discussion of principles, we will examine precisely what a natural law concept based in dignity means for the humble practitioner of law, for those who interpret it. On the interpretive stage, our framework is an essentially purposive one. It acknowledges that there is an essential character to the legal system composing the “spirit” of laws. When we view legality beyond manifested social fact and we re-incorporate moral facts, the spirit of the law naturally takes a more important interpretive role in evaluating statutes. As we have seen, calculating exactly what the spirit of a statute is will inevitably involve bringing values to bear in determining what is reasonable in light of our system’s over-arching purposes. In a system motivated by dignity, this would be a two-fold determination.

The interpreter must delimit what is reasonable for a functioning legal system to do in light of its underlying moral ends, which we have offered generally under the aegis of human dignity and defined particularly as bringing about conditions
that allow its subjects to strive after human goods. This will involve measuring up the content of a given statute in both a broad and narrow sense. Broadly, the interpreter must determine if the forbearances within the given statute are befitting of the teleology of the system, if the statute restricts a population’s ability to strive after human goods, if it is repressive, or if it is justifiable within the moral schema of the system. Of course, not all statutes will positively reinforce human dignity. For instance, statutes that determine traffic rules will not directly influence a population’s ability to pursue human goods, but at the very least, arbitrary statutes of this kind must not be found to detract from that capacity.

The broad view will also inevitably involve thinking in terms of reciprocity and tacit limitations on authoritative power. An interpreter must ask questions like, “Do the forbearances within a statute generally fit with what the population is willing to be subjected to?” “Does it minimally respect its way of life, its civic institutions, and does it treat it as more than means to a political end?”

Narrow evaluations of statutes will be reliant on the particular political morality of the interpreter and their system. Here, the interpreter will summon particular moral principles to determine the spirit of the statute itself, recognizing that each proposition of law is a sub-plan of those that come before it and that this chain of legal planning inevitably leads to the teleology of the system as a whole. This means that the over-arching purpose of law is contained within every single proposition of law within the system. This is more than an endorsement of purposive interpretation. Rather, I am proposing that it is a fundamental feature of
the legal system. To form new propositions of law, for the legal system to persist, we are required to measure those new propositions to its fundamental, underlying purpose. If that purpose is, as we have seen, an ultimately moral one, then it is only through principles and moral calculation that we may do so. We arrive then, at the all-important function of the principle, as the component of our legal system that allows it to persist, to change, and to strive towards an ever-brighter ideal, towards dignity.

V. Conclusion

We have used the general framework presented by H.L.A. Hart in The Concept of Law as a springboard to proffer a new system of natural law. As we have shown, moral facts pervade our understanding of the legal system, and the positivist conception cannot hope to explain them. The framework that we have sketched here, through analysis of Hart’s concept, rests on a broadened notion of the minimal natural contents of law. We have introduced a new way of framing the question that plagues the concept of law. We have chosen to ask, “What does law aspire to be?” rather than “What is law?” This has enabled us to examine moral facts within the system, vital as they are, in a new and informative light.

Where Hart bases his concept of natural content solely in the proposition that human beings desire to survive, we have based ours on the seemingly non-controversial proposition that human beings, in fact, desire much more than survival. Our biology has enabled us to communicate, to form friendships, to make art, and to propagate knowledge. No matter the particular political morality, these human judgments indelibly inform the over-arching aim of any legal
system. The teleology of the legal system is then to service human dignity, to create conditions where human beings can strive after these kinds of goods that are common to our species. This is a uniquely human enterprise and a product of intellectual creativity. At its root, this is what law aspires to do.

As we have seen, law is neither an all-or-nothing proposition of social fact nor a political accident. It is a construction closely tied, and bound by, the natural conditions of human dignity. When laws respect that dignity, they are successful. When they do not, the system can only survive by violence and suppression. We have characterized this, under the framework, as lawlessness.

Further, we have found that the principles that guide and shape our system are just as important as the rules codified within it. These inform and direct the moral aim of the system. They demand that, in hard cases, we do not forget that law reproduces and satisfies certain standards of morality, and they remind us of the inherent moral character of the legal system. The implications of adopting such a view, of viewing legality as an aspiration of the legal system rather than a logical quality, are wide and far-reaching.

Hart decried the dangers of allowing moral deliberations to seep into the conversation of what constitutes law, calling something like the system I propose a “narrow” concept of law. In reality, this system is anything but narrow. It does not entrap its practitioners into a limited view of what is legally possible. Encouraging the deployment of moral principles in jurisprudence frees law’s practitioners from the familiar failures of mechanical interpretation. When we freely acknowledge the moral contents of statutes, we are better poised to
recognize the possible morally iniquitous demands hidden within them. If, however, we shield moral propositions with real moral consequences in legalistic language and semantics, we are less likely to do the due diligence in ensuring that they are the right moral propositions.

In fact, the natural foundation we have laid, with human dignity at its core, leaves a vast array of possible legal propositions open for enactment in the future. Which ones we choose to give the force of law will be a matter of political and philosophical debate. Our framework simply demands that whenever we bring a proposition of law to debate, that we remember what it is we are doing as its practitioners, that wherever social control is involved, we are always studying its abuse, and that we constantly aspire towards a greater degree of legality.
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