THERE IS THERE THERE: DEFENDING THE DEFENSELESS WITH PROCEDURAL NATURAL LAW[1]

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I. INTRODUCTION

This century has produced fruits of science and technology never before imagined. Still, whenever we humans get too self-satisfied, the horrors of the century intrude to shatter our smugness. The recitation of horrors must give pause to anyone contemplating the future of the human race who has the empathy and intelligence to process the information, even those blessed with an innate optimistic streak. There was the Nazi killing of Jews and Gypsies,

1. "There is no there there." BARTLETT'S FAMILIAR QUOTATIONS 627 (Justin Kaplan, ed. 1992) (quoting Gertrude Stein referring to Oakland, California).

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Stalin's gulag, the Turkish slaughter of Armenians, Mao Tse Tung's cultural revolution in China, Idi Amin's Uganda, Nicolae Ceausescu's Romania, Pol Pot's Cambodia, the Argentine junta's street round-ups, torturing and killing, Saddem Hussein's killing of the Kurds and Shiites, the Serbian "ethnic cleansing" of Muslims, the Sudan and Rwanda. The ever expanding list sickens and numbs us. The rationalist assumption of the past that the edible fruits of human intelligence would be harnessed to produce a golden future of peace and harmony today seems the naive dream of an earlier time. For we have come to recognize the dark side of human nature that disturbs the sweet dreams of our more youthful sleep with its whispered threats of barely comprehensible destruction.

This article is written with these thoughts in mind. As a law article, it has only limited potential to deal with the seemingly insoluble problem of the destructive aspect of human nature. One area where legal scholarship can concern itself with this problem is to determine whether the concept "law" must be applied to whatever a government does to those living within the borders it controls even if the government engages in unspeakable brutalities. That is, is "law" equivalent to "state power"?

On one side of the legal divide are what are called positivists.[2] Positivists believe that law can be separated from morality. They accept "what is called the

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2. Legal positivists believe that a value-free descriptive analysis of the "law" can be provided. Natural law theorists attempt to show that there is a necessary connection between "law" and moral values. The article deals with the debate between positivists and natural law theorists. This division is not intended as exhaustive of the positions taken by members of all the various philosophic schools that interact with jurisprudence which could be mentioned: those supporting natural rights, such as, Thomas Hobbes and John Locke; the deconstructionists, such as, Jacques Derrida and Stanley Fish; the American legal realists, such as, Karl Llewellyn and Jerome Frank; the Scandinavian realists, such as, Alf Ross and Karl Olivecrona; adherents to Critical Legal Studies, such as, Duncan Kennedy, Mark Tushnet and Mark Kelman; or the radical feminists, such as, Andrea Dworkin and Catherine MacKinnon.

Some of the adherents of the more radical philosophic schools probably would reject positivism as well as any version of natural law. A deconstructionist assertion is that there is no basis for any position, legal or otherwise, that might be taken.

> The problem Derrida finds with [the Western philosophic] tradition seems to be that it searches for the single best answer to the questions it asks. The positive alternative is to realize that we are stuck with the "movement of play" in a centerless field that contains
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> nothing to "arrest[] and ground[] the play of substitutions.

Martha C. Nussbaum, *Skepticism about Practical Reason in Literature and the Law*, 107 HARVARD L. REV. 714, 725 (1994).

> "Reasons do not confirm or shore up your faith; they are extensions of your faith and are reasons *for you* because of what you already believe at a level so fundamental that it is not (at least while you are in the grip of belief) available for self-conscious scrutiny."

Id. at 727 n.59, quoting STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 7 (1993).

Seemingly, if there are no answers and there are no reasons, then there could be no basis for providing either a descriptive analysis of "law" as attempted by legal positivists or a necessary moral connection to "law" as attempted by natural law theorists.

American legal realists also rejected legal positivism.

> [T]he later realists, like Frank and Llewellyn, were explicit that a properly realist jurisprudence should aspire to be a value-free social science. Nevertheless, the realists rejected the positivist idea of law as sovereign commands, and, with it, the assumption of Bentham and Austin that the foundations of the modern legal system rested upon the law created through procedures of statutory legislation.

separability thesis—the idea, roughly, that there is no noncontingent link, no necessary connection between law and morality."[3] Some of the legal

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Instead, the realists claimed that the foundations of modern law rested upon the behavior of the courts.

CHARLES COVELL, THE DEFENCE OF NATURAL LAW 17 (1992).

Another basis for rejecting positivism is set forth by adherents of Critical Legal Studies. Tushnet, who accepts radical rule skepticism, summarizes the CLS view of the implications of that position for liberalism and the rule of law. He tells us that, given liberal premises about the human tendency to oppress and exploit others, "if the Realists were right, nothing stood between us and the abyss in which the strong dominated the weak, for the law, which liberals thought was our guardian, provided only the illusion of protection."

ANDREW ALTMAN, CRITICAL LEGAL STUDIES 154 (1993) (quoting Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 625 (1984)).

The various versions of the radical critique of traditional legal scholarship would also constitute a rejection of both positivism and natural law theory. Therefore, these critiques would reject a central thesis developed in this article, namely, that in their attempt to provide a value free descriptive analysis of legal systems, legal positivists adopt, in part, a version of natural law. The assumption of the article then is that positivists as well as some natural law theorists have something useful to say. Otherwise why write an article analyzing their theories? Therefore, in order to make the central points of the article without needlessly straying into other issues, the radical critique of positivism will be delayed until the last substantive section.

But one point is worth mentioning at the outset. One can easily agree with the American Realists that in the controversial case, the judge's personal and political biases might count more than the language of the statute or the precedents. One might also agree with the deconstructionists and CLS scholars that, at least in some instances, legal language is indeterminate. But this does not show that there are not myriad instances in which the rules of the legal system are fairly clear and non-controversial or that police officers, clerks within the governmental bureaucracy or judges will not comply with them. Assuming, contrary to my view, that one accepts the radical critiques as well founded, one still has to live one's life in a world which seems relatively well ordered. The way for people to reduce the degree of irrational and arbitrary governmental interference with their lives is to conform their behavior to the seeming ordinary meaning of available rules that have been enforced in the past. Thus, anyone seeking to make her life easier, including the deconstructionist, Critical Legal scholar and Realist, probably pays her taxes on time and stays within the speed limit while driving on busy urban streets. So the issues presented by the critics, namely, language indeterminacy, the political basis for decision making, class, race, gender or personal bias, etc., are unlikely to present themselves in the usual instance of the person's interaction with the state. Just like almost everybody else, the radical critic is likely to pay attention to the prohibitions and permissions etched by the legal system and live within the guidelines presented. "[T]he sort of skepticism modern thinkers [present] attacks certainty and justification rather than belief and commitment, and...leaves the rest of the practices of life unaltered." Nussbaum, *supra* at, 716–17. *See also*, Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985), quoted in part in MICHAEL J. GERHARDT AND THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY 255 (1993).

3. Daniel E. Wueste, *Book Review: Fuller's Processual Philosophy of Law*, 71 CORNELL L. REV. 1205 (1986). *See also*, H.L.A. HART, THE CONCEPT OF LAW (1961) [hereinafter HART, CONCEPT OF LAW]. Hart defines natural law as an assertion that there is, in some sense, a necessary connection between law and morality. *Id.* at 151-52, 181. Hart's definition of natural law is the one adopted in this article. Notice that this definition of natural law does not entail the traditional way of looking at the concept; namely, as put pejoratively by one critic: "a metaphysical theory of law [which] pretends to discover a natural law imminent in nature." HANS KELSEN, PURE THEORY OF LAW 77 (Max Knight trans., 1989) [hereinafter KELSEN, PURE THEORY]. What is being discussed need not involve the natural world, that is, the world outside of how humans conceive and understand it. Indeed, this very same pejorative critic acknowledged that his theoretical explication of the concept of "law" contained a natural law element: "If one wishes to regard [the basic norm] as an element of a natural-law doctrine...very little objection can be raised.... What is involved is simply the minimum...of natural law, without which...cognition...of law is [im]possible." HANS KELSEN, GENERAL THEORY OF LAW AND STATE 437 (1945) [hereinafter KELSEN, LAW AND STATE].

philosophers associated with this position are J.L. Austin,[4] Hans Kelsen,[5] H.L.A. Hart,[6] and Joseph Raz.[7]

On the other side of this debate are what are called natural law theorists. In contrast to the positivists, they assert that there is a necessary connection between law and morality.[8] Some of the legal philosophers associated with this position are Saint Augustine,[9] Saint Thomas Aquinas,[10] John Finnis[11] and Lon

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4. "The existence of law is one thing, its merit or demerit is another." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, (quoting J.L. Austin), *in* PHILOSOPHY OF LAW 64 (Joel Feinberg and Hyman Gross eds., 4th ed. 1991) [hereinafter Hart, *Law and Morals*].

"Now to say that human laws which conflict with the Devine law are not *binding*, that is to say, are not laws, is to talk stark nonsense. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1954).

5. Kelsen asserts that his pure theory of law "only describes the law and attempts to eliminate from the object of this description everything that is not strictly law," including ethics. KELSEN, PURE THEORY, *supra* note 3, at 1. Further, "from the standpoint of a cognition directed toward positive law a legal norm may be considered valid, even if it is at variance with the moral order." *Id.* at 68. "The concept of a legal obligation refers exclusively to a positive legal order and has no moral implication whatever." *Id.* at 117. As Joseph Raz puts it, "Kelsen does not regard the law as necessarily good or justified in any sense." JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 132 (1980) [hereinafter RAZ, LEGAL SYSTEM].

6. The vice of this use of the principle that, at certain limiting points,
> what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.

Hart, *Law and Morals*, *supra* note 4, at 74.

7. "It is not the business of legal theory to justify the law, but to explain it." RAZ, LEGAL SYSTEM, *supra* note 5, at 137. "Legal reasons are such that their existence and content can be established on the basis of social facts alone, without recourse to moral argument...." *Id.* at 212. "[W]hat is law is a matter of social fact, and the identification of law involves no moral argument." JOSEPH RAZ, THE AUTHORITY OF LAW 38 (1986) [hereinafter, RAZ, AUTHORITY OF LAW].

8. "[M]ost writers assume that [natural law and legal positivism] are not only mutually exclusive but also jointly exhaustive of the possibilities." Wueste, *supra* note 3 at 1205.

9. "'What are states without justice but robber-bands enlarged?'" HART, CONCEPT OF LAW, *supra* note 3, at 152 (quoting St. Augustine).

"'Where true justice is wanting, there can be no law. For what law does, justice does, and what is done unjustly, is done unlawfully.'" KELSEN, PURE THEORY, *supra* note 3, at 49 (quoting St. Augustine).

10. The law we have in us by nature is the sort of product of reason.... Since
> good is grasped as always desirable, the first premise in reason's planning of action is that good is to be done and pursued and evil avoided.... That includes, firstly, whatever accords with the natural tendency every substance has to try and preserve its natural being; so the law in us by nature commands whatever conserves human life and opposes death. Secondly, man naturally seeks whatever accords with his generic animal nature, whatever *nature teaches all animals*: mating between the sexes, and bringing up one's young. And thirdly, man naturally seeks whatever accords with the rational nature that distinguishes him as human: to know the truth about God, for example, and to live a social life; so the law in us by nature commands whatever is relevant to such inclinations, like avoiding ignorance and not offending those we live with.

ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, Sec. 94 1-2, 286-87 (Timothy McDermott ed. 1992).

11. [The principles of natural law] justif[y] regarding certain
> positive laws as radically defective, *precisely as laws*, for want of conformity to those principles.... The legal validity (in the focal, moral sense of 'legal validity') of positive law is derived from its rational connection with (i.e. derivation from)

Fuller.[12] The natural law theories can further be divided into two groups, substantive natural law theories and procedural natural law theories.[13] The former believe roughly that law must serve specified human ends,[14] while the

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natural law.... The basic forms of good grasped by practical understanding are what is good for human beings with the nature they have.

JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 24, 27, 34 (1980) [hereinafter, FINNIS, NATURAL RIGHTS]. For Finnis the basic values of human well-being are knowledge, life, play, aesthetic experience, friendship, practical reasonableness and religion.

12. I have insisted that law be viewed as a purposive enterprise,

dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it.... In opposition to this view it is insisted that law must be treated as a manifested fact of social authority or power, to be studied for what it is and does, and not for what it is trying to do or become....

....

...Th[e] effort to discover and describe the characteristics that identify law usually meets with a measure of success.... [The reason] lies in the fact that in nearly all societies men perceive the need for subjecting certain kinds of human conduct to the explicit control of rules. When they embark on the enterprise of accomplishing this subjection, they come to see that this enterprise contains a certain inner logic of its own....

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...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...

....

...If I were asked, then, to discern one central indisputable principle of what may be called substantive natural law—Natural Law with capital letters—I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire.

LON L. FULLER, THE MORALITY OF LAW 145, 150-51, 162, 186 (1964) [hereinafter referred to as FULLER, MORALITY OF LAW].

13. Jacques Derrida distinguishes between natural law theory and positivism on the basis that the former puts an emphasis on ends while the latter emphasizes process. "Natural law attempts, by the justness of ends...to 'justify' the means, positive law 'to guarantee'...the justness of the ends through the justification...of the means." Jacques Derrida, *Force of Law: The 'Mystical Foundation of Authority'*, DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 32 (Drucilla Cornell, et al. eds., 1992).

As this article indicates, I reject the assertion that natural law theory need only be concerned about ends and not with means. I also reject Derrida's inference that the positivists (or procedural natural law theorists) assert that a focus on legal means necessarily produces just ends.

14. The quotations provided in the footnotes for each of the natural law theorists mentioned above, Saint Augustine, Saint Thomas Aquinas, John Finnis and Lon Fuller, indicate their support for substantive natural law concepts. (Lon Fuller has also developed the procedural natural law approach which forms the basis of this article.) Ironically, however, several positivists provide descriptive analyses that substantive natural theorists might wish to adopt. One of these is Hans Kelsen, who provides the following brief survey of primitive law:

The oldest norms of mankind are probably those aiming at a restriction of the sexual impulse and the desire of aggression. Incest and murder are probably the oldest crimes, outlawry and blood revenge the oldest socially organized sanctions.

KELSEN, PURE THEORY, *supra* note 3, at 82.

Another positivist, H.L.A. Hart, indicates that, given such contingent facts as our human vulnerability to attack, it is (naturally?) necessary for legal rules to "veto...murder, violence and theft...." Hart, *Law and Morals*, *supra* note 4, at 76.

Elsewhere Hart states:

Among...rules obviously required for social life are those forbidding, or at least restricting, the free use of violence, rules requiring certain forms of honesty and

latter believe that the concept "law" as it is defined contains a procedural element that, if followed by government, provides moral protection to those dealing with government.[15] While Lon Fuller, like Aquinas, Finnis and the others mentioned above, presents a substantive natural law tradition, Fuller also develops a procedural natural law position[16] that is the inspiration for this article.

In this article I attempt to defend a procedural natural law position. This will be done through an examination of how we use language.[17] In doing so, no attempt will be made to analyze the substantive natural law position, neither to

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truthfulness in dealings with others, and rules forbidding the destruction of tangible things or their seizure from others.

HART, CONCEPT OF LAW, *supra* note 3, at 167.

15. The procedural natural law position will be explicated further below. *See infra* section II.

16. Some commentators have placed Henry Hart and Albert Sachs as taking the same procedural approach as Fuller did. See James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L REV. 371, 377 (1993) (hereinafter referred to as Boyle, *Legal Realism and the Social Contract*). Contrary to my view of Fuller, I view Hart and Sachs as dealing with the value of analyzing legal process in the context of Anglo-American law rather than making claims transcending any particular culture about what the ideal of law contains. One might also view John Rawls as a natural law proceduralist.

> From...the first of the two so-called principles of *justice as fairness* Rawls derived the concrete principles of justice as regularity—among which he listed the principles of procedural natural justice governing civil adjudication, together with all the various principles, like those of promulgation, non-retroactivity and clarity, that Fuller took to be core requirements of the internal morality of law.

COVELL, THE DEFENCE OF NATURAL LAW, *supra* note 2, at 55.

The difference between the approach taken here and that taken by Rawls is that whereas Rawls is attempting to determine what we would call "justice," I am attempting to determine what is included in one version of the concept of "law" itself without any formal effort to attach it to another concept called "justice" that contains a moral element. (A similar distinction can be made with respect to the analysis of "justice" by Hanna Pitkin. *See* HANNA F. PITKIN, WITTGENSTEIN AND JUSTICE (1972)).

17. It can be argued that it is through the use of ordinary language as it applies to widely used legal concepts that the positivists themselves come to reject the notion that "law" has any necessary moral connection. John Austin, for example, uses "the current of ordinary speech" as a basis for rejecting the notion that "reward" comes within the term "sanction." John Austin, *A Positivist Conception of Law*, *in* PHILOSOPHY OF LAW 30 (Joel Feinberg and Hyman Gross eds., 4th ed. 1991) [hereinafter Austin, *Positivist Conception*]. Hans Kelsen states that, "[t]o arrive at a definition of law, it is convenient to start from the usage of language...." KELSEN, PURE THEORY, *supra* note 3, at 30. He also states that in describing an organ of the state, such as a court, "we largely have to deal with the common use of language." *Id.* at 157.

H.L.A. Hart puts it:

> "[The utilitarians (Austin and Bentham) expressed] the important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was as vital to our understanding of the nature of law as historical or sociological studies."

Hart, *Law and Morals*, *supra* note 4, at 66. It should be noted, however, that Hart rejects the thesis that language usage can enable one to decide whether an evil regime acts lawfully: "Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage." HART, CONCEPT OF LAW, *supra* note 3, at 204.

By contrast, Joseph Raz rejects the usage of language as a guide, stating that "legal philosophy is not and was never conceived to be by its main exponents an enquiry into the meaning of [the word 'law'] or any other word" but rather "the study of a distinctive form of social organization." RAZ, LEGAL SYSTEM, *supra* note 5, at 209-10. (But on occasion Raz also seemingly refers to linguistic usage. At one point he states that "we can rely on our linguistic intuitions" to inform us which statements state rules and which do not. RAZ, AUTHORITY OF LAW, *supra* note 7, at 147).

support it nor to attack it.[18] The procedural natural law position is supported because, as we use language, we can judge and condemn a regime as violating the concept of "law", "legality" or "the rule of law"[19] when the regime fails to provide or follow certain procedures. But this use of legal terminology does not preclude our language being flexible enough so that the concept "law" can also be used to describe what that very same regime is doing.[20] In short, the assertion that as "law" is used in our language, it allows for a procedural natural law application does not preclude its also having a second inconsistent positivist application.[21] For example, we understand what is meant by the assertion that "the Nazi regime created the law in Germany" as well as the assertion that "the Nazi regime lacked legality." But it is the latter assertion that this article will attempt to defend.

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18. This is because I have not reached any definitive conclusions on this subject.

19. These three terms are used interchangeably in this article.

20. Hanna Pitkin points out:

> that words are not, or not merely, labels but often signals; that language is learned from instances of use, and consequently meaning is compounded out of instances of use: and that meaning is context-dependent, that meaning and sense need to be completed by context. These three theses further imply a simple but remarkable important conclusion: the various cases out of which the meaning of a word is compound need not be mutually consistent: they may—perhaps must—have contradictory implications. These inconsistent or contradictory implications are what give rise to conceptual puzzlement and paradox.

PITKIN, *supra* note 16, at 85.

Indeed, the positivist, Joseph Raz, provides examples of the two inconsistent uses of the term "law" in the same sentence, the clearest of them being the following: "I have been treating the rule of law as an ideal, as a standard to which the law ought to conform but which it can and sometimes does violate most radically and systematically." RAZ, AUTHORITY OF LAW, *supra* note 7, at 223.

The positivist, H.L.A. Hart, also recognizes the point that there are two ways of speaking about the concept "law." *See* HART, CONCEPT OF LAW, *supra* note 3, at 203-07. One way of speaking, the positivist way, focuses on the elements of the concept "law" and separates the concept from any moral concern. This way of reflecting the concept "law" is compatible with a linguistic usage that refers to a particular regime, (say, the Nazi regime) as having acted lawfully but immorally.

As developed in this article (rather than by Hart) the other way of speaking, the procedural natural law way, notices that elements of the concept "law," if adhered to by a regime, provide persons with some protection against the regime's arbitrary and irrational use of power. The person who is shielded to some extent against the regime's arbitrary and irrational use of power by its adherence to legal norms could easily regard this protection as morally desirable. If these legal norms are not followed by a regime (say, the Nazi regime), then it is also appropriate linguistic usage to refer to the regime as having acted unlawfully.

Hart believes, however, that "we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage." *Id.* at 204. Rather, for him the question is which version of linguistic usage is pragmatically more useful. He opts for the positivist usage because he believes it: (1) reduces confusion; (2) allows for noticing complexities; and (3) possibly leads to a stiffening of resistance to an evil regime by its separation of law from morality.

By contrast with Hart, I believe that it is unwise as well as unnecessary to ignore the procedural natural law usage. Specifically, I believe that: (1) regardless of its practical application, exploring the procedural natural law concept has value in its own right as a scholarly exercise; and (2) the concept can also have practical value. The practical value occurs because even immoral regimes sometimes care when neutral outside observers label what the regime's leadership is doing as outside the scope of legality.

21. The focus here on two uses of the term "law" is not intended to rule out other possible uses, such as, the law of the jungle, Islamic law (shari'a), Jewish law (the TALMUD) and Canon Law.

This article is divided into seven substantive parts. First, the article attempts to persuade the reader that, as we use language, the concept "law" has a procedural component which, if adhered to, limits a government's arbitrary and irrational use of power. This concept or idea of "law" provides a normative basis for judging whether a regime is acting in accordance with it.

Second, the actual procedural components of "law" are discussed. These include the regime's use of rationality and non-arbitrariness in making and enforcing rules. Rationality involves treating similars similarly and being able to justify distinctions made through reasons that could persuade a hypothetical neutral observer. Also included in the concept "law" is the regime's: making rules that proscribe conduct rather than status, publishing rules in advance so that people can attempt to conform their behavior to them rather than, say, enforcing retroactively made rules and determining guilt or innocence through a hearing where evidence is presented to and arguments made before an impartial decision maker rather than, say, using terror in the streets to promote the regime's ends.

Third, from the perspective of those who interact with government, the limitation on government's use of power imposed by "law" constrains government in a way that the interactor regards as morally desirable. The concept "law," thus, can be regarded as having a necessary moral element sometimes referred to as procedural natural law.

Fourth, the question is raised as to the source of the concept of "law" as limiting what government can do to persons. Is it a product of Western civilization? If so, does that make it inapplicable to other cultures? Or is it embedded in the human ability to think rationally and, therefore, has universal appeal whether or not its origin derives from Western sources?

Fifth, a standard objection to natural law theory is discussed, namely, that the theory derives an ought from an is. In response, it is asserted that the thesis presented here does not derive an ought from an is because its persuasiveness rests on an implicit acceptance of the desirability of there being a normative element which is part of the concept of "law" itself. There is no jump from what is to what ought to be because the analysis remains throughout at the level of what is. The argument is a two step process. In the first step, one asserts that "law" has a definitional element limiting what government can do while acting in accord with the concept. In the second step, one notes that this limiting element provides a buffer which protects people against government arbitrariness and irrationality. From the viewpoint of those dealing with government, this buffer provided by "law" can be regarded as a morally desirable constraint on government. Thus, the argument is that "law" does, in fact, have a definitionally necessary moral element, not that "law" ought to have a necessary moral element. To assert that "law" ought to have the necessary moral component that it does, in fact, have, is an unnecessary and irrelevant additional step.

Sixth, to some extent this analysis dissolves the traditional conflict between natural law theorists and positivists as to whether law has a necessary moral element.[22] This is because the positivists, who assert that law can be

22. It is worth noting that this effort to partially dissolve the conflict between positivists and natural law theorists is not at all similar to Professor D'Amoto's effort to resolve the conflict

described independent of any necessary moral element, themselves provide descriptive definitions of law.[23] I argue that if a government adheres to the descriptive limitations imposed by the positivists' definitions of law, then the government has also limited the arbitrariness and irrationality with which it can use power. Thus, in their efforts to describe "law," the positivists are doing the same thing, though not to the same degree, as the procedural natural law approach does. That is, they are both providing definitional limitations which protect persons against governmental arbitrariness and irrationality. From the perspective of those who deal with such a government, this constraint could be regarded as morally desirable and beneficial.

Seventh, a brief analysis of a representative radical critic of traditional legal scholarship will be provided.[24] This critique includes the idea that language is a matter of convention and, at least to some extent, indeterminate, that legal analysis, including that of procedure, cannot be separated from politics and that an emphasis on procedure such as undertaken here reinforces the domination of the status quo. In response, I will suggest that even if one accepts that language is partly indeterminate and wholly conventional, the concept of procedural natural law serves a valuable purpose. Further, while one can emphasize the political aspect of legal procedure, the purpose served by emphasizing procedure does not reinforce the status quo. Rather, a central theme of this article is that the emphasis on legal procedure as a necessary element of "law" serves to undermine the status quo.

II. UNDER ONE USE OF THE TERM "LAW", NOT JUST ANYTHING WHICH GOVERNMENT DOES COMES WITHIN IT

The philosopher, Ludwig Wittgenstein, asked, "isn't the meaning of the word also determined by...[its] use?"[25] His question implies his answer, namely, that to understand what a word or concept means, examine how it is used in language.[26] This is the approach taken here with the concept "law."

Several examples will be provided which it is hoped will show that the term "law" provides contours which limit what a regime acting in compliance

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between the two schools of legal philosophy by treating positivism "as a reductionist position within naturalism." Anthony D'Amato, *Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence*, 14 W. ONTARIO L. REV. 171, 198 (1975). Professor D'Amoto defends a universally shared notion of substantive justice: "I have some confidence that I am talking...about *universal* reactions" to, say, a playground bully or children making fun of a stutterer. Anthony D'Amoto, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527, 560 (1993). By contrast, I am not attempting to defend a substantive natural law version of justice under which positivism is subsumed. Rather, I am defending procedural natural law and leaving substantive natural law undiscussed. The defense of procedural natural law does not eliminate all the differences between positivism and natural law, particularly the substantive natural law version, nor does it subsume positivism under substantive natural law. Rather, the claim is made that positivists engage in a description of "law" that corresponds, in part, to that provided by procedural natural law.

23. The positivists discussed here are Austin, Hart, Kelsen and Raz.

24. Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

25. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 139, at 54 (G. E. M. Anscombe trans., 3rd ed. 1953).

26. Habermas makes a similar point: "[E]veryday language is also the medium by which the intersubjectivity of a shared world is maintained." JURGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 199 (Christian Lenhardt and Shierry Weber Nicholsen trans., 1991).

with it can do to those who interact with it. To put it another way, the descriptive language of "state power" has broader application than the descriptive language of "law."[27] The thesis can be expressed in simple terms: in one sense of our use of language, to describe a government's use of its power on those persons within its territorial control does not necessarily entail that it has exercised lawful authority over these persons.

To elucidate the thesis further, assume that it is rejected. The rejection of the thesis entails that the application of the term "lawful" to a regime's actions does not indicate that the regime's power to act has been limited in any way. If one takes this position, then the term "law" seemingly has no descriptive definitional limits other than whatever limits there might be on a regime's power to act.

Since our use of language is the basis for supporting the thesis that an appropriate application of the term "law" constitutes a descriptive limit on a regime's use of power, some examples are provided here.[28]

One example assumes that you are in a strange country. You are walking down a main street in the largest city. Suppose that you hear a siren and notice that it comes from a small truck coming toward you. The truck looks like a police van. The van stops in front of you and several uniformed men get out. Without notice to you, the men grab you, beat you into submission with their gun handles, drag you into the van and throw you bound hand and foot with your mouth gagged onto the floor. The van speeds off with the siren blaring and stops in front of a building that looks like a courthouse. You are dragged out of the van, and brought before someone who is dressed like a judge. The "judge" then informs you that you are undoubtedly guilty (without informing

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27. Interestingly, the positivist, Hans Kelsen, recognizes that "law" is not equivalent to "state power." He states that "[a] state is the political organization of a society," but that "[t]he legal system is only part of the norms constituting the political system... ." RAZ, AUTHORITY OF LAW, *supra* note 7, at 100.

28. The examples in the text are developed from the author's imagination in an effort to convince the reader that we use and understand the legal language employed to criticize what is being done by a regime. But our public discourse contains similar examples. One such example is the report sent to the Polish Government-in-Exile during World War II by the Jewish Socialist Party in Poland, stating, "without a shadow of doubt, that the *criminal* German Government has begun to carry out Hitler's prophecy that in the last five minutes of the war — whatever its outcome, he will kill all the Jews in Europe." MARTIN GILBERT, AUSCHWITZ AND THE ALLIES 42 (1981) (emphasis added).

Another example is the statement of Christine Loh, a member of Hong Kong's Legislative Council, made just a few years before China's take-over of Hong Kong on the difference between China and Hong Kong.

> China is in some ways a medieval country. They are still trying to grow by edict. We are modern, professional, international. China now has no sense of its own moral values: nothing but get rich quick. We in Hong Kong do have a moral basis, the values of the *rule of law*.

Anthony Lewis, *The Edge of the Wave*, N.Y. TIMES (Int'l ed.) July 19, 1993, at A15 (emphasis added).

One final example is the remark of Hanan Ashrawi, an articulate Palestinian leader, who chose to form a citizen's commission with the purpose of monitoring the proposed Palestinian government rather than join it.

> It's not easy to establish a citizens' rights commission. Nobody wants a group of high-powered people with credibility telling them, *"This is illegal* and this is unjust." But somebody has to have the guts to do it.

Claudia Dreifus, *Hanan Ashrawi*, N.Y. TIMES MAGAZINE (Int'l ed.), June 26, 1994, at 24. (emphasis added).

you of the charges), but that you are still entitled to a trial before having the death sentence imposed. A burly looking gentleman who claims to be your lawyer then informs the "judge" that a trial isn't necessary because you are obviously guilty. "Your lawyer" then smacks you a few times across the face with his gun handle, apparently for the sheer joy of it. Accepting the "lawyer's" assertion that no trial is necessary, the "judge" says, "very well, I am sentencing you to death by torture."[29]

But before being dragged out of the "courtroom," the gag is removed from your mouth and you are allowed to utter a few choice thoughts. Let us

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29. A fairly similar tale is told by a great novelist who was trained in the law. Although it can be read in several different ways, one way of reading Franz Kafka's *The Trial* is as an allegory about a state's "legal system" which violates the essential elements of the rule of law. Here are some excerpts uttered either by or to the accused, one K, or by the narrator.

(by K) "And the significance of this great [judicial] organization, gentlemen? It consists in this, that innocent persons are accused of guilt, and senseless proceedings are put in motion against them, mostly without effect, it is true, as in my own case. But considering the senselessness of the whole, how is it possible for the higher ranks to prevent gross corruption in their agents? It is impossible. Even the highest Judge in this organization cannot resist it."

FRANZ KAFKA, THE TRIAL 57-58 (1964).

(by K) "... [I]t is an essential part of the justice dispensed here that you should be condemned not only in innocence but also in ignorance."

Id. at 62.

(to K) "What you say sounds reasonable enough," said the man, "but I refuse to be bribed. I am here to whip people, and whip them I shall."

Id. at 107.

(narrator) "They wanted to eliminate defending counsel as much as possible; the whole onus of the Defense must be laid on the accused himself. [N]othing could be more erroneous than to deduce from this that the accused persons had no need of defending counsel when appearing before this Court.... For the proceedings were not only kept secret from the public, but from the accused as well....For even the accused had no access to the Court records."

Id. at 145-46.

(narrator) "The case had simply reached the stage where further assistance was ruled out, it was being conducted in remote, inaccessible Courts, where even the accused was beyond the reach of a lawyer. Then you might come home some day and find on your table all the countless pleas relating to the case, which you had drawn up with such pains and such flattering hopes; they had been returned to you because in the new stage of the trial they were not admitted as relevant; they were mere waste paper."

Id. at 154.

(to K) "[T]he Court, once it has brought a charge against someone, is firmly convinced of the guilt of the accused and...can never be dislodged from that conviction."

Id. at 187.

(to K) "[I]n these proceedings things are always coming up for discussion that are simply beyond reason, people are too tired and distracted to think and so they take refuge in superstition. [O]ne of the superstitions is that you're supposed to tell from a man's face, especially the line of his lips, how his case is going to turn out. Well, people declared that judging from the expression of your lips you would be found guilty, and in the near future too."

Id. at 217-18.

(to K) "[I]t is not necessary to accept everything as true, one must only accept it as necessary." "A melancholy conclusion," said K, "it turns lying into a universal principle."

Id. at 276.

(narrator) "But one of the hands of the partners was already at K's throat, while the other thrust the knife deep into his heart and turned it there twice."

Id. at 286.

assume that you try charm, flattery, bribery and threats, and nothing works. What would you say? Assuming you have embraced the legal positivist position that there is no necessary connection between law and morality, you could still attack what has happened to you on moral grounds.[30] You could call what was being done to you, "wicked, evil, indecent, immoral, barbarous and uncivilized."[31]

But suppose you realize from his sardonic smile that the "judge" obviously does not care one bit whether your moral sensibilities have been offended.[32] In your rage you then seek to hurl an invective at the "judge" which, given the "judge's" so-called job description, might actually have some impact. So you scream, "you call this law? This isn't law. It's a mockery of everything that law stands for."[33]

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30. The positivist, Joseph Raz, explicates Hans Kelsen's, his fellow positivist's, moral position thusly:

> Kelsen's relativism does not preclude the possibility or necessity of assessing the law by moral standards. He simply insists that every evaluation is valid only relative to the particular moral norm used which in itself has no objective validity. Consequently moral criticism or justification of the law is a matter of personal or political judgment. It is not an objective scientific matter and does not concern the science of law.

RAZ, AUTHORITY OF LAW, *supra* note 7, at 131. The fact that Kelsen's morality is relativistic would not preclude other positivists taking an absolutist moral stance.

Hart also asserts that a legal system may be deserving of moral opprobrium: "If with the utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed." Hart, *Law and Morals*, *supra* note 4, at 74.

31. You might also be tempted to use terms such as "unjust" and "unfair." But these terms, unlike the ones given in the main body of the text, which indicate only moral opprobrium, involve the combination of law and morality. Because these terms join together the two concepts "law" and "morality" that the text for heuristic reasons is attempting to separate, it would confuse the analysis to deal with them.

32. Anyone who thinks this example exaggerates how the more extreme dictators operate might take note of the following brief description of Idi Amin's Uganda by one of his earlier followers.

> At the start...you more or less knew what to do and what to avoid if you wanted to stay alive. You knew when to speak, when to shut up and what to say or not say.... What saved you yesterday turns out to be your death-warrant today. I have no friends, no colleagues left. They are all dead or escaped. But mostly dead.

WOLE SOYINKA, A PLAY OF GIANTS x (1984) (quoting Robert Serumaga).

33. "On the gallows men would actually complain, in their 'last dying words', if they felt that in some particular the due forms of law had not been undergone." E. P. THOMPSON, WHIGS AND HUNTERS 268 (1975) (describing 18th Century British law).

A premise of this assertion and indeed of this article is that totalitarian regimes sometimes attempt to convey the impression that they comply with the notion of "law" or "legality" or "the rule of law" in the sense described here. This attempt is illustrated by the Moscow show trials of the 1930s which Stalin used to justify getting rid of old communist comrades. One distinguished writer, Robert Conquest made the following observation:

> The trial [of Zinoviev and Kamenev] had on the whole been a success for Stalin.... [T]he outside world, whose representatives he had allowed in to authenticate it... was at least inclined not to reject it outright, from the start, as a fabrication.... The allegations were examined in detail. They were found convincing by various British lawyers, Western journalists, and so forth [though they] were thought incredible by others.

ROBERT CONQUEST, THE GREAT TERROR 105 (1990).

Thus, whereas the spokesperson for a totalitarian regime might argue that the critic who attacks the regime for violating moral norms is attempting to apply an inapplicable, relativistic morality (for example, "bourgeoisie morality"), the very same spokesperson might attempt to respond to the critic of the regime's so-called "legality" with an effort to show that the regime

If this verbal thrust seems understandable to you, you have stepped beyond what a legal positivist can appropriately say. This use of language transcends what logically can be said by someone who rejects the view that a descriptive definition of law is equivalent to whatever use of power a regime engages in. And even if you yourself would not use the language set forth in the example, if you would understand someone else using this language, then you are implicitly rejecting the view that our language only defines the term "law" as coextensive with a regime's power to act.

In this context, understanding the language of the example is designed to show that you are implicitly accepting that it makes sense to critique a regime's actions as unlawful using a standard of legality that exists outside of the regime's power relationships. In effect, your acceptance of this example as making sense indicates that you have adopted the terminology of procedural natural law.

The issue then is framed. If one rejects the linguistic thrust put forth above, then one accepts that the regime's determination of what law is within its borders is the only basis for judging what the regime declares to be law. Given this position, then there is no legitimate basis for rejecting what the "judge" has done in the name of law.[34] This view provides no "legal" protection to the person against the arbitrary and irrational excesses of a regime. But that by itself does not undercut the positivist's position. For under the positivist view one still can assert whatever moral (non-legal) arguments one chooses to assert against what the regime has done. What does undercut the positivist's position, however, is one's willingness to accept that, at least in some circumstances, how we use language is inconsistent with the positivist's assertion that the term "law" is equivalent to the term "state power."

Here is another example designed to show that our use of language reflects that a regime's acting in accordance with law is not necessarily the same thing as its use of power. Assume that in the last example you miraculously escape from the clutches of the "law" through some sort of ruse. You now decide to cut short your visit to this strange country and instead visit a neighboring country. Taking a busperson's holiday, you decide to visit the country's one law school. You are given a tour of the law school's facilities and even get to meet the provost. You inform her that in your country you are a lawyer with an especial interest in comparative procedural law and you wonder if you could sit in on a civil or criminal procedure class. The provost informs you that at her law school there is no course on procedure or on anything that could be its functional equivalent. You ask, "don't your lawyers and officials need procedures for deciding adversarial proceedings, and for determining what rules to apply and how to change them?" The provost then informs you that, "we don't have rules or need for procedures in our country, for the Maximum Leader determines what is done by indicating his whim at that particular moment."

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does, in fact, comply with the critic's concept of "legality." The regime's spokesperson might regard it as important to appear to respect "legality" even though the very same spokesperson might regard the critic's morality as unworthy of notice.

34. One is reminded of the remark of Humpty Dumpty to Alice, "When I use a word...it means just what I choose it to mean—neither more or less." LEWIS CARROL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 171 (1978).

The question to be asked here is, what would you think of such an approach to "law"? Would you think and presumably say, "how interesting, in our country we have something called procedure as part of our legal system, but in your country your legal system has managed to dispense with such a boring subject?" Or is it more likely that you would think (and presumably not say), "no matter what they call it, this can't be a legal system in any meaningful sense?" Again, if your unspoken response would be more a variant of the latter approach than the former, then you are treating the term "law" as inconsistent with a definition that equates it with state power. The same would be true even if you yourself would not use this sort of language but you would understand someone else using such language.

For a final example, assume that, contrary to your better judgment, you decide to stay in this strange country. As a result you get to meet the Maximum Leader at a party at his presidential palace. Attempting to engage in small talk, you ask him how the law functions in his country. He tells you that he is the law. Further, he states that as part of his law he dispenses with the trial stage and proceeds directly to the punishment stage. Indeed, his legal judgments are meted out right here in the presidential palace. He then escorts you to a large sound proof room next door to the dining room where prisoners are being tortured to death. He then says, "this is where I render the only legal judgments that matter in my country."[35] Presumably you would respond politely and quickly walk out of the room, take leave of the Maximum Leader and get out of the country. But what would you think about what you have seen? Undoubtedly, you would regard it as barbaric and sadistic. But wouldn't you also think that this was not law as you understood it?

If you might think this, how could you justify to yourself this form of self-expression? If law is whatever those in power say it is or do, then what you have just witnessed is surely law. Even if you were inclined to accept what you had witnessed as law, though morally repugnant law, you do not escape the realization that natural law language is an appropriate part of our discourse if you would understand someone else's regarding what you had seen as a gross violation of the ideal of law. For as long as you understand this use of language, then you are admitting that in one sense of the concept "law" does not encompass just anything that a barbaric government might do to those living within its borders. This use of the term "law" would exclude a regime's extreme arbitrariness, brutality, irrationality, killing without rational justification, thuggery and street violence.

This use of the concept of law produces contrasting judgments about democracies[36] and the more extreme dictatorships. The former are legal

35. Anybody familiar with the literature would be aware that the textual example of torture without benefit of a trial is not a figment of my imagination. But for those who would like a fairly similar factual account, here is a journalist's description of life in the Sudan.

> [O]utside the realm of the [Islamic] shari'a system, extralegal punishments have proliferated. The secret police pervade Khartoum... .[P]risoners of the secret police...have been whipped, sliced, burned, clubbed, shackled and hung by their wrists or ankles, mutilated, blinded, shocked and starved. They have been deprived of light, space, water, medicine, and sleep. They have been lowered into deep wells poisoned with animal carcasses.

William Langewiesche, *Tarubi's Law*, THE ATLANTIC MONTHLY, Aug. 1994, at 32.

36. A democracy that controls people that are not citizens (say, because they are of a different ethnic, racial or religious group) does not necessarily treat these subject people within

systems while the latter, at least in part, are not. Thus, to use a paradigm example, Nazi Germany's treatment of its Jews (stripping them of citizenship and killing them) clearly violated this ideal. So did Stalin's Soviet Union where "enemies" were rounded up in the middle of the night and without trial shipped to camps in Siberia where they would be likely to die.

Perhaps the notion that the concept "law" has an outer limit might be illuminated by way of an analogy with medicine. Suppose one were to go to a strange country, get sick while still at the hotel, and call the concierge requesting that a doctor be sent to the room. If a woman in a white hospital gown and a black bag were to come up to the room, the woman might look like a doctor. But when she takes a hatchet out of the bag and starts to swing it at you, you would decide soon enough that she wasn't performing as a doctor. Thus, the notion of a "doctor" has its limits. As one scholar put it, "A society in which doctors regularly poisoned their patients could not be said to have a medical system."[37]

Obviously, there are differences between medicine and law. Whereas medicine is advanced through the scientific method using empirical testing, law is not necessarily empirically based at all. By contrast with the use of the empirical methodology, a law is viewed as valid because it has been formulated in accordance with an authoritative norm. Also, there is a point to medicine, namely, curing the patient or at least not harming her. But it is an open question as to whether there is a point to law.[38]

Still, the relevance of the analogy also deserves mention. The concept "medicine" has an outer limit. Its purpose is to cure or heal persons who are in need and curable.[39] It is implicitly entailed by this understanding of medicine that a doctor would not deliberately act to cause a patient undesired harm unrelated to any curative effort. Despite the fact that she is referred to as "Doctor," presumably we would agree that a more accurate descriptive term of

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the contours of the ideal of legality. Examples of such states would include the ante bellum United States (with respect to its African American slaves), the apartheid regimes in South Africa (with respect to its blacks, coloreds and other non-whites) and Israel's control of the West Bank and Gaza (with respect to the Arabs). One way of examining these states is to question the extent of their commitment to democracy. In the context of this article, the proposed way to examine these states is to view them as not extending the rule of law to the disfavored groups.

But in defense of some democratic governments that have not afforded the rule of law to hostile individuals or groups within their borders, it could be argued that another value, namely, the value of the survival of the state and the society that supports it, is more important than the rule of law and therefore supersedes it. So, for example, Abraham Lincoln might have so argued when he suspended habeas corpus during the Civil War or Israeli spokespeople could argue so long as there remains legitimate fear for the survival of the state.

Of course, in some instances this defense can be questioned on several bases. One is whether a particular state is really in sufficient danger to justify its actions. Another is whether a particular state deserves to survive.

37. ROBERT S. SUMMERS, LON L. FULLER 39 (1984).

38. Philosophers of law who believe in substantive natural law, such as, Aquinas, Finnis and Fuller (the latter adhering to both a substantive and a procedural natural law position), also believe that "law" contains a purposive element, namely, to facilitate human activity. (By contrast, positivists who believe that "law" has no necessary moral element, such as, Austin, Hart, Kelsen and Raz, reject the notion that "law" contains a purposive element.) As one who adopts a purely procedural natural law position, it isn't necessary for me to deal with this question.

39. If a patient is not curable, then the purpose of medicine is to reduce pain and needless suffering.

the person in the example above would be that of hatchet murderess. For the woman would be acting beyond the outer limits of "medicine."

Similarly, it is asserted that in one sense of the term "law" also has an outer limit. Unlike "medicine" this limit to "law" is not analyzed by determining whether those practicing it use the empirical method and need not be analyzed by determining whether some purpose implicit in the concept has been served. The examples above are designed to indicate that the outer limit of the term "law" consists in its adherence to articulable procedures. If the regime grossly violates what are regarded as appropriate procedural constraints, then what is being done by the regime is not "law."[40] If the examples above are persuasive, this is one sense in which we use the term "law."

III. FURTHER EXPLICATION OF THE IDEA OF LEGAL PROCEDURE

So far, while a thesis of procedural natural law has been suggested, there has been minimal discussion of what constitutes procedure. A further discussion will be undertaken here.

One might say that as the term is used in law, procedure is contrasted with substance. There is good reason for hesitating to pursue this approach, however. As any law student who has struggled with the terms "procedure" and "substance" knows, it is difficult if not impossible to provide satisfactory, non-circular defining characteristics of these terms.

Another approach would be to illuminate the term "procedure" by examining the efforts of philosophers who have grappled with it. The views of three such philosophically oriented thinkers will be considered, Jurgen Habermas, H. L. A. Hart and Lon Fuller.

The philosopher Jurgen Habermas attempts to elucidate the concept of procedure in his *Moral Consciousness and Communicative Action*.[41] There, although he does not discuss the concept of legal procedure as such, Habermas

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40. Although not the position taken in this article, some commentators draw a similar conclusion from a substantive law prospective rather than the procedural prospective adopted here, namely, that unless the state adheres to certain substantive values, it ceases to comply with the rule of law. Several examples are provided here.

"[A] purported legal system that purposefully systematically deeply diminished the well-being of those living within its borders might be said to lose not only its legitimacy, but also its title as law." SUMMERS, *supra* note 37, at 40.

> [T]hose [natural law] principles justify the exercise of authority in community. They require...that authority be exercised...with due respect for the human rights which embody the requirements of justice, and for the purpose of promoting a common good... [A]ttention to the principles...justifies regarding certain positive laws as radically defective, *precisely as laws*, for want of conformity to those principles.

FINNIS, NATURAL RIGHTS, *supra* note 11, at 23-24.

> Despite [their] disagreements, [Oakshott, Hayek, Dworkin and Finnis] were nevertheless united in their conviction that the particular rights which defined the basic entitlement of the individual citizen to due process in the administration and enforcement of law ranked as fundamental requirements of justice. It was for this reason that the theorists were drawn to the conclusion that the justice of law depended, in part at least, on its conformity to an internal morality of procedure which was given in the very concept of law itself.

COVELL, DEFENSE OF NATURAL LAW, *supra* note 2, at 27.

41. HABERMAS, *supra* note 26.

does describe his theory of discourse ethics as a procedural concept. Habermas' discourse ethics consists of three components, cognitivism (which requires explaining how moral judgment can be justified), universalism and formalism. As Habermas puts it, "discourse ethics...establishes a *procedure* based on presuppositions and designed to guarantee the impartiality of the process of judging."[42]

Another effort to delineate procedure is provided by the British legal philosopher, H. L. A. Hart in *The Concept of Law*.[43] There Hart distinguishes between primary rules of a legal system, which require persons to do or abstain from certain actions, and secondary rules, which do not impose similar duties on persons. Rather, these secondary rules are concerned with how "the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined."[44] It is the primary rules which correspond to the traditional legal category of the substantive element of law and the secondary rules[45] which roughly correspond to the procedural element.

Elsewhere, Hart provides additional commentary on the characteristics of the concept of "legal procedure":

> If we attach to a legal system the minimum meaning that it must consist of general rules—general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals—this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. It is, however, true that *one* essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of the law, not justice of the law. So, there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles. Natural procedural justice consists therefore of those principles of objectivity and impartiality in the administration of the law which implement just this aspect of law and which are designed to ensure that rules are applied only to what are genuinely cases of the rule or at least to minimize the risks of inequality in this sense.[46]

A third effort to describe the idea of legal procedure is provided by the American law professor, Lon Fuller.[47] Indeed, as noted above, Fuller is the principal exponent of the view that the concept "law" contains a necessary procedural moral element or what he calls procedural natural law.[48] One

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42. *Id.* at 122. *See also id.* at 121.

43. HART, CONCEPT OF LAW, *supra* note 3.

44. *Id.* at 92. *See also id.* at 78-79.

45. Specifically, Hart called these rules of recognition, change and adjudication. *Id.* at 89-95.

46. Hart, *Law and Morals*, *supra* note 4, at 77.

47. FULLER, MORALITY OF LAW, *supra* note 12; Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) [hereinafter Fuller, *Reply to Hart*].

48. One scholar regards Fuller's analysis as a deduction from the meaning of law: "[W]hen Fuller describes the 'morality that makes law possible,' he has in mind a set of formal criteria that define, or perhaps it would be better to say are deduced from, the very meaning of law." Boyle, *Legal Realism and the Social Contract*, *supra* note 16, at 372.

I have my doubts whether Professor Boyle is right about this. But whether he is or not, the version of procedural natural law developed in this article is not deduced from the meaning of law. Rather, the criteria developed here are elements that we are aware belong to the concept "the

version of Fuller's idea of procedural law (or what he sometimes refers to as the inner morality of the law) comes in the form of eight principles: (1) made laws "must be sufficiently general (i.e., there must be rules); (2) must be publicly promulgated; (3) must be sufficiently prospective; (4) must be clear and intelligible; (5) must be free of contradiction; (6) must be sufficiently constant through time so people can order their relations accordingly; (7) must not require the impossible; and (8) must be administered in a way sufficiently congruent with their wording so people can abide by them."[49] Elsewhere, Fuller fleshes out his idea of procedural law by explicating what would constitute a violation:

> When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality—when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.[50]

Another facet of Fuller's procedural morality is the requirement of "'justice itself'...that like cases be decided alike."[51]

From these philosophic efforts one can glean various aspects of procedure. Although Habermas' is delineating an ethical system rather than a legal procedure, his effort to articulate an ethical procedure produces criteria similar to one's understanding of the concept of law. One requirement that he sets forth is formalism, which seems akin to Hart's secondary rules. Another requirement is impartiality in judging. A third requirement is that arguments be available (and preferably used) which justify the result reached. Finally, universalism is required, which seemingly includes the treating similars similarly.

From Hart one learns that legal procedures are not directed at the general public in the way that the primary rules are. These primary rules are

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rule of law" because we recognize that as we use language these elements are generally included within the concept.

Another point worth mentioning before getting into Fuller's approach is Professor Boyle's assertion that Fuller's approach is based on a social contract: "... Fuller is clearly adopting the structure and rhetoric of the social contract in his analysis of the bonds between government and citizen." *Id.* at 377. *But see* COVELL, THE DEFENCE OF NATURAL LAW, *supra* note 2, at 50.

Whether or not there is an implicit or explicit social contract element in Fuller's analysis, I make no use of a social contract approach in defending the procedural natural law position taken here. Rather, as stated *supra*, the defense is based on linguistic usage. Whether or not one ought to comply with the laws of a government that itself complies with the procedural elements that make up the rule of law is not explicitly addressed.

49. SUMMERS, *supra* note 37, at 28. *See also*, FULLER, MORALITY OF LAW, *supra* note 12, at 39, 46-91.

Some of the same points are made by Lucas:

> A legal system must satisfy certain conditions if it is to count as a legal system at all: the laws must be generally known, and for the most part be of general application; there must be general agreement about what are to be accepted as laws, and a generally recognized way of adjudicating doubtful cases, with due regard for the arguments on either side.

J. R. LUCAS, ON JUSTICE 32 (1980).

50. Fuller, *Reply to Hart*, *supra* note 47, at 660.

51. SUMMERS, *supra* note 37, at 28.

exemplified by the prohibitory norms of criminal law and the laws empowering persons to enter into contracts. By contrast legal procedures are directed to those who interact with the government, particularly officials of the system, including judges and lawyers, to inform them how to decide what primary rules to apply, how to change the primary and secondary rules and how to decide legal disputes.[52] Even when Hart asserts that law consists of general rules, thereby including general primary rules, he is directing his assertion at governmental officials and what they must do to make law, thereby delineating secondary procedural rules. Further, Hart is asserting that these general rules involve human action, thereby seemingly excluding from the purview of law directives involving status. Another feature of Hart's analysis is the requirement that similars be treated similarly.[53] Like Habermas, he also indicates that objectivity and impartiality are components in the administration of the law, thereby seemingly requiring that decisions involving whether there has been a legal transgression be determined by an impartial judge based on the facts presented. Fuller, like Hart,[54] requires that laws be in the form of general rules. Also, like Hart[55] he seemingly requires that law deal with human activity rather than status.[56] Again, like Hart, he requires that the administration of the laws be done by judges based on the terms of the laws they purport to enforce.[57] Like Habermas he requires that similars be treated similarly.[58] And

52. This emphasis on rules is not intended to deny the value of Professor Kennedy's distinction between rules and standards and his emphasis on the value of the latter in judicial decision making. He refers to "the rule of law" model of decision making "as the deduction of legal rules from first principles, and the mechanical application of the rules to fact situations." Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1754 (1976). Under this vision the "system, defined in terms of some point in the past, has the qualities of internal consistency necessary to allow the judge to distinguish between usurpation and the simple extension of existing principles." *Id.* at 1762. By contrast, under a regime of standards "every case would require a detailed, open-ended factual investigation *and* a direct appeal to values or purposes." *Id.* at 1752.

The proposal in this article is that the concept "the rule of law" includes general rules which are often applicable and applied in individual instances. Many of these instances of application occur in a mechanical fashion at the administrative level, say by police officers and clerks, without there being any need for judicial resolution. But once a case does arise that requires a judicial resolution, it is not suggested that these rules can always be applied deductively or ever be applied mechanically. Nor do I intend to suggest that, as part of the concept "the rule of law", judges would necessarily eschew either political preferences (policies and principles) or what Kennedy would call the application of a standard, that is, the individualized case-by-case analysis in decision making.

But what would be rejected by an approach that respects the rule of law is the absence of general rules or their being widely ignored by ad hoc decision making that makes no effort at providing consistent application or the basis for future reliance either by the public or by officials of the regime.

53. Contrary to the intended point made by the examples set forth above and argued in this article, Hart does not explicitly provide a basis within his concept of "law" for critiquing a regime's decision to treat as dissimilar those whom an outsider would regard as similar. This issue will be taken up further *infra* notes 126–134 and accompanying text.

54. HART, CONCEPT OF LAW, *supra* note 3, at 121.

55. *Id.* at 24.

56. This is suggested by his requirements that laws be such that: (1) people can order their relations accordingly; (2) people can abide by them; and (3) they not require the impossible.

57. In explicating Derrida's deconstructionism, J. M. Balkin suggests the possibility that "all readings of legal materials are actually misreadings." If that is so, "then law cannot be a rational enterprise and the Rule of Law is impossible to achieve." J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 775 (March 1987) (hereinafter referred to as Balkin, *Deconstructive Practice*).

up to a point he agrees with Habermas that procedure must be rational, for he precludes contradiction and impossibility.[59] In addition, he requires that laws be publicly promulgated and prospective.[60]

The elements of procedure mentioned by Habermas (even though he is discussing his theory of ethical discourse rather than law), Hart and Fuller limit the concept of "law" in ways consistent with the examples provided at the beginning of this article.[61] That is to say, both the examples and the efforts of Habermas, Hart and Fuller reflect our use of language to delineate the boundaries where a regime's compliance with legality ends and its extra-legal use of power begins. Thus, if, as suggested, one accepts what these thinkers have articulated as reflecting the idea of legal procedure as it exists in our linguistic discourse, then one can articulate various aspects of the idea of procedural law. Here then are some of the aspects.

Rationality is one of the components of procedure gleaned from these writings and general analysis.[62] Although accessible to interpersonal and therefore public discourse, each person's judgment of whether a regime is acting rationally begins with her filtering that regime's actions through her understanding of what constitutes being rational.[63] Nonetheless, despite the subjective element, a person's judgment as to a regime's rationality includes the attempt to eliminate her personal biases.[64] Rationality includes non-

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What Balkin means by misreading is that there is no single way to read a text, that is, (to use his language) every reading of the text is partial. I agree that in many instances there are several reasonable ways to read a legal text. In such cases, a police officer, clerk or judge will have a fair degree of discretion. But as Balkin himself notices, there are limits to how much discretion one has in interpreting a legal text before the interpretation can reasonably be criticized as outside the permissible scope of interpretation. As Balkin puts it, "the deconstructive reversal has not demonstrated that all readings of Brown v. Board of Education, [347 U.S. 483 (1954)] are equally legitimate." *Id.* at 776.

58. In describing Fuller's view James Boyle asserts that it is "ethically thin." He also suggests that Fuller regards "autonomy [as] more legitimately the concern of the state than equality." Boyle, *Legal Realism and the Social Contract, supra* note 16, at 394.

Assuming that the concept "thin ethic" means that it fails to provide as many substantive answers to specific questions as a thick ethic, I would agree an ethic that emphasizes process is thinner than an ethic that emphasizes substance. Still, by ignoring Fuller's requirement of formal equality (that similars must be treated similarly), Boyle treats Fuller's ethic as thinner than it is. Also, as I assert below as an element of procedural natural law (though not in Fuller's version), equal treatment requires the regime's spokesperson to explain why it treats less favored persons within its control worse than it treats its own elite. Once this element is added to a procedural ethic, the regime cannot escape criticism as violating the notion of legality simply by asserting that those who come within its rules (namely, the less favored) are all treated alike. Once the legal ethic allows the critic to hold a regime accountable for its rules (assuming that they treat the elite differently than others), then the legal process ethic can no longer be criticized so easily as being insufficiently "thick."

59. SUMMERS, *supra* note 37, at 28.

60. *Id.*

61. *See supra* part II.

62. "Justice is reasonable. Some say it simply *is* embodied reason. Certainly, the word 'justify' in English simply means to give reasons." LUCAS, *supra* note 49, at 35.

63. "'If we cannot find a way to interpret the utterances and other behavior of a creature as revealing a set of beliefs largely consistent and true by our own standards, we have no reason to count that creature as rational, as having beliefs, or as saying anything at all.'" BJORN RAMBERG, DONALD DAVIDSON'S PHILOSOPHY OF LANGUAGE 82 N.8 (1989) (quoting Donald Davidson) [hereinafter referred to as RAMBERG, PHILOSOPHY OF LANGUAGE].

64. "A rational person will try to be alert to biases...and will take steps to correct those biases he knows of." ROBERT NOZICK, THE NATURE OF RATIONALITY 74 (1993).

arbitrariness.[65] It involves deliberation, evaluation[66] and determining how well what is at issue fits into a pattern of what is already considered rational.[67] Also, while whoever is making a judgment will be expected to interpret texts in light of how they are currently understood, this does not give license to interpret the

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See also JOHN RAWLS, A THEORY OF JUSTICE, 18–22, 142-44 (1971) (discussion of the original position).

65. A famous illustration of the principle that the concept "law" involves non-arbitrariness was penned by the 19th century logician, Lewis Carroll:

> At this moment the King... called out, "Silence!" and read out from his book, "Rule Forty-two. *All persons more than a mile high to leave the court.*"
>
> Everybody looked at Alice.
>
> "*I'm* not a mile high," said Alice.
>
> "You are," said the King.
>
> "Nearly two miles high," added the Queen.
>
> "Well, I shan't go, at any rate," said Alice; "besides, that's not a regular rule; you invented it just now."
>
> "It's the oldest rule in the book," said the King.
>
> "Then it ought to be Number One," said Alice.
>
> The King turned pale, and shut his notebook....
>
> "Let the jury consider their verdict," the King said, for about the twentieth time that day.
>
> "No, no!" said the Queen. "Sentence first—verdict afterwards."
>
> "Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"
>
> "Hold your tongue!" said the Queen, turning purple.
>
> "I won't!" said Alice.
>
> "Off with her head!" the Queen shouted at the top of her voice.

LEWIS CARROLL, ALICE IN WONDERLAND 149-155 (Scholastic Inc. 1989).

Although less humorously put, the positivist, Joseph Raz, agrees with Lewis Carroll's seeming demonstration that a legal system limits arbitrariness. As Raz puts it, there is a "difference between law and a system of absolute discretion.... Law has limits....It is a necessary feature of all legal systems...that they have limits.... [W]hy is it necessary that legal systems have limits? The answer is that the only alternative...is a system of absolute discretion." RAZ, AUTHORITY OF LAW, *supra* note 7, at 113, 115. "The rule of law is often rightly contrasted with arbitrary power. Arbitrary power is broader than the rule of law." *Id.* at 219.

While Raz's notion of the rule of law would allow for the ruler to implement whims, it would not allow for the constant changing of the whims whenever it suited the ruler's purpose.

66. "To term something rational is to make an *evaluation*; its reasons are *good* ones (of a certain sort), and it meets the standards (of a certain sort) that it *should* meet." NOZICK, THE NATURE OF RATIONALITY, *supra* note 64, at 98.

67. "The rationality of a belief is connected to a dense network of reasoning, inference and evaluation of evidence in chains of overlapping statements." *Id.* at 71.

"The idea of rationality is that of the ability, given certain present and particular data, to unite or relate them with other data in certain appropriate ways." JONATHAN BENNETT, RATIONALITY 85 (1964).

texts in a way that is wholly arbitrary.[68] It involves using the accepted[69] tools of deductive and inductive logic.[70] It involves treating similars similarly. If one is judging whether a regime has rationally decided a particular novel case that does not comfortably fit within the rules or precedent, one might use either Sartorius' concern to produce a logical fit,[71] or Dworkin's Herculean effort to combine fit with justification.[72]

But because we often use the concept "the rule of law" to judge a regime's whole body of laws and whether their application is rational, and therefore legal in the sense we are discussing, we must have a principle by which to judge which transcends the issue of how to decide a particularly hard or novel case. The principle is to begin with the assumption that human beings are similar.[73] Once one makes that assumption, the burden of persuasion then falls on the regime's spokesmen being able to explain and justify to a disinterested outside observer (namely, ourselves) any deviation from the principle.[74] For example, the Nazi spokesperson has to be able to provide a rational explanation to the disinterested outside observer why exactly the Germans belonging to the Nazi party, who were favored by the state, were different from the Jews and Gypsies who were being killed. So, in so far as the regime treats different people differently, the regime's spokesperson must explicate both the regime's general rules and its decision making process in

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68. The Rule of Law cannot operate unless legal materials (which in theory, are what bind persons) are iterable. The Rule of Law presupposes that the same corpus of legal materials will be applied to case A as to case B. If a different rule were applied in each case we would not have the Rule of Law. However, the author's present intent when she creates legal materials is not iterable; it is forever lost at the moment of creation. All that remains is the sign, the existence of which makes intersubjective communication possible. The iterability of the sign of the author's intent, and not the intent itself, is essential to the operation of the Rule of Law.... The statute's claim to legal authority is derived not from the intent of its framers, but from its present signification.... The purpose of the deconstruction is not to establish that any interpretation of the text is acceptable, but that the yearning for originary meaning... is incomplete... The intent theory and a theory of free play must coexist in an uneasy alliance in which neither can be master nor servant.

Balkin, *Deconstructive Practice*, *supra* note 57, at 782-85.

69. "'[W]e define a rational belief as one which is arrived at by the methods which we now consider reliable.'" RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 337 (1979) (quoting A. J. Ayer).

70. ALAN GEWIRTH, REASON AND MORALITY 46 (1978).

71. ALTMAN, CRITICAL LEGAL STUDIES, *supra* note 2, at 40.

72. RONALD DWORKIN, LAW'S EMPIRE 255 (1986).

73. [A]ll social rules treat individuals as abstractions. It is not only possible for individuals to be treated in that way; it is essential to human social life. Where there are social rules, people must regard themselves and others as 'just anybody' or 'no one special' to borrow Sartre's suggestive term....When the Jew, the black, or the homosexual is regarded as 'just anybody' by the existing system of legal rules, he or she is protected from the inclinations of intolerance and prejudice that could well play a role in more context-sensitive modes for regulating public and private power.

ALTMAN, CRITICAL LEGAL STUDIES, *supra* note 2, at 190, 193.

74. "Legality is also a concomitant of the principle of treating like cases alike...." LUCAS, *supra* note 44, at 77. Presumably the source of this aspect of the concept of "law" comes from the human capacity to engage in applied logic or algebra. In these disciplines, each instant of a class is treated as similar to every other instant of that class. Likewise, in "law" as a concept, one initially assumes that each person is a replicable instant of the class of humans, and then seeks to determine whether any purported differences among humans would justify treating them differently.

individual cases in language that would make some sense to a disinterested outside observer.

Other aspects of legal procedure include dealing with behavior rather than status,[75] publishing general rules in advance so that people have an opportunity to conform their behavior to them,[76] determining guilt or innocence through a hearing before an impartial fact finder[77] rather than, say, rendering "justice" through state sponsored forays of terror in the street.[78]

The listing of these characteristics is not intended as either independently necessary conditions of legal procedure or even as collectively sufficient conditions. Rather, these characteristics are generally present to a greater or lesser extent in what we call the rule of law. Thus, a regime can on occasion violate some of these characteristics and still be regarded as acting in accordance with law. It is not an all or nothing concept. Fuller himself noted the lack of any firm boundary in the concept when he stated, "To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel

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75. "[L]aw is defined as *a form of social organization through the systematic institution of supreme authoritative standards of conduct.*" Steven L. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 776 (1989).

The concept of "law" deals with behavior or activity rather than status; doing rather than being. But there are situations where what is widely regarded as a legal system deals with what seems more like status than action. For example, because of one's status as a wealthy person, some of one's wealth will be taken by the state in taxes to be redistributed to the poor; or because of one's status as a minor, one cannot drink alcohol; or because of one's status as an old person, one must retire from one's job.

Several points can be made in partial response. One of these, as noted in the text *infra*, is that the listing of characteristics of the concept "law" does not preclude that in some instances, what is accepted as an appropriate example of a legal system will in some particulars violate some of these characteristics. That is to say, the notion of a "legal system" does not have defining characteristics that always provide clear boundaries between what can be included and what cannot. To rephrase the point, what we regard as a legal system will generally have certain characteristics, but that does not mean that everything done by that system will always be describable as coming within these characteristics.

Also, there are degrees on the status-activity continuum. A paradigm example of a norm proscribing activity is a law which punishes x (a person) for doing y (say, committing murder). A paradigm example of a norm proscribing status is a regime's killing x (say, a Jew or gypsy) for being x. While the examples given at the beginning of this footnote, involving wealthy persons, minors and old people, regulate or proscribe status, they are not paradigm examples of proscribing status. This is because there is an element of activity involved. Assuming that x is about to do something which might result in the acquisition of wealth, she can expect that if she is successful the state will take some of it to be redistributed to the poor. Or if x (the minor or old person) does y (drinks alcohol, hides the fact that she is at mandatory retirement age and continues to work at a particular job), she is violating the law. Thus, because they involve elements of activity as well as status, these are closer to being borderline cases than to being paradigm examples of a regime's punishing status.

76. One might argue that the American legal maxim that "ignorance of the law is no excuse" is inconsistent with the importance of the legal rule being promulgated in advance so that a person can conform her conduct to it. But the point enunciated here is not that the person will necessarily know the law in advance of her action only that theoretically she could learn the law in advance of her action.

77. This liberal conception of the rule of law...incorporate[s]...
> institutional arrangements...[which] include an independent judiciary to interpret and apply the authoritative norms; access to the courts by the population; and the guarantee of a hearing, fairly conducted, in which the relevant parties to any case can present their sides of the story. Such arrangements are designed to secure the rule of law by insuring *due process* of law.

ALTMAN, CRITICAL LEGAL STUDIES, *supra* note 2, at 26.

78. These components of legal procedure will be discussed further *infra*.

of legal form can *so far depart* from the morality of order, from the inner morality of law itself, that it ceases to be a legal system."[79] Fuller's statement implies that a regime's departure from the idea of law in some contexts would not necessarily mean that the regime would be regarded as lacking legality in other contexts or lacking a legal system in general.[80] To support this thesis with an example, a paradigm instance of a regime's violation of the idea of law would be Nazi Germany's treatment of its Jews. But granting this would not necessarily mean that one would be forced to the conclusion that the regime lacked legality in other contexts, say, involving the marriages, divorces, contracts, property transactions and civil suits between non-retarded, heterosexual Aryan Germans in good political standing.

There is nothing particularly unusual about this approach. Indeed, it is quite consistent with the suggestion of Wittgenstein, who attempted to understand a linguistic concept in terms of the relationships of its uses rather than look for defining characteristics: "the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail."[81]

This focus on how language is used enables me to suggest another essential distinction between substantive natural law and procedural natural law. The difference lies in what the former theorists are focusing on as compared to the latter:[82] substantive natural law theorists, such as Aquinas[83] and Finnis,[84]

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79. Fuller, *Reply to Hart*, *supra* note 44, at 660 (emphasis added). The positivist Joseph Raz asserts that one difference between himself and Lon Fuller is that he (Raz) would allow for a greater departure from the concept "the rule of law" than Fuller would, that is, he would call a government institution a legal system even if there were a great degree of departure from the ideal of the rule of law.

> I have been treating the rule of law as an ideal, as a standard to which the law ought to conform but which it can and sometimes does violate most radically and systematically. Fuller, while allowing that deviations from the ideal of the rule of law can occur, denies that they can be radical or total... It is, of course, true that most of the principles enumerated [in Raz's enunciation of principles making up the ideal of the rule of law] cannot be violated altogether by any legal system.

RAZ, AUTHORITY OF LAW, *supra* note 7, at 223.

This quotation suggests that Raz, the positivist, explicitly agrees with Fuller that there is an ideal, "the rule of law", against which the actual is measure. The difference between them as to when the ideal has been breached by the actual becomes a matter of degree rather than kind.

But this analysis raises several questions: (1) How does Raz go about determining that there is such an ideal? And (2) Isn't Raz asserting a natural law position which is difficult to square with his positivism?

80. "... Fuller does say that one would have to take a holistic assessment of his eight criteria, and apparently agrees that one deviation from legality would not be enough to undermine a legal system." Boyle, *Legal Realism and the Social Contract*, *supra* note 16, at 391.

81. WITTGENSTEIN, *supra* note 25, at 32e. Wittgenstein referred to the similarities in the various uses of a concept as family resemblances. He also provided this illuminating analogy: "[T]he strength of the thread does not reside in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres." *Id.*

82. One way of examining the issue of the substance/procedure dichotomy in this context is to play the following mind game. Assume that you are at the information desk at the entrance to a great university in a country whose culture is relevantly similar to our own. You want to know where to go learn how the culture treats various issues. So you ask a series of question: (1) In what academic discipline would I learn about human nature?; (2) In what academic discipline would I learn about how government goes about satisfying human aspirations and goals?; (3) In what academic discipline would I learn about how government ought to further the common good?; and (4) In what academic discipline would I learn about what constitutes the rule of law?

are concerned about the nature of human beings and their basic needs,[85] to which law ought to conform,[86] whereas procedural natural law theorists, such as Fuller, are concerned about the meaning of the concept of "law" itself.[87]

IV. THE CONCEPT "LAW" HAS A NECESSARY MORAL ELEMENT

Various philosophers have attempted to define morality (or ethics, the two terms being used interchangeably here). William Frankena has defined ethics as philosophy "concerned with providing the general outlines of a normative theory to help us answer problems about what is right or ought to be done."[88] Alan Gewirth defines morality:

> as a set of categorically obligatory requirements for action that are addressed at least in part to every actual or prospective agent, and that are concerned with furthering the interests, especially the most important interests, of persons or recipients other than or in addition to the agent or the speaker.[89]

Some of the answers would suggest some overlapping. The answer to question one might include biology and psychology. The answer to question two might include political science and sociology. The answer to question three might include political science (theory) and philosophy. And the answer to question four might include philosophy and, you guessed it, law school. It is because there is a specialized discipline called the law which is concerned with what is distinctively legal, including what constitutes the idea of law, that we can refer to the search for the distinguishing methodology of the law as a procedural one.

83. [T]he law in us by nature... command[s] us to do whatever reason, when planning action, naturally grasps to be good for man, whatever man naturally seeks as a goal. That includes... whatever accords with the natural tendency every substance has to try and preserve its natural being... [,] mating between the sexes and bringing up one's young.

AQUINAS, *supra* note 10, at §§ 942, 287.

84. "The basic forms of good grasped by practical understanding are what is good for human beings with the nature they have." FINNIS, NATURAL RIGHTS, *supra* note 11, at 34. "[E]ach reader must ask himself: What *are* the basic aspects of my well-being?"... "What, then, are the basic forms of good for us?" *Id.* at 85–86. For Finnis, the answers are: life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion. *Id.*

85. Here is the language of a similar approach taken by a contemporary substantive natural law philosopher: "I am proposing that we cannot effectively go beyond positivism without first examining certain basic philosophical and theological assumptions concerning human nature." Frank S. Alexander, *Beyond Positivism: A Theological Perspective*, 20 GA. L. REV. 1089, 1090 (1986).

86. The antecedents of substantive natural law go back to Plato and Aristotle, "[who] recognized no fundamental conflict between the condition of political society and the condition of human nature. On the contrary, they conceived the state...as an ethical form of human association, which made possible the full realization of the ends essential to the rational nature of the human agent." COVELL, *supra* note 2, at 5.

87. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality—when all these things have become true of a dictatorship, it is not hard for me, at least, to deny it the name of law.

Fuller, *Reply to Hart*, *supra* note 47, at 660.

88. WILLIAM FRANKENA, ETHICS 5 (1963).

89. GEWIRTH, *supra* note 70, at 1.

Jurgen Habermas refers to rightness (or justice) as "our world of legitimately ordered interpersonal relations."[90] More simply morality has been defined in terms of "how one should treat other persons."[91]

If morality involves a normative or ought element in interpersonal relations, does it make sense to refer to the morality of an institution such as government? The suggestion here is that it does. One reason for asserting that it does is that, for the most part, the defining characteristics of morality provided above can be applied to an institution as well as to a person.[92] Another reason is that as we use language, institutions sometimes are judged by the same normative language as are persons. Consider the following examples. "In firing her without notice the corporation treated her immorally." "Even though legally there is now no way to recover the money, the union, by misappropriating its pension funds, violated its workers' rights." Or "the government acted unfairly when it informed the alien that if he left the country he could return, and then when he left refused to let him back in." One can argue whether it is the institution that has acted immorally or only some persons within it. But regardless of how one resolves this argument, we understand the use of language that ascribes moral terminology to institutions.

If one accepts that it makes sense to make moral judgments about governmental and other institutions,[93] what criteria would one use to make such judgments? One appropriate common sense criterion is to make moral

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90. HABERMAS, *supra* note 26, at 137. He adds:

> Moral intuitions are intuitions that instruct us on how best to behave in situations where it is in our power to counteract the extreme vulnerability of others by being thoughtful and considerate. In anthropological terms, morality is a safety device compensating for a vulnerability built into the sociocultural form of life.

Id. at 199.

91. TIBOR MACHAN, INDIVIDUALS AND THEIR RIGHTS 33 (1989).

92. Several of the stages of moral judgment developed by Colbe and Kohlberg that they apply to persons also have their correlates in the various elements developed supra as aspects of the "rule of law." For example, at stage three of their hierarchy of moral values, they posit: "[l]iving up to what...people generally expect of people in [their] role." Under the rule of law government too is expected to live up to its general rules, say, by not sanctioning people unless the government has promulgated general rules in advance which people can theoretically follow. At stage five Colbe and Kohlberg posit that the rules relative to the group "should usually be upheld...in the interest of impartiality." Here too, "the rule of law" involves impartially treating similars similarly. At stage six they discuss "universal principles of justice [and] equality of human rights" As I have been applying "the rule of law", it assumes a certain universality, including that regardless of culture, the least favored within that culture would prefer to be treated as the elite treats itself and a disinterested outsider can demand a rational explanation from the regime's spokesmen for any substantial variation in the regime's treatment of the two groups. Also, the notion of equal treatment is an aspect of "the rule of law." ANNE COLBE AND LAWRENCE KOHLBERG, 1 THE MEASUREMENT OF MORAL JUDGMENT 18–19 (1987).

93. A basic criticism of procedural natural law is that it is not a moral concept at all, but rather involves efficiency or social engineering. "[These principles] concern *effectiveness*, and we would not express them in moral terms." DAVID LYONS, ETHICS AND THE RULE OF LAW 77 (1984). Obviously, I disagree with this assessment. It might well be that from the perspective of those justifying a government's consistent application of procedural natural law, "effectiveness" or "efficiency" might seem the appropriate justifying terminology. But from the perspective of those interacting with government rather than government itself, which the writer regards as the appropriate basis for judging, the issue isn't simply one of efficiency. In addition, it involves the government treating the person fairly and morally. As Lyons himself recognizes, "[f]airness requires that a person have fair warning." *Id.* at 75. "It is generally accepted [as a moral appraisal] that one should be true to one's word." *Id.* at 122. Just as promise keeping is regarded as a moral concept both on utilitarian and deontological grounds, so too is the government's consistent application of the procedural principles mentioned here.

judgments about government on the same basis as such judgments are made in purely interpersonal relationships. To put it simply, that basis would entail understanding how people believe others including government ought to treat them.

It is suggested here that the concept "law," as its characteristics have been fleshed out above, provides some minimal protection to persons against government irrationality and arbitrariness. Because paradigm examples of "law" involve the publication of general rules in advance and the changing of these rules only through some recognized and published procedure, law provides some constancy through time. This enables persons to govern and plan their lives according to some structure insuring that their expectations will not be arbitrarily thwarted.[94] Because paradigm examples of "law" treat similars similarly,[95] one assumes that everyone similarly situated will be treated the same. And because paradigm examples of "law" include being able to rationally explain to a disinterested outside observer who is similar and who is dissimilar, the government cannot comply with the concept "law" when it arbitrarily

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94. A criticism of Fuller's inner morality of law is that its allowance of legal retroactivity is inconsistent with the supposed morality involved in enabling people to plan their lives in accordance with the existing laws.

> [I]t is hard to see how compliance with a set of principles that does not completely disallow retroactivity—because, as Fuller says, retroactive laws 'may actually be essential to advance the cause of legality'...necessarily guarantees that citizens have a fair opportunity to obey the law. Because lawmakers do not necessarily run afoul of Fuller's principles by enacting retroactive laws and because there can be no fair opportunity to obey such laws,...[w]e shall have to rest content with the weaker but plausible claim that compliance with Fuller's principles tends to secure this opportunity for citizens.

Wueste, *supra* note 3, at 1209.

I agree with the critic's point that Fuller's application of his own concept "law" does not always, in fact, enable people to comply with all of its specific requirements. Regardless of Fuller's view, I regard any instance of a retroactive "law" as inconsistent with a core aspect of the concept of "legality." Because a paradigm or core aspect of legality is its providing those people governed by it with a theoretical opportunity to comply with its requirements, a retroactive "law" violates this aspect of the concept. But this does not mean that a government's occasional use of retroactivity renders the concept of "legality" inapplicable to its actions in general. For the argument presented here as to what constitutes a government's adherence to the rule of law does not require that the government adhere to every aspect of legality in each instance of its actions. Indeed, there might be justifiable non-legal reasons for a government's violation of the principle of non-retroactivity. (Israel's trial of Adolph Eichmann comes to mind. *But see* HANNAH ARENDT, THE BANALITY OF EVIL (1964)). But if the number and character of the government's use of retroactivity increases to the extent that people cannot generally plan their lives with the expectation that their compliance with government laws will secure them protection from its sanctions, then the concept of "legality" would be violated.

95. This idea has been traced back to Aristotle.

> The essential idea of distributive justice Aristotle defined as that of *treating equals equally*. In this sense, the principle of distributive justice served to constitute the state as a form of human association whose members were bound together as equals under a system of publicly defined rules and laws. From this principle of distributive justice Aristotle derived, albeit provisionally, many of the principles that were taken by later theorists to be implicit in the very concept of the rule of law.

COVELL, *supra* note 2, at 5.

One essential difference between the explication of Aristotle's treating similars similarly, however, and that expressed in this article is that the article does not limit the state's legal obligation to those whom the state might regard as its members. Rather, if the state controls the person, whether or not it regards the persons as its citizen, it must treat the person similarly to what a rational outsider would regard as its relevantly similar citizens or else be able satisfactorily to explain to the rational outsider why it is not doing so.

singles one out from others for irrationally disparate treatment. Because paradigm examples of "law" involve determining the outcome of disputes through an impartial fact finder examining the evidence presented and relying on recognized and published procedures for deciding cases, people are somewhat protected against being arbitrarily deprived of their property or liberty. These are all examples of how the concept "law," if followed by government, provides persons with some minimal protection against government arbitrariness and irrationality.[96] It is assumed that if these persons are rational, they would believe that it would be morally desirable to have these protections against government.[97] "Law," thus, has a necessary moral element

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96. The rule of law plays such a central and abiding role in the theories of liberal thinkers because they judge it to be an indispensable mechanism for securing the dominant value cherished by their tradition—individual liberty....The law is an indispensable mechanism for regulating public and private power in a way that effectively helps to prevent the oppression and domination of the individual by other individuals and by institutions.

ALTMAN, CRITICAL LEGAL STUDIES, *supra* note 2, at 12-13.

97. There is a certain ironic congruence between the thesis developed in the text and some of the statements made by the positivist, Joseph Raz: "That the test [for the content and determination of the existence of the law] is *capable* of being described in value-neutral terms does not mean that no value or deontic conclusions are entailed by it." RAZ, AUTHORITY OF LAW, *supra* note 7, at 40.

Raz goes on to affirm, as a matter of fact, a core value which is also asserted in this article as the central, morally desirable feature of procedural natural law: "[We value the rule of law because w]e value the ability to choose styles and forms of life, to fix long-term goals and effectively direct one's life towards them." *Id.* at 220.

Thus, Raz is making two relevant assertions: (1) his value neutral descriptive analysis of "law" does not preclude value laden conclusions entailed by the description; (2) the value laden conclusion that he draws from his description is that we humans desire a regime's adherence to the rule of law because, as a result, we can plan our lives more easily.

But against an arguably similar position taken by Lon Fuller, the point has been made by Ronald Dworkin that Fuller's internal morality of the law provides people with strategic principles for following the law rather than moral reasons. Wueste, *supra* note 3, at 1216.

The writer disagrees with this argument. The basis for this disagreement is perhaps best expressed by the observation of Robert Summers.

> Admittedly, the choice may be a choice to obey an evil law, but the citizen will at least have had a fair chance to decide whether to do so or not, and to act accordingly. This is in itself moral, even though, overall, what the state happens to be doing to the citizen through the substance of the law is immoral. Observe that if the principles of legality were violated, there could be a dual moral objection: the citizen could be subjected to an evil law *and* could lack any fair opportunity to know of it in advance and act accordingly. Indeed, to punish or sanction a citizen for not following an evil (or even a beneficent) law that is unfollowable is also unjust. And injustice is indisputably immoral.

Robert S. Summers, *Summer's Primer on Fuller's Jurisprudence—A Wholly Disinterested Assessment of the Reviews by Professors Wueste and Lebel*, 71 CORNELL L. REV. 1231, 1234 (1986) (quoting ROBERT S. SUMMERS AND LON L. FULLER, JURISTS: PROFILES IN LEGAL THEORY No. 4, 37-38 (1984)).

Joseph Raz also rejects the assertion that there is a necessary connection between legal procedure and morality: "Fuller's attempt to establish a necessary connection between law and morality fails." RAZ, AUTHORITY OF LAW, *supra* note 7, at 224. But it is not clear to this reader why Raz believes that Fuller's attempt to establish a necessary connection between law and morality fails.

On the one hand he asserts that the rule of law is designed to minimize the danger of arbitrary power. But by virtue of Raz's definition of the concept "law," namely, as involving generality, clarity, and prospectivity, the law cannot bring about evils which altogether violate these values. Thus, according to Raz, since "the law cannot sanction arbitrary force or violations of freedom and dignity through [the] total absence of generality, prospectivity, or clarity," the

because rational self-interested persons would believe that government morally ought to provide them with such protection.[98]

One might argue that this minimal procedural morality entailed by the concept "law" does not, in fact, provide persons much protection against government arbitrariness and irrationality. It has been argued, for example, that Nazi Germany acted in accordance with Fuller's eight procedural

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law deserves no moral credit for not bringing about those evils which as a matter of definition it could not bring about. *Id.* at 224.

If, as one gathers, this is an adequate presentation of what Raz is asserting, there are several weaknesses to his position. For one thing, the moral issue is not whether the rule of law could commit evils which, as a matter of one's definition (Raz's, Fuller's or the writer's), it cannot commit. The moral issue is whether the rule of law, if followed by a government, restrains the degree of government arbitrariness and irrationality. It is government arbitrariness and irrationality that the rule of law restrains. So, to assert that there can be no moral merit in the law's adherence to principles which, by definition, it cannot violate is to miss the point: government's adherence to the rule of law has, to use Raz's terminology, moral merit because government can violate the rule of law. If, as argued here, the notion that a government's adherence to the rule of law restrains its arbitrariness and irrationality, then it seems appropriate to assert that there is a necessary connection between the rule of law and morality.

Another point worth making is that the argument presented here is not, as Raz would make it, that something called the law (Raz's terminology) or rule of law deserves moral credit. The issue is whether, from the perspective of the person who has to deal with the government, the government's adherence to the rule of law is morally desirable. The argument is that it is because the result of the government's self restraint is that the person can more easily plan her life. And she would regard this as morally desirable.

On the other hand, while Raz insists that law and the rule of law have no moral virtue, he also states that the rule of law does have a moral value: "[T]he rule of law is not merely a moral virtue." *Id.* at 225. "The special status of the rule of law does not mean that conformity with it is of no moral importance." *Id.* at 226. While one could articulate Raz's position in fuller detail, one still leaves his analysis wishing that he had been more careful to explicate his easy dismissal of Fuller's view.

98. "Some reasons for wishing officials to be faithful to the law are grounded on moral considerations. Considerations of fairness and autonomy, for example, argue against penalizing people for doing what they had no reason to believe would be punishable." LYONS, ETHICS AND THE RULE OF LAW, *supra* note 93, at 201.

The positivist, Joseph Raz, makes a point that might be confused with the argument that is put forth here.

> It may be a necessary truth that all legal systems conform to some moral values and that a system which violates these values cannot be a legal system. My claim is merely that if this is indeed the case then these necessary moral features of law are derivative characteristics of law. If all legal systems necessarily possess certain moral characteristics they possess them as a result of the fact that they have other properties which are necessary for them to fulfill their unique social role.

RAZ, AUTHORITY OF LAW, *supra* note 7, at 104.

One gathers that Raz is asserting that any existing legal system would need to have achieved a certain level of acquiescence by the population it controls, and that this might not be achievable without the system's having certain moral features. But this is a derivative, social fact about a legal system.

By contrast, the argument put forth in the text above is that the moral component of any legal system is not derivative, but rather consists in its necessary features as a legal system. A legal system, any legal system, definitionally has certain contours and limits, which, if followed, limits government arbitrariness and irrationality. Because of this, persons who might interact with government can plan their lives more easily. The reliance factor resulting from the legal limits on government power is self evidently morally desirable, at least when contrasted with its obverse.

While Raz does not assert that the concept "law" contains a necessary moral element, he does indicate that it enables people to plan their lives. As he puts it: "Legal systems...do provide guidance to individuals." *Id.* at 112.

principles[99] with the exception to some extent that the law be promulgated.[100] But this is much too cribbed an application of Fuller's procedural views. Apart from the specifics of Fuller's eight principles, his procedural morality also excluded the use of government thugs to engage in forays of terror in the streets.[101] In the case of the Jews, this principle was violated on Kristallnacht as well as when they were rounded up to be deported to the concentration camps.

In addition, the Nazis violated the principle enunciated by Fuller that similar cases be treated similarly.[102] While the Nazis could (and did) argue that Jews, Gypsies, the retarded, communists and homosexuals whom they killed were not similar to those protected by the regime,[103] under the analysis developed here this argument would satisfy the requirement only if the regime's spokespeople could persuade the disinterested neutral observer that the alleged dissimilarity was sufficiently rationally based.[104] If the argument rested,

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99. These principles are that law must be: (1) sufficiently general; (2) publicly promulgated; (3) sufficiently prospective; (4) clear and intelligible; (5) free of contradictions; (6) sufficiently constant through time so people can order their relations accordingly; (7) does not require the impossible; and (8) administered in a way sufficiently congruent with its wording so people can abide by it. FULLER, *supra* note 12, at 39.

100. FRIEDMANN, LEGAL THEORY 18–19 (1967).

101. Lon Fuller, *Fidelity to Law*, 71 HARV. L. REV. 630, 660 (1958) [hereinafter, Fuller, *Fidelity to Law*].

102. Fuller stated that justice requires that like cases be treated alike. SUMMERS, *supra* note 37, at 28. Fuller also scornfully referred to Hart's positivistic limitation on this principle as being limited to the administration of the law rather than as part of the concept "law" itself. Hart, *Law and Morals*, *supra* note 4, at 624. Fuller's response is that "[Hart] does make brief mention of 'justice in the administration of the law,' which consists in the like treatment of like cases, by whatever...perverted standards the word 'like' may be defined." Fuller, *Fidelity to Law*, *supra* note 101, at 645–46. Thus, Fuller seems to accept the view of legality that includes a requirement that real similars be treated similarly, and not just deference to the government apparatus' determination of who is similar and who is not. At any rate, this is the view I develop in this article. This requirement entails a standard of rationality that excludes the arbitrary and perverted distinctions that might be created and defended by the regime itself.

In contrast, the positivist, Joseph Raz (like Hart) explicitly disagrees with this characterization of the rule of law: "Racial, religious, and all manner of discrimination are not only compatible [with] but often institutionalized by general rules" which accord with the rule of law. RAZ, AUTHORITY OF LAW, *supra* note 7, at 216.

103. These primarily consisted of politically correct, normally intelligent, Aryan heterosexuals.

104. One writer, commenting on the notion of legal objectivity within a society, states that the only objectivity that he can accept in the law "which makes a clear claim about the nature of the reality it seeks to explain" is its being available for public criticism and evaluation. Noel B. Reynolds, *The Concept of Objectivity in Legal Reasoning*, 14 W. ONTARIO L. REV. 1, 24 n. 74 (1975).

My view is that this approach of subjecting a regime's laws and their application to public evaluation will produce a general consensus, at least in extreme cases, even cross-culturally. That is, in an extreme case disinterested outside observers from various cultures will generally agree on their assessment of a regime's assertion that it is treating similars similarly. In order to insure this consensus, an additional assumption might be required, namely, that these disinterested outside observers might need to have a certain level of intelligence, education and knowledge of science, such as, what constitutes a human being.

Let us assume that a regime propounds two separate laws. First, that any person who seeks a job in a police department must meet the height requirement of being at least five foot eight inches tall. And second, that any person residing within the territory controlled by the regime who is a member of a disfavored racial group will be killed regardless of the person's age or prior indication of hostility to the regime. I believe that, regardless of the culture of the disinterested observers, the second of these two laws will appear both clearly irrational and also more irrational than the first of these laws. That there might or might not be a consensus as to the

at least in part, on the assertion that every Jew was "a parasite, a bacillus and a vampire, bleeding all nations to death and corrupting all that was noble and healthy in 'Aryan' and German life",[105] then the burden would be on the Nazi supporters to provide evidence to the neutral disinterested observer that there was sufficient rational evidence to support this claim. Simply the assertion by Hitler that this was so, while it would satisfy the regime's apologists, would not be sufficient to satisfy the rational outside observer.[106] Indeed, it is difficult to

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existence of a rational justification for the first law (because it presumably is a borderline case) would not detract from the likely consensus as to the second law.

105. GILBERT, *supra* note 28, at 13.

106. Here, for example, is John Rawls' explication of rationality.

> [N]one [of the parties in a veil of ignorance] would urge that special privileges be given to those exactly six feet tall or born on a sunny day. Nor would anyone put forward the principle and conceptions that basic rights should depend on the color of one's skin or the texture of one's hair....The rationality of the parties and their situation in the original position guarantees that ethical principles of justice have this general content. Inevitably, then, racial and sexual discrimination presupposes that some hold a favored place in the social system which they are willing to exploit to their advantage. From the standpoint of persons similarly situated in an initial situation which is fair, the principles of explicit racist doctrines are not only unjust. They are irrational.

RAWLS, A THEORY OF JUSTICE, *supra* note 64, at 149.

Rawls' concept of rationality is based on a presupposition that a person would be ignorant about her special circumstances and characteristics. To that extent one might argue that his concept of rationality would allow for conclusions that differ from those set forth in this article. But I believe that a similar result is reached through the requirement that the spokesperson for the regime convince a disinterested outside observer of the rationality of the regime's differential treatment of those it favors as against those it disfavors. In the usual instance a per se distinction based on race or sex would no more convince the rational outsider than a per se distinction based on eye color. (But occasionally, distinctions based on race or sex might be rationally justified. If one is directing a movie about life in Sweden, he might be justified in rejecting the application of a Japanese actor from the lead role.)

F. A. Hayek also provides an analysis compatible with that developed here.

> As a true law should not name any particulars, so it should especially not single out any specific persons or groups of persons....The requirement that the rules of true law be general does not mean that sometimes special rules may not apply to different classes of people if they refer to properties that only some people possess. There may be rules that can apply only to women or to the blind or to persons above a certain age.... . Such distinctions will not be arbitrary, will not subject one group to the will of others, if they are equally recognized as justified by those inside and those outside the group.

F. A. HAYEK, THE CONSTITUTION OF LIBERTY 153–54 (1960).

Hayek's notion that distinctions between groups have to be justifiable to those outside as well as inside the group favored by the distinctions is of a piece with my assertion that the concept "the rule of law" implies that a regime's distinctions between groups can be rationally defended to neutral outsiders.

One critic of the notion of equal treatment, Peter Westen, has written that the concept is empty of content, that it is circular. Because it depends for its force on there being an external substantive right to which the persons seeking equal treatment are comparing themselves, what is really being demanded is that the person be given her due in accordance with that right. As Westen puts it: what this comes to is that "people who by a rule should be treated alike should by the rule be treated alike." Peter Westen, *The Empty Idea of Equality*, reprinted in part in STEPHEN E. GOTTLIEB, JURISPRUDENCE 493 (1993).

A response to this thesis is that it does not seem to be an empty idea to ask of the regime to justify to the neutral outsider how it distinguishes between those people whom it favors and those whom it disfavors by providing articulable, rational reasons for the distinction. Since what is at issue is whether the regime's basis for distinction between some favored ones and others is rational, requiring the regime's spokesperson to explain the basis for the distinction in language that actually explains the distinction rather than simply repeats it is neither circular nor empty.

imagine how the regime could even begin to satisfy this assertion about every member of the disfavored groups.[107]

What these procedural requirements of "law" provide is an argument on behalf of the weak against the strong[108] that the latter are violating a widely

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107. The notion that similars must be treated similarly is a moral concept as well as a legal one. As a moral concept it was expressed by Kant as the Categorical Imperative: "'Act according to a Maxim which can be adopted at the same time as a Universal Law.'" IMMANUEL KANT, THE PHILOSOPHY OF LAW 34 (1887). But in Western civilization, it goes back to the Old Testament injunction, "love thy neighbor as thyself." *Leviticus* 19:18. This concept appears to have universal appeal, for variants of the Golden Rule exist cross-culturally. In Judaism, there is Hillel's response to the non-Jew asking for the Torah to be explained while standing on one foot: "What is hateful to you, do not do to your neighbor." H. T. D. ROST, THE GOLDEN RULE 69 (1986). In Christianity, it is expressed in Matthew 7:12 as: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them." *Id.* at 76. In Islam, "Seek for mankind that of which you are desirous for yourself." *Id.* at 103. In the Hindu Mahabharata: "Do not to others what ye do not wish Done to yourself." *Id.* at 28. In the Pali canon of Buddhism it states: "*Make thine own self the measure of the others,* And so abstain from causing hurt to them." *Id.* at 39. In Confucianism, "What you do not want done to yourself, do not do to others." *Id.* at 49.

One problem with this approach to ethics is that (with the exception of the Buddhist version) it does not protect the recipient of the action from the actor who would be willing to receive what he gives. The sadist who beats the masochist could respond to the critic, "but I enjoy being beaten (being the masochist) just as I enjoy beating (being the sadist)." If the recipient were, in fact, not a maso-sadist, then this response of the sado-masochist, while satisfying the Golden Rule, would not satisfy the recipient.

The Kantian ethic surmounts this difficulty by requiring the actor to consider the recipient's ends as well as his own. Under this ethic a sado-masochist could not beat the unwilling non-sadomasochist. Habermas' strong version of this ethic is that: "Only those norms may claim to be valid that could meet with the consent of all affected in their role as participants in a practical discourse." HABERMAS, *supra* note 26, at 197.

But a legal system cannot function on the assumption that it requires the consent of everyone. Because self-interested people have different, conflicting needs and interests, these needs and interests cannot always be harmonized. A government that attempted Habermas' ethic would break down into anarchy. But even the weaker Kantian version of this ethic, one that takes into account the needs and interests of the recipient as well as the actor, could not always fit into a legal system. Sometimes a government which operates what would generally be considered a legal system has to ignore the perceived needs and interests of its citizens, as when it sends them off to battle to possibly die.

So the defense of the notion of a "legal system" must by necessity employ the still weaker claim of treating similars similarly. But this defense does not have to deal with the ethical dilemma posed above, namely, that it cannot effectively respond to the sado-masochist. For the sadist, say, Hitler or Stalin, has not inflicted the same punishment on himself as he inflicts on others allegedly similarly situated. Once the totalitarian leader is unable to convince the rational disinterested outside observer that he is not similar to those whom he is killing he has no additional effective argument to provide. The leader's response, "I too enjoy being tortured and killed," can be met with incredulity since the totalitarian leader has chosen to do the torturing and killing rather than to be the recipient of these actions. His being alive is a sufficient refutation to the assertion that he is as much the masochist as he is the sadist.

108. It might be argued by deconstructionists or marxists that, contrary to this position, the concept of "law" is always an instrument of the strong, that is, those in power. Thus, any protection the weak think they might obtain from the existence of legal procedures are either illusory or sops provided by the power so as to make them acquiesce in the status quo power relationships.

Much of this critique of legal procedure can be accommodated within the thesis developed here. Even if the rule of law reflects and reinforces the political status quo, it nonetheless provides some desirable protection against the power elite's more irrational and arbitrary use of its dominating power. One can assume that wealthy, heterosexual, white males dominate a particular society. Still, despite their subordinated status, poor, lesbian, African-American females are more fully able to maximize whatever opportunities are available to them if the government dominated by the male power elite adheres to the rule of law.

accepted conceptual norm. Contrary to a substantive natural law criticism,[109] this is a powerful verbal weapon in the hands of those appealing to enlightened world opinion on behalf of the disfavored. For, if a regime cannot rationally explain to the outsider why it treats its disfavored differently than its favored, then to that extent the regime's use of power to achieve its aims violates the limits imposed by the concept of "legality". Even if the regime's leadership does not care that the regime is violating this concept, enlightened world opinion often does care. The unanswered assertion that the regime has violated "legality" becomes a useful verbal weapon on behalf of the regime's victims in mobilizing enlightened world public opinion (and perhaps action) against the regime. Indeed, this might be virtually the only weapon the weak and defenseless have at their command against the regime's guns.

Assuming that the regime's spokespeople could not otherwise satisfy the outside judge that its actions came within with the notion of "legality," the spokespeople might attempt the following ploy:

> You (Americans, Western Europeans) use the term "legality" to include certain procedural requirements. In our country we use the same terminology in a more honest way to describe what is really occurring. To put it simply, the elite of every country uses its governmental apparatus to favor those whom it wants to favor and to oppress and destroy those whom it seeks to harm. In some countries (yours for example) a phony distinction is drawn between the government's use of power to achieve its ends by whatever means and its use of certain so-called legal procedures to achieve the same ends. But this distinction is artificial because "Western legality" is the disguised use of pure power. In our country, therefore, we have decided to collapse this phony distinction between "power" and "legality" and just use the one term, "legality" to refer to everything that government does.[110]

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109. Here is one substantive natural law version of the criticism against Hart's positivist version of the doctrine (limiting the demand that similars be treated similarly to the administration of the law within a particular legal system):

> Nor are the requirements of justice in my account restricted (like Hart's) to what can be drawn from the principle "Treat like cases alike and different cases differently." My theory includes principles for assessing how one person ought to treat another (or how one person has a right to be treated), regardless of whether or not others are being so treated; in my usage, a principle forbidding torture in *all* cases is a principle of justice.

FINNIS, NATURAL RIGHTS, *supra* note 11, at 163–64.

By contrast, my argument is not subject to this criticism. One reason is that the concept "law" seems inconsistent with the use of torture either as a means of obtaining evidence or as a basis for punishing someone for having committed a legal violation. (Even Hart could make that argument for, as he asserts, society's punishment for voluntary offenses is "[offered to] individuals including the criminal the protection of the laws on terms which are fair." H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 22 (1968) [hereinafter HART, PUNISHMENT].

One could also argue that the application of torture could not, in fact, be done consistent with the principle of treating similar cases similarly. In order to satisfy this criterion, the regime's leadership would have to be able to voluntarily and in good faith agree to be tortured if it were engaged in a similar violation of the law. Unless that leadership were capable of sufficient masochism to honestly apply the same principle to itself, that leadership would be in a poor position to argue convincingly to enlightened world opinion that similars were being treated similarly. Thus, contrary to Finnis' understanding of Hart, torture almost certainly could not be justified under this version of the principle of treating similars similarly.

110. This hypothetical response is inspired by the remembered language used by apologists for the former Soviet regime. When questioned about the lack of democracy and legality in the Soviet Union, the response was that the nation had a superior form of democracy and legality; namely, Soviet democracy and Soviet legality. One purported reason why Soviet

The response to this ploy consists in the assertion that the same term can be used to refer to two different (though related) concepts. It is an effort by a regime's spokesperson to take advantage of the positive connotation of the term "legality" by using the same term to denote a different concept which, if properly understood, would have a negative connotation, namely, the use of raw state power. Once this ploy is understood as a deliberate effort to confuse the issue by using the same term to refer to different concepts, it has no more persuasive value than if the regime's spokesperson had used different terminology to refer to the regime's activities, say, the language of power.[111]

V. WHERE DOES THE CONCEPT "LAW" COME FROM?

What is being asserted here is that we have a concept called "law" which can be applied to certain activities of government, but not necessarily to all activities of government. This concept "law," if used in the way discussed, protects persons against some of the more extreme forms of government arbitrariness and irrationality because it provides procedures that persons can rely on and follow in an attempt to live their lives without becoming enmeshed in the government bureaucracy. From the person's perspective these legal procedures that government complies with constitute a morally desired limitation on government power.

But where does this concept "law" come from? What is the epistemological basis of the concept? Did I make it up? Is it something that developed as part of Western civilization and has no relevance outside of that context? Is the concept some sort of floating universal, a Platonic ideal[112] or Justice Holmes' "'brooding omnipresence in the sky?'"[113]

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legality was superior was because, unlike Western law which pretended to transcend the interests of the dominant bourgeois class, it was honestly based on the dominant class interest, namely, that of the proletariat.

111. Perhaps a sports analogy might be helpful. Assume that one goes to a strange country and asks the hotel concierge whether baseball is played in her country. She says, "yes," and shows you a man in a broom closet using a paddle to hit a ball against the wall. The fact that she informs you that "here we have a baseball game in progress" does not mean that you are witnessing baseball as you understand the term. Rather, she is using a term familiar to you to refer to some other activity.

112. LORD LLOYD AND M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 53 (5th ed. 1985) [hereinafter referred to as LLOYD AND FREEMAN, JURISPRUDENCE].

Having to respond to this accusation ought to confront anyone defending a natural law position. But the need for a response is not limited to someone taking the natural law position. It also confronts any positivist who appears to be asserting that the concept "law" has describable defining characteristics who does not limit these descriptive characteristics to what has been observed thus far. To the extent that the positivist makes a claim that his articulated descriptive characteristics extends beyond specific empirically observed legal systems, how can this claim be justified? Thus, when, for example, the positivist, Hans Kelsen, asserts that his pure theory of law is "objectivistic and universalistic," he too can be asked, "on what basis can you assert this?" *See* KELSEN, PURE THEORY, *supra* note 3, at 191. Indeed, his reference to his concept as universalistic suggests more a Platonic ideal than an empirical study.

Indeed, even a positivist as empirically cautious as H. L. A. Hart seems to be making an assertion about a concept that transcends any particular national culture:

> Most educated people have the idea that the laws in England form some sort of system, and that in France or the United States or Soviet Russia and, indeed, in almost every part of the world which is thought of as a separate 'country' there are legal systems which are broadly similar in structure in spite of important

differences. Indeed an education would have seriously failed if it left people in ignorance of these facts....

HART, CONCEPT OF LAW *supra* note 3, at 2-3.

If this were truly an empirical statement, Hart would have amassed a good deal of evidence to support his position that virtually every country's legal system had similar features. This he does not do. He also would be willing to amend his analysis if newly studied countries were, by chance, to have entirely different legal structures. This too he appears unwilling to do. Thus, Hart seems to be asserting that his descriptive characteristics for the concept "law" have (nearly?) universal application.

Hart also observes that the positivist John Austin was not content to make empirical assertions about the nature of law. Rather, his concept of law reads like a universal claim: "The theory does not merely state that there are *some* societies where a sovereign subject to no legal limits is to be found, but that everywhere the existence of law implies the existence of such a sovereign." *Id.* at 65.

Joseph Raz is less clear. At one point he seems conscious of the possible dilemma created by attempting to give a descriptive analysis to a concept which appears to have universal application, and specifically rejects the idea that his descriptive analysis has any universal application: "It is not part of the argument that a similar conception of legal systems is to be found in all cultures and in all periods." RAZ, AUTHORITY OF LAW, *supra* note 7, at 50.

The assumption here is that Raz is asserting that the conception of a legal system can change, depending on the culture, that is, it is culturally relative. But perhaps what he is asserting is that the concept of a legal system might not apply to every culture. This latter possibility would be consistent with Raz's statements quoted below, but like that quotation it does raise the question whether the concept exists independent of its current linguistic usage in a particular culture.

Elsewhere, he seems to adopt the view that his analysis of "law" does have universal application.

> The first [assumption I wish to mention] is the assumption of universality according to which it is a criterion of adequacy of a legal theory that it is true of all the intuitively clear instances of municipal legal systems. Since a legal theory must be true of all legal systems the identifying features by which it characterizes them must of necessity be very general and abstract. It must disregard those functions which some legal systems fulfill in some societies because of the special social, economic, or cultural conditions of those societies. It must fasten only on those features of legal systems which they must possess regardless of the special circumstances of the societies in which they are in force. This is the difference between legal philosophy and sociology of law. The latter is concerned with the contingent and with the particular, the former with the necessary and the universal... . Legal philosophy has to be content with those few features which all legal systems necessarily possess.

Id. at 104–05.

Raz also makes what appears to be universal claims for what he calls the social functions of law. These claims are beyond what could be expected from a cautious descriptive empirical account of the legal institutions that he has so far examined.

> It seems to me that all legal systems necessarily perform, at least to a minimal degree,...social functions of all the types to be mentioned, and that these are all the main types of social functions they perform....

Id. at 167.

> There are four primary functions.
> (a) *Preventing Undesirable Behavior and Securing Desirable Behavior*
> (b) *Providing Facilities for Private Arrangements Between Individuals...*

Id. at 169.

> (c) *The Provision of Services and the Redistribution of Goods*
> ....
> (d) *Settling Unregulated Disputes*.

Id. at 171 & 172.

But Raz goes even further than this in adopting a universal notion of the concept or ideal of "the rule of law." He illustrates "the fruitfulness of the formal conception of the rule of law" by presenting a list of eight principles which he regards as "similar" to Fuller's own list. *Id.* at 218 n.7. These principles are: (1) all laws should be prospective, open and clear; (2) laws should be relatively stable; (3) particular legal orders should be guided by open, stable, clear and

The easiest of these questions to answer is that I did not make up the concept "law." Rather, I am employing a concept explicated by such legal thinkers as Lon Fuller and H.L.A. Hart[114] among others.[115]

The origin of the concept came from what we would call Western antecedents, particularly Greece and Rome.[116] And today it is a concept arguably most extensively employed in countries that would be viewed as the heirs of Greece, Rome and the Judeo-Christian world views. These countries would particularly include the democracies of Western Europe, North America, Australia, New Zealand, and Israel.[117] If this is so, then what value does the concept "law" have except that it happens to be employed by persons in the countries of the West?[118]

Three possible bases for the concept are provided.[119] One might be called the pragmatic basis. A second might be called the legal conventionality basis. And the third might be called the rationality basis. The first basis for the concept assumes arguendo that what is being discussed is a concept that developed in the West[120] and is employed in the West. Even if so, this would

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general rules; (4) the independence of the judiciary must be guaranteed; (5) the principles of natural justice must be observed; (6) the courts should have review powers over the implementation of the other principles; (7) the courts should be easily accessible; and (8) the discretion of the crime-preventing agencies should not be allowed to pervert the law. *Id.* at 211–19.

113. LLOYD AND FREEMAN, JURISPRUDENCE, *supra* note 112, at 270.

114. *See supra* notes 34–37 and accompanying text.

115. *See* Part III *supra*.

116. LLOYD AND FREEMAN, JURISPRUDENCE, *supra* note 112, at 106–08; LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 15–46 (1987).

117. This list is not meant to exclude other countries, such as, Japan, whose history has interacted with the West but cannot so easily be described as the heir of Greece, Rome and Judeo-Christianity.

118. "Only the Occident has witnessed the fully developed administration of justice of the folk community... and only the West has known 'Natural Law'." Max Weber, *Economy and Society* (1968), *reprinted in* LLOYD AND FREEMAN *supra* note 112, at 587.

119. These responses are not intended as necessarily exhaustive.

120. An issue that is not discussed here is whether, regardless of how one explains the origin of the concept "the rule of law," it can be subject to substantial, further modifications in the future. The primary reason why this issue is not discussed (in addition to the fact that it would unduly lengthen the article) is that, I am not so sure of my answer as to explicate it in depth.

But it seems reasonable to say this much. If one adopts a rationalist approach, then presumably once the contours of the concept "the rule of law" are known, then the concept would not change in its essentials. (This view would not prevent people from using the same conceptual terminology, "the rule of law," to come to refer to some very different concept, such as, the whims of the ruling elite.) Alternatively, if one takes an empiricist approach, then the concept would change with the circumstances of language use. Thus, if one accepts the empiricist approach, what is described in this article is a concept whose meaning can be explicated as of the present time, but which is subject to change in the future. (But even under an empiricist approach, as the terminology "the rule of law" radically changed what it was referring to, one would be expected to accept that the same term was now referring to something descriptively different.)

For what it is worth, the positivists discussed below, with the exception of Raz, seem to assume that the concept "law" has a certain fixed meaning.

The difficulty of determining the degree to which the concept "the rule of law" can remain the same concept even though its referent changes has its corollary in the philosophic literature discussing scientific concepts. Here are the examples of two inconsistent views. "In the sciences, at least, disciplines are regarded as conveniences...and their boundaries shift or disappear as knowledge and understanding advance." NOAM CHOMSKY, KNOWLEDGE OF LANGUAGE, 35 (1986). "Katz insists that disciplines such as chemistry, biology, and so forth

not negate the concept's value. This is because, regardless of its source or origin, the concept has intrinsic value that can appeal to people across cultural boundaries.[121] The notion that people are provided some protection against a regime's irrationality and arbitrariness through that regime's maintaining procedural safeguards that come within the concept of "the rule of law" would seem desirable to people regardless of their backgrounds.[122] As mentioned above, I call this as the pragmatic basis for regarding "the rule of law" as having value transcending its Western origins. In this respect the notion of "law" is like other concepts that have transcended their cultural origins because they are perceived to have cross-cultural value. Indeed, "democracy" itself would be an analogous concept. Other analogous concepts might include "monotheism," "philosophy" and "public opinion polling."

A second basis for "the rule of law" is the legal conventionality basis. This basis assumes that the concept is culturally bound. Here no assumption is made that we could find substantial empirical evidence that the concept's use has spread from users of Western languages to human speakers around the world. Rather, under this alternative approach, the relevant speakers are those within the various legal communities in the world who share the Western sense of legality.[123] Assuming that one can determine which legal communities use legal

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have inherent, conceptually determined boundaries. Indeed, he regards the claim as uncontroversial, the alternative being a form of 'nihilism' that 'would turn the spectrum of well-focused academic disciplines into chaos.'" *Id.* n. 22 at 49 (quoting J. KATZ, LANGUAGE AND OTHER ABSTRACT OBJECTS, 79–80 (1981)).

121. This view can be justified, in part, by the fact that a number of articles in the UNITED NATIONS, A UNIVERSAL DECLARATION OF HUMAN RIGHTS, provide human beings with specific legal protections that are consistent with the procedural natural law protections provided here.

> Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.
>
> Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
>
> Article 9. No one shall be subjected to arbitrary arrest, detention, or exile.
>
> Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.
>
> Article 11. 1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense. 2. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.

Reprinted in GOTTLIEB, JURISPRUDENCE, *supra* note 106, at 153.

122. "[T]he principles of legality, which [Fuller] terms 'the inner morality of the law' were urged by [the positivist] Bentham on his contemporaries in the name of utility." H. L. A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, 357 (1985).

> For this law has found its way to a good many parts of the globe. But even here the rules and rhetoric have imposed some inhibitions upon the imperial power. If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million masked supporters.

E. P. THOMPSON, WHIGS AND HUNTERS, 266 (1975).

123. "Wittgenstein's solution to the skeptical paradox [that is, the question of determining whether someone is following a rule of the language] is crucially framed in terms of a

terminology in the Western sense,[124] then one can determine whether the actions of the governments where those legal communities exist are complying with this terminology.

A problem with this approach is that it is tautological. If one accepts the definition of "legality" provided by Western legal scholars, then all one is asserting is that certain actions of various governments comply or do not comply with this definition. There is no effort to show that the concept has universal applicability, only that it is applied where it is applied. What is the value of such an approach?

A response is that it has rhetorical value. A reference to the absence of legality in the Western sense can be used as the basis of a verbal attack on a regime that asserts it is acting legally. In itself, this has value. It has value because the regime that violates the Western sense of legality while at the same time its spokespeople assert that it is acting in accordance with this very same notion of legally is attempting to confuse (gullible) public opinion by trading in on the positive connotation which is associated with the Western use of the term "legality."[125] The clearing up of linguistic confusion serves a useful purpose in itself. But in this case the value in clearing up the confusion is substantially greater. This is because, even if one assumes that the concept "law" in the Western sense of legality does not have cross-cultural application, it seems to be widely perceived by many educated people around the world as a positive value, and its absence as a negative value.[126] Thus, the clearing up of a linguistic confusion has the additional important effect of casting regimes that pretend to be acting in accordance with "the rule of law" in the Western sense in a negative light for many. The rhetorical effect is not based on sophistry; that is, making an argument for the sake of arguing, but rather on a widely perceived understanding of what is morally desirable.

Another possible response to the question, "where did the concept 'law' come from?" is to suggest the possibility that it comes from human

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community of language users." CHOMSKY, KNOWLEDGE OF LANGUAGE, *supra* note 120, at 224.

There is nothing in Wittgenstein's approach which precludes the community of language users from being specialists in a particular discipline, such as, the Western concept of law, rather than speakers of a natural language, such as, English, Urdu. Here, for example, is one writer's description of language use in terms of those within a discipline rather than in terms of users of a particular natural language: "We can read [Thomas] Kuhn [THE STRUCTURE OF SCIENTIFIC REVOLUTIONS] as showing the ways in which scientific innovations change *the language of scientists* ." RAMBERG, PHILOSOPHY OF LANGUAGE, *supra* note 63, at 132 (emphasis added).

124. Both the descriptive analysis of procedure provided by Fuller *supra* and the positivists discussed below seemingly provide a good guide to what is included within this terminology.

125. [A] critique of the ideological co-option of language would also have to involve an account of incommensurability. It must be a critique that shows how a discrepancy between linguistic conventions and the meaning of what is said serves to disguise certain social facts. It should demonstrate how linguistic conventions have been manipulated, that is, how the production of meaning *via* a language has actually served to obscure linguistic understanding, and how this has served particular interests or social institutions.

RAMBERG, PHILOSOPHY OF LANGUAGE, *supra* note 63, at 133.

126. This observation is based in part on the staying power of such organizations as Amnesty International and the perceived importance of the U.S. State Department's annual list of countries that engage in human rights abuses.

rationality.[127] I call this the rationality basis. The assumption underlying this view (one that goes back to Immanuel Kant[128] and earlier philosophers[129]) is that, regardless of culture, rational humans[130] process information in certain common ways because their thinking mechanisms function in similar ways.[131]

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127. One might wonder how this possible reliance on human rationality distinguishes this version of natural law from the various versions of substantive natural law that I have chosen not to discuss. In both instances there is a reliance on human nature.

In response, I note two differences. One is that, contrary to the substantive natural law theorists, what is discussed here is legal procedure. What is being asserted is that human rationality might be the basis for asserting that there is a common human understanding that a government which acts in accordance with certain procedures is acting more desirably than one which acts arbitrarily and irrationally.

A second distinction is that whereas substantive natural law theorists assert that humans have certain needs which government ought to comply with, the assertion here is that rational humans commonly process information so that they believe it to be desirable for government to provide certain procedural protections which we have come to call the rule of law. As discussed infra, the substantive natural law position leads to the logical fallacy of deriving an ought from an is whereas this version of procedural natural law does not.

128. "Kant argued that all subjective experience of the natural world was governed by certain so-called *categories of the understanding*. For Kant, these categories were basic and original forms of human thought, which possessed a universal or *a priori*, validity." COVELL, DEFENCE OF NATURAL LAW, *supra* note 2, at 35.

> There is, therefore, only one categorical imperative. It is: Act only according to that maxim by which you can at the same time will that it should become a universal law... [I]t must...hold for all rational beings (to which alone an imperative can apply), and only for that reason can it be a law for all human wills.

Immanuel Kant, *Grundlegung Zur Metaphysik Der Sitten*, reprinted in part in STEPHEN E. GOTTLIEB, JURISPRUDENCE 448 (1993) [hereinafter Kant, *Grundlegung*].

Kant asserts that by virtue of his rationality, man is to be treated as an end by others and not simply as a means.

> Now I say, man, and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will... Such a being is thus an object of respect and, so far, restricts all (arbitrary) choice... The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.

Id. at 448.

Kant's analysis differs from that taken in this article in several respects: (1) Kant is referring to how humans ought to treat other humans, while the article deals with the concept "the rule of law" as a concept limiting government arbitrariness and irrationality; and (2) Kant is basing his analysis solely on human rationality while the article, while treating rationality as an aspect of legality, is asserting that from the prospective of the individual there is a universal human desire that one not be treated arbitrarily and irrationally by government. Nonetheless, the end result in both approaches is a moral argument against the arbitrary treatment of one person by another (person or government).

129. "Plato's answer [to the question of how we come to know what we know] was that much of what we know is inborn... Leibnitz argued that the idea is basically correct... Much of our knowledge is innate, he held..." CHOMSKY, KNOWLEDGE OF LANGUAGE, *supra* note 120, at 263.

130. There are differences among us, but these generally concern the

> facility with which we grasp the import of an argument. Some people are unable to follow abstract reasoning at all, but this is a deficiency in mental capacity, not a matter of exclusion from a select group who are endowed with inexplicable moral insight.

LYONS, ETHICS AND THE RULE OF LAW, *supra* note 93, at 191.

131. "It is important to bear in mind that the study of one language may provide crucial evidence concerning the structure of some other language, if we continue to accept the plausible assumption that the capacity to acquire language, the subject matter of [universal grammar], is common across the species." CHOMSKY, KNOWLEDGE OF LANGUAGE, *supra* note 120, at 37.

One philosopher praises Chomsky's views by asserting that he "has argued persuasively that at least some linguistic transformation patterns are inborn and occur in every human

While people in a particular culture might be first to express an awareness of a concept, that does not necessarily mean that the concept is culturally dependent. The fact that specific humans in a specific time and place are the first to verbalize the processing of information about the external world (the world that they perceive lies beyond themselves) in a novel but valuable way does not detract from this novel processing of information having cross-cultural appeal. To use an analogy from science, the fact that Archimedes was the first who articulated and verbalized the notion of specific gravity does not mean that use of the concept is limited to those living in ancient Greece.

The closest analogy to the notion of "law" that comes to mind is the notion that child rearing involves nurturing. Each parent starts as a novice, and yet one guesses that most parents, at least in theory, recognize that the task of child rearing includes attempting to inculcate the child's self-acceptance and self-love so that the child can later function adequately in the world.[132] The fact that the nurturing parent need not have read about nurturing a child in some expert's book on child rearing suggests that this insight is intuitively grasped by the typical parent regardless of the culture.

The arguable similarity of nurturing applied to child rearing compared to the value of the concept of "legality" lies in the fact that people across cultural divides would be likely to recognize in theory that the application of each concept is desirable.

If this is so, why then do regimes often violate the "rule of law?" The reason is suggested by focusing on where the analogy between the two concepts of nurturing children and the rule of law breaks down. At least on the surface

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language, so that they need not be learned at all. PITKIN, *supra* note 16, at 58. She goes on to suggest that some concepts. might be "necessary, natural human forms of life." *Id.* at 227.

Here is how another Chomsky supporter puts it: "So what are the modules of the human mind?... Being a bit foolhardy myself, I will venture a guess as to what kinds of modules, or families of instincts, might eventually pass [the] tests [of what is determined by the various relevant scientific disciplines].... [Included in the list would be] [j]ustice, [and a] sense of rights, obligations, and deserts." STEVEN PINKER, THE LANGUAGE INSTINCT, 419–20 (1994).

While Pinker's terminology seems more consistent with a substantive natural law position than the procedural one enunciated here, it does suggest that the desirability of being governed under "the rule of law" might also be included under what Pinker calls an "instinct."

Interestingly, the positivist Joseph Raz, as part of his defense of a version of the concept "the rule of law", notes that "it is *universally* believed that it is wrong to use public powers for private ends...." RAZ, AUTHORITY OF LAW, *supra* note 7, at 220 (emphasis added). Assuming that he is right, where does this universal belief come from?

132. The firm establishment of enduring patterns for the solution of
> the nuclear conflict of basic trust versus basic mistrust in mere existence is the first task of the ego, and thus first of all a task for maternal care.... [T]he amount of trust derived from earliest infantile experience...[depends] on the quality of the maternal relationship. Mothers create a sense of trust in their children by that kind of administration which in its quality combines sensitive care of the baby's individual needs and a firm sense of personal trustworthiness within the trusted framework of their culture's life style. This forms the basis in the child for a sense of identity which will later combine a sense of being "all right", of being oneself and of becoming what other people trust one will become.

ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 249 (2nd ed. 1963).

> When a mother is perceptive of her child's signals and responds promptly and appropriately to them her child thrives and the relationship develops happily. It is when she is not perceptive or not responsive, or when she gives him not what he wants but something else instead, that things go wrong.

JOHN BOWLBY, ATTACHMENT 357 (1969).

conscious level,[133] in child rearing the interest of the parent is perceived by the parent as the same as that of the children. Thus, the parent believes that it is part of his or her role to help nurture the child. And if, contrary to fact, the child were mature enough to articulate her views, she presumably would agree that she needed to be nurtured. But there is no similar theoretical assurance that a regime's rulers will regard it as in their interest to provide those living within their control with protection against their own irrationality and arbitrariness. The perceived self-interest of the regime's leaders, like that of King John at Runnymede before the signing of the Magna Carta, might be in opposition to the subjects' interests.[134] Thus, whereas it might be comparatively easy to provide empirical support for the notion that nurturing children is widely perceived as a positive value regardless of the cultural, a similar cross-cultural effort on behalf of the notion of "legality" runs up against the fact that those who have the guns (the regime's leaders) often perceive it as in their interest to ignore the concept that their subjects presumably would want implemented. Since there is no good way to poll the subjects of a totalitarian regime as to whether they would want the regime to honestly implement the notion of the rule of law, it might seem that the concept has little cross-cultural appeal. But from the perspective of the regime's subjects, just as from the perspective of the inarticulate children dealing with child rearing, it seems obvious that they would prefer to be treated better rather than worse and, therefore, would prefer the implementation of a concept that promised to treat them better. Just as Alice in Wonderland preferred the rule of law to the Queen's whims, so would rational subjects prefer the rule of law so that they could more easily plan their activities,[135] govern their lives and attempt to comply with the government bureaucracy.[136]

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133. One gathers that Freud would have suggested that unconscious parental motivation would be more complicated than this simple theoretical model indicates.

134. "In form a donation, a grant of franchises freely made by [King John], in reality a treaty extorted from him by the confederate estates of the realm, a treaty which threatens him with the loss of his land if he will not abide by its terms...." FREDERICK POLLOCK & FREDERICK W. MAITLAND, THE HISTORY OF ENGLISH LAW 171 (1968).

135. In his dispute with H.L.A. Hart, Lon Fuller asserts:

> I have insisted that law be viewed as a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it.... In opposition to this view it is insisted that law must be treated as a manifested fact of social authority or power, to be studied for what it is and does, and not for what it is trying to do or become.

FULLER, MORALITY OF LAW *supra* note 12, at 145; *see also* Fuller, *Reply to Hart*, *supra* note 47, at 632.

In contrast to Fuller's position in his dispute with Hart, which concerns whether "law" is purposive or not, my point is that the notion of "law", whether viewed as purposive or not, enables people to plan their lives according to its requirements. The difference can be exemplified by the following: Suppose a particular statute appears not to have any understandable purpose; it would still exemplify the concept "law" if it were clear enough so that it became interpretable in a way whereby it could be followed. In that case a person could plan her life in accordance with it.

136. Another possible key to understanding how a concept arguably can have cross-cultural appeal even though the leadership in some regimes does not abide by it or even recognize it is suggested by Habermas' use of the developmental psychology of moral consciousness developed by Kohlberg (and discussed briefly above) as indirect confirmation of Habermas' own moral philosophy. What Kohlberg suggests is that as the person goes through stages of physical and emotional development, he achieves higher levels of moral judgment. For Kohlberg, the highest stage of moral judgment is that of universal ethical principles. HABERMAS, *supra* note 26, at 119–33.

VI. PROCEDURAL NATURAL LAW THEORY DOES NOT DERIVE AN OUGHT FROM AN IS

David Hume asserted that an ought cannot be derived from an is.[137] In the past substantive natural law theories seemingly have committed this logical fallacy, thereby illustrating Hume's point. Thomas Aquinas, for example, asserted:

> [T]he order of the precepts of the natural law is according to the order of natural inclinations. For there is in man, first of all, an inclination to good in accordance with the nature which he has in common with all substances, inasmuch, namely, as every substance seeks the preservation of its own being, according to its nature.... Secondly, there is in man an inclination to things...*which nature has taught to all animals*, such as sexual intercourse, the education of offspring and so forth. Thirdly, there is in man an inclination to good according to the nature of his reason, which nature is proper to him. Thus man has a natural inclination to know the truth about God, and to live in society...to shun ignorance, to avoid offending those among whom one has to live....[138]

The reason why this is perceived as a fallacy is that even if one concedes that humans have the nature that Aquinas (or Finnis) ascribes to them, it is not at all clear why law ought to comply with this nature. Suppose the dictator interested in his own survival were to say: "I do not wish to make my legal system conform to human nature, for this would put my regime in danger; what I want is to keep my subjects in fear for this would better secure the continued existence of my regime which is all I care about." It is difficult to see how an analysis of human nature responds to the dictator's thrust. For what secures the dictator's regime's stability is an empirical question as to which he can be right or wrong, and not a question either about human nature or what ought to follow from it.[139]

Those who "climb[] to the top of the greasy pole" (BARTLETT'S FAMILIAR QUOTATIONS 435 (Justin Kaplan, ed., 16th ed. 1992)(quoting Benjamin Disraeli) in totalitarian countries must, by necessity, be at least as ruthless as their opponents. This very quality of ruthlessness would seemingly be inconsistent with a highly developed moral consciousness. Thus, the leadership in such countries would be inclined to maximize their power with a minimal concern for self restraint based on moral or other concerns. This would explain why they often ignore the rule of law.

137. DAVID HUME, A TREATISE OF HUMAN NATURE, BOOK III, Pt. 1, § 1. William Frankena, a Twentieth Century philosopher of ethics, puts the general consensus as follows: "ethics does not depend *logically* on facts about man and the world, empirical or nonempirical, scientific or theological." FRANKENA, *supra* note 88, at 84. John Finnis refers to the standard interpretation of Hume "as announcing the logical truth, widely emphasized since the latter part of the nineteenth century, that no set of non-moral (or, more generally, non-evaluative) premises can entail a moral (or evaluative) conclusion." FINNIS, NATURAL RIGHTS, *supra* note 17, at 37. Hans Kelsen puts the thesis thus: "Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vica versa." KELSEN, PURE THEORY, *supra* note 3, at 6. *But see*, PITKIN, *supra* note 16, at 219-40.

138. Saint Thomas Aquinas, *Concerning the Nature of Law*, *in* PHILOSOPHY OF LAW 12, 19 (Joel Feinberg and Hyman Gross eds., 4th ed. 1991).

139. Several defenders of natural law theory have made an effort to respond to Hume's is/ought dichotomy. One such effort was undertaken by Lon Fuller who:

> [I]nterpreted [the doctrine that an ought cannot be derived from an is]...to the effect that facts cannot tell lawyers, legislators, and judges what they ought to do.... [H]e flatly repudiated any such notion. The existence of purposes is factual, and from given purposes we may readily argue that we ought to have one rule rather than another.

By contrast, the defense of procedural natural law undertaken in this article does not rest on human nature, human purposes or human opportunities. And it does not derive an ought from an is. The argument begins with an empirically based premise as to how language is used to describe an institution rather than, as Aquinas, Finnis and Fuller would have it, how humans are or what their purposes or opportunities are. It asserts that we describe an institution called law as containing certain procedural features. If followed, these features protect us against some of the arbitrariness and irrationality of government power. And in our use of language we understand that the presence of these features give us some minimal moral protection against government. The reason why these procedural features of a legal institution are morally (as well as pragmatically) desirable is because they enable us to plan our lives with greater certainty. Thus, if we do what the government has indicated that it requires, we can survive and sometimes even prosper. Since the government's acting in accordance with legality fulfills a desired expectancy interest, it has a moral dimension.

This argument does not go from an is to an ought but rather stays purely on the level of is. In short, if a government provides for the features coming within our notion of "the rule of law," it provides us with some desired moral protection. That one believes government ought to provide us with this protection (an ought), while an implicit assumption underlying this article, is not needed and is not used as an explicit conclusion from a premise about states of affairs in the world (an is).

SUMMERS, *supra* note 37, at 70.

This seems to be fairly similar to the position taken by John Finnis in his defense of Aquinas and himself. Finnis puts it:

> For Aquinas...what is decisive, in discerning the content of the natural law, is one's understanding of the basic forms of (not-yet-moral) human well-being as desirable and potentially realizable ends or opportunities and thus as to-be-pursued and realized in one's action, action to which one is already beginning to direct oneself in this very act of practical understanding.... Aquinas would deplore... Hume's failure to see that reason is an 'active principle' because one is motivated according to one's *understanding* of the goodness and desirability of human opportunities, including the opportunity of extending intelligence and reasonableness into one's choices and actions.... Aquinas would reject the assumption...that the primary and self-evident principles of natural law are moral principles (in the modern sense of 'moral') or that they are initially grasped as principles concerned with self-evident relations of conformity or dis-conformity to human nature.

FINNIS, NATURAL RIGHTS, *supra* note 11, at 45, 47–48.

But even assuming that one understands what Fuller and Finnis are asserting (one ought to act to promote one's purposes or opportunities?) and is not troubled by the apparent jump from an is (one's purposes or opportunities) to an ought (what one ought to promote), this still does not explain why law ought to promote a person's purposes or opportunities. Whether or not what is being referred to is human nature or something else (say, human opportunities or in Fuller's case, human purposes), it is a logical fallacy to assert (as they seem to be doing) that law ought to comply. Suppose the totalitarian leader were to assert that "I seek to protect myself rather than my subject's purposes and opportunities and my legal system, which deliberately keeps my subjects enslaved, is designed for this purpose." The assertions of Fuller and Finnis are not responsive to the leader's point.

Another response of Fuller is that "law" itself is purposive, that is, it exists in order to fulfill human purposes. But this does not seem self evidently so. To the contrary, one assumes that the dictator could argue that the purpose of his legal system was to promote his own ends even if it meant thwarting those of all of his subjects.

An analogy might be helpful. Suppose one is asked whether one has been a parent. The question is ambiguous. Does it mean, "did you become a parent"[140] or does it mean, "have you raised and nurtured a child?"[141] If the question involves the latter, then a positive response accurately describing what one has done also involves the normative element of what we believe ought to be done, namely, raising and nurturing the child. But it is not going from an is to an ought, say, that being a parent ought to involve nurturing. Rather, as we use the term, "parenting," it descriptively does involve nurturing. Nurturing is included in the very notion of "parenting" just as procedure is included in the very notion of "legality".[142]

VII. POSITIVIST ACCEPTANCE OF PROCEDURAL NATURAL LAW DISSOLVES SOME OF THE CONFLICT BETWEEN POSITIVISM AND NATURAL LAW.

It was the positivists, Jeremy Bentham and John Austin, who laid down the gauntlet to natural law theory. Bentham, proffering utilitarianism, rejected natural law theory as "nothing but a phrase."[143] Austin put it, "as opposed to [natural law]...every law properly so called is a positive law.... The *science of jurisprudence*...is concerned with positive laws, or with laws strictly so-called, as considered without regard to their goodness or badness."[144] "The existence of law is one thing its merit or demerit is another."[145] More recently, the positivist Hans Kelsen reiterated the same theme:

> The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not of specific legal order.... The theory attempts to answer the question what and how the law is, not how it ought to be.... It is called a pure theory of law because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law [,such as,]...psychology, sociology, ethics and political theory.[146]

Thus, according to the positivists, their task is to provide a complete descriptive analysis of the concept of "law" without referring to any necessary moral element.

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140. This would occur either by participating in giving birth or by adoption.

141. This analogy, like the discussion of "legality" in this article, has two alternative descriptive references, only one of which also contains a normative element. Here, "parenting" either refers to giving birth or involves nurturing. As to the concept "law," as indicated above, one version is simply whatever a regime does, while the other version includes certain procedural elements.

142. For those with a little knowledge of both German and Yiddish, admittedly a small subset of English speakers, another analogy might be helpful. If one refers to someone as a mensch, one might be using the German word "mensch," which in English is translated to mean man. Alternatively, one might be using the Yiddish word "mensch," which means responsible adult. If it is the Yiddish usage of the word, then the descriptive term "mensch" already contains a prescriptive element, that is, one is describing a male as having what is regarded as the positive characteristic of being a decent, responsible, morally upright adult. Under this usage, it would be unnecessary and useless to add, "then he ought to become a responsible adult!" This is because we bring to the descriptive *is* an understanding that it is desirable, that is, it contains the prescriptive *ought*.

143. LLOYD AND FREEMAN, JURISPRUDENCE, *supra* note 112, at 272.

144. *Id.* at 298–299.

145. *Id.* at 304.

146. KELSEN, PURE THEORY, *supra* note 3, at 1.

This article rejects this claim of the positivists. But in addition, the article also makes the claim that, at least to some extent, the positivists themselves, by providing their descriptive analyses, are setting forth a concept of legality which undoes their very claim. For the positivists, here specifically including Austin, Kelsen, Hart and Raz, by attempting to describe "law" develop a concept which is not coextensive with a regime's use of power. Although the descriptive analysis of each is not always in agreement with the descriptive analysis of the others, each of them provides an analysis which, to a greater or lesser extent, if followed, limits the ability of a regime to use its raw power on those living within its borders. This limitation on a government's arbitrariness and irrationality, as argued above, constitutes a moral element built into the concept "law," indeed, a necessary moral element inferentially contained within each positivist's descriptive analysis.

A. John Austin

A brief summary of some of the strands of the description of "law" set forth by each of the positivists mentioned, namely, Austin, Kelsen, Hart and Raz, will be provided. I begin with Austin. Austin's descriptive analysis of "law" is designated as having a universal quality, that is, as applying cross-culturally.[147] In addition, Austin's descriptive concept of "law" provides some limitations on the proper use of the concept. Austin states, for example, that a "law...may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[148] This statement implies several limits on a regime's use of power. First, that the law has some element of rationality or else the requirement that the rule be laid down by a being who is intelligent would seem to be an unnecessary addition to the description. And second, that law is concerned with conduct rather than status for otherwise there would be no need for a requirement that the law be laid down for the guidance of an intelligent being.[149] The assertion that law requires conduct is explicitly asserted elsewhere. "[A] law is a command which obliges a person or persons to a *course* of conduct."[150] Also, "[b]y every command, the party to whom it is directed is obliged to do or to forbear."[151]

Austin also distinguishes between laws and occasional commands.[152] "Now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule."[153] "If uttered by an absolute monarch, without deliberation or ceremony, it would scarcely be confounded with acts of legislation, and would

147. RAZ, LEGAL SYSTEM, *supra* note 5, at 25.
148. Austin, *Positivist Conception*, *supra* note 17, at 27.
149. These implications are strengthened by other assertions of Austin. One of these is that "where *intelligence* is not, or where it is too bounded to take the name of *reason*, and therefore is too bounded to conceive the purpose of a law, there is not the *will* which law can work on, or which duty can incite or restrain." *Id.* at 28. "[A] law is a command which obliges a person or persons to a *course* of conduct." *Id.* at 32.
Also, Joseph Raz summarizes this part of Austin's thesis as: "*A* desires some other persons to behave in a certain way." RAZ, LEGAL SYSTEM, *supra* note 5, at 11.
150. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, LECTURE I, 24 (1954) [hereinafter AUSTIN, PROVINCE OF JURISPRUDENCE].
151. *Id.* at 19.
152. Austin, *Positivist Conception*, *supra* note 17, at 31.
153. AUSTIN, PROVINCE OF JURISPRUDENCE, *supra* note 150, at 19.

be styled an arbitrary command."[154] Here Austin seems to be providing several descriptive limitations on "law". One of these is that a law exists through time and is not constantly changed as an arbitrary command might be. This would seem to rule out of the domain of "law" the Queen's commands to Alice in Wonderland. Also, the use of descriptive terminology which is the obverse of being arbitrary, such as, the reference to deliberation, would again associate "law" with rational thought. In addition, it could be argued that the notion of ceremony associated with law might suggest that "law" involves a public process or procedure. The view that Austin's understanding of the concept "law" involves publication so that those whom it governs can, in theory, attempt to comply with it is strengthened by his statement that "[a legal] command...is a signification of desire."[155] This understanding of Austin is also supported by his assertion that the term "command" (which is a necessary component of "law") includes "[an] expression or intimation of the wish by words or other signs.... The expression or intimation of the wish [or command is] presented *prominently* to my hearer."[156] All of these are descriptive elements in Austin's theory of law which, if followed by a sovereign, would constrain the sovereign in ways that its subjects would find morally desirable.[157]

To summarize Austin, he asserts that the concept "law" is limited in that it involves rationality, it involves publication so that its recipients can learn what it contains and attempt to comply with it, it involves rules that persist through time and do not constantly change and it commands conduct (the doing of something or its forbearance) rather status.

B. Hans Kelsen

Like John Austin, Hans Kelsen attempted to develop an understanding of the concept of "law" independent of any moral element. The very title of his classic work, *Pure Theory of Law*, indicates the seriousness of his effort to cleanse all extraneous material, including a discussion of morality, from his analysis of law.[158] But if one applies the basis of analysis adopted in this article, namely, determine whether his descriptive definition of "law" limits what a regime can do under its name, then Kelsen too provides some limitation on this concept's appropriate use. Thus, if a regime complies with Kelsen's analysis of

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154. *Id.* at 21. Austin might not mean for this criterion to be absolutely necessary, for as he puts it: "As issued by a sovereign legislature, and as wearing the form of a law, the order which I have now imagined would probably be *called* a law. And hence the difficulty of drawing a distinct boundary between laws and occasional commands." *Id.* at 20.

155. RAZ, LEGAL SYSTEM, *supra* note 5, at 11. Supporting this understanding, Raz summarizes Austin's thought as including the two following propositions: "[*A*] has expressed [his] desire [that some other persons behave in a certain way]...and...[the law] expresses the content of his desire...." *Id.* Again, to the same point, Raz summarizes Austin as asserting that "a command is law only if it is *addressed to* people who are likely to suffer the prescribed sanction...." *Id.* at 15 (emphasis added). Also, "[o]beying a command involves knowing it...." *Id.* at 15.

156. AUSTIN, PROVINCE OF JURISPRUDENCE, *supra* note 150, at 17-18.

157. Austin does add, however, that "[s]upreme power limited by positive law is a flat contradiction in terms." LLOYD AND FREEMAN, JURISPRUDENCE, *supra* note 112, at 308. But this does not mean that "law" is whatever the sovereign decides it is, only that a sovereign need not act in accordance with law.

158. "It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements [such as].... psychology, sociology, ethics, and political theory." KELSEN, PURE THEORY, *supra* note 3, at 1.

law, people who are governed by the regime are protected against some of the regime's arbitrariness and irrationality. One example is his assertion that the legal order is a normative order commanding, permitting, forbidding or authorizing human behavior.[159] If this defining characteristic were strictly applied, which it is not, it would determine that government edicts dealing with a person's status rather than her behavior were not laws.[160]

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159. *Id.* at 4, 5, 10. Also, "[i]t is a legal norm only if it purports to regulate human behavior...." RAZ, LEGAL SYSTEM, *supra* note 5, at 113, (quoting KELSEN, LAW AND STATE, *supra* note 3, at 123). Raz elsewhere puts Kelsen's theory "of the nature of norms" as "divided into two groups." The first group explains the nature of norms as *guiding and justifying behavior*. The second group is concerned with the nature of norms as *justified standards* of behavior. RAZ, *supra* note 5, at 122.

160. While the overall impression created by Kelsen's writings is that he believes that a legal entity can do whatever it wants to someone based on her status, including killing her, at several points he does recognize the status/behavior distinction and indicates that a legal entity can sanction someone based only on her behavior, not her status. For example, "[f]or the content of legal norms is not individuals, but their behavior; it is not human beings, but a certain human behavior...." KELSEN, PURE THEORY, *supra* note 3, at 165. Elsewhere, he also states:

> A legal order—like any normative social order—can command only specific acts or omissions of acts; therefore, no legal order can limit the freedom of an individual with respect to the totality of his external and internal behavior, that is, his acting, wishing, thinking or feeling.... [A] minimum of freedom, that is, a sphere of human existence not interfered by command or prohibition, always remains reserved.

Id. at 43. Another indication that his notion of "law" regulates behavior is that he applies the concept of imputation, a normative relationship of behavior deserving (in the sense of a legal ought) a reward or punishment. *Id.* at 89–99.

But in various ways Kelsen does not strictly apply this defining characteristic. For example, he states that "[c]ollective liability is a characteristic element of primitive legal orders...." *Id.* at 122. Nonetheless, it appears from his analysis that when collective liability is applied, it is applied because of the behavior of someone else who the legal order determines is related to the person liable.

At another point, he states:

> The condition for the deprivation of liberty is not a definite behavior of the individual, but the suspicion of such a behavior.... The legal order of totalitarian states authorizes their governments to confine in concentration camps persons whose opinions, religion, or race they do not like; to force them to perform any kind of labor; even to kill them. Such measures may morally be...condemned; but they cannot be considered as taking place outside the legal order of these states.

Id. at 40. He attempts to reconcile this view with his requirement that law deals with behavior by asserting that here the law "is a reaction against a delict [illegality] that has not even been committed yet, but is expected in the future as a possibility...a socially undesired behavior of which...in the opinion of the legal authority [the undesired persons] are considered capable." *Id.* at 41.

Seemingly, statements such as these would suggest that Kelsen believes that, while a person could be committed to an institution because of the state's fear of what she would do in the future or could be found liable for what a relative had done, a person could not be legally enslaved simply because of who she was rather than what was feared she would do or to whom she was related. Also, if a person was killed because of her status, contrary to Kelsen's assertion above, the "law" would have eliminated all of the dead person's "wishing, thinking and feeling." *Id.* at 43. Thus, killing someone solely based on her status would seemingly be a violation of Kelsen's concept of "law."

So far, the summary of Kelsen's views seems consistent with the assertion that he would deny the notion of legality to a regime which kills people based purely on their status. The obvious example is Nazi Germany where Jews, Gypsies, homosexuals and retarded were killed. But while Kelsen's analysis would accommodate some of what the Nazis did to the Jews and the others under the notion of "legality," based, say on the fear of what they would do in the future, it would not be able to accommodate all the killing the Nazis engaged in.

But Kelsen goes further in his attempt to accommodate the Nazi regime and other such regimes within his understanding of legality. He does so by asserting that the law defines who a

person is. If the law defines someone as not a person, then that non-person can be enslaved (or killed):

> [E]ven the so-called physical person is an artificial construction of jurisprudence—that even the so-called physical person is actually only a "juristic" person.
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> ....
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> .... Slaves are not "persons," they have no legal personality.
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> ....
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> .... The so-called physical person, then, is not a human being, but the personified unity of the legal norms that obligate or authorize one and the same human being. It is not a natural reality but a legal construction, created by the science of law—an auxiliary concept in the presentation of legally relevant facts. In this sense a physical person is a juristic person.

Id. at 172, 174.

So, by virtue of his determination that the state can legally classify who is a person and who is not, he can reject the thesis asserted in the text that legality involves behavior rather than status. Another thesis that he seems to reject is the insistence that the concept of "state power" is broader than "legality": "the dualism of state and law is abolished...." for "every state is a state governed by law...." *Id.* at 318, 313. Thus, applying Kelsen's terminology, one is precluded from asserting that while the state is killing the person, it is not the state's legal system which is doing so. "The question whether an individual belongs to a state [and, as such, is subject to the state's laws] is...a legal question" determined by the state's legal system. *Id.* at 288. If the person belongs to the state, the state's legal system can sanction her behavior but presumably not solely her status. But if the state's legal system decides that the person does not belong to the state, she then ceases to be a person and the state's killing her because of her status cannot be described as the state's legal system killing a person. "A relatively centralized, autocratic coercive order which, if its flexibility is unlimited, offers no legal security is a legal order too...." *Id.* at 319.

Assuming that this is an accurate summary of Kelsen's views, one's agreement with it depends on one's acceptance of two important points: (1) that who is and who is not a person is a juristic concept determined solely by the state; and (2) that regardless of whatever defining characteristics are provided as to what constitutes "law", as far as the "person" is concerned, a state can safely ignore all of these characteristics and still come within the concept "law".

For me, to restate these points is to indicate their inadequacy. Indeed, Kelsen seems to be pulling a sleight of hand in order to avoid the problems created by his position. This is because earlier in the text he indicated that he is engaging in an ordinary language analysis of "law."

> To arrive at a definition of law, it is convenient to start from the usage of language.... Our task will be to examine whether the social phenomena described by [the English "law", and the German, French and Italian equivalent] have common characteristics by which they can be distinguished from similar phenomena, and whether these characteristics are significant enough to serve as elements for a concept of social-scientific cognition. The result of such an investigation could conceivably be that the word "law" and its equivalents in other languages designates so many different objects that they cannot be comprehended in one concept. However, this is not so. Because, when we compare the objects that have been designated by the word "law" by different peoples at different times, we see that all these objects turn out to be *orders of human behavior.*

Id. at 30–31.

Thus, Kelsen seems to use an ordinary language analysis to assert that the concept "law" determines who is a person, that is, that personhood is a juristic and not an ordinary language or biologic concept. (This technique has its analogue in the United States Supreme Court's use of the term "person" as a legal concept so as to exclude a fetus from constitutional protection in Roe v. Wade, 410 U.S. 113 (1973).) But regardless of who treats "personhood" as a legal concept, it retains an ordinary language usage which is not manipulable by a government to exclude whom it will.

The other feature of Kelsen's analysis, namely, that despite his extensive definitional description of "legality," whatever the state chooses to do (regardless of its conformity with his description), comes within the notion of "legality." From this he concludes that the dualism between law and the state is abolished. But if state power is equivalent to state legality, then on what basis does he write a 356 page book purporting to provide a descriptive analysis solely devoted to explicating the concept "law?" He could have stated in a page or less that "law" is whatever a state apparatus in control of a people within a geographic territory says it is. One

Also, this normative order gains its validity by having been authorized by a higher norm. The higher norm in turn is authorized by a higher norm which extends upward through a hierarchy of valid norms.[161] At the apex of this hierarchy lies the basic norm, which is presupposed rather than authorized by a higher norm.[162] Thus, in the United States it is the Constitution which constitutes the basic norm, for the American people presuppose that they ought to follow as that document directs. In Nazi Germany the orders of Hitler constituted the basic norm, for it was his wishes that the German people presupposed they ought to follow. But even though this analysis by Kelsen provides people with very little protection against government, as indicated by the fact that he seeks to accommodate the Nazi regime within it, it does provide the outline of a procedural requirement for law.[163] The distinction between the gangster's order to give him money accompanied by the threatened use of a gun and a similar order of a tax collector lies in the fact that "the official's act is authorized by a tax law, whereas the gangster's act is not based on such an authorizing norm."[164] Also, the tax law, unlike the gangster's command, gets its

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guesses that the reason why he writes a book describing the nature of law rather than a page monograph is that he does not believe that "law" is equivalent to state power. But if he does not believe it, then why does he not assert it more clearly? Perhaps the reason is because he is acutely conscious of the natural law position that he is attempting to leave out of his analysis and is determined not to provide any support for that position. *See id.* at 319.

One further difficulty with an attempt to comply with Kelsen's terminology is that there is no accurate way to describe what the state's legal apparatus is doing. For example, it would not be a sufficiently accurate description to assert that it was killing a thing, or killing a non-person, or killing organic matter or disposing of a former person. By virtue of Kelsen's effort to couple the state with law and his effort to treat the state as determining who persons are, he violates his own effort to use language in its ordinary sense, and makes it difficult to understand descriptively what is going on when the totalitarian state kills human beings simply because it does not like them. In attempting to escape his self-created dilemma (that is, defining "law" as dealing with human behavior rather than status but regarding a government acting in accordance with the rule of law as not constrained by this fact), he seems to create at least as many problems as he solves.

161. "[L]aw...is not a single norm, but a system of norms; and a particular norm may be regarded as a legal norm only as a part of such a system." *Id.* at 47. "The norm which represents the reason for the validity of another norm is called...the 'higher' norm." *Id.* at 194. "[T]he structure of the legal order is a hierarchy of higher and lower norms, whereby the higher norm determines the creation of the lower one...." *Id.* at 206.

> To the question, why the individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. The statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes.

RAZ, LEGAL SYSTEM, *supra* note 5, at 97 (quoting KELSEN, LAW AND STATE, *supra* note 3, at 115).

162. [The] presupposed highest norm is referred to...as [the] basic norm. All norms whose validity can be traced back to one and the same basic norm constitute a system of norms....The basic norm is the common source for the validity of all norms that belong to the same order—it is their common reason of validity.

KELSEN, PURE THEORY, *supra* note 3 at 195.

It is this presupposed basic norm which authorizes the procedure by which legal content is developed: "the constitution ordinarily does not predetermine the content of laws, but only the procedure of legislation." *Id.* at 88–89.

163. The importance of procedure in Kelsen's schema as limiting what a regime can legally do is underlined by his statement, "the solution attempted here is merely the scientifically exact formulation of the old truism that right cannot exist without might and yet is not identical with might. Right (the law), according to the theory here developed, is a certain order (or organization) of might." *Id.* at 214.

authority from the basic (constitutional) norm which is presupposed. When the gangster issues his command there is no presupposed basic norm because the gangster's order does not have the lasting effectiveness which the tax law does. Unlike the tax law issued in accordance with the appropriate procedure,[165] once the gun is removed there is no longer any reason to obey the gun person's command.[166] In short, if there is no appropriate procedure, there is no law.[167] "'[T]he basic norm, in a certain sense, means the transformation of power into law.'"[168]

Kelsen further accepts a version of the logical law of the excluded middle: "The two norms: '*a* ought to be' and '*a* ought not to be' exclude each other insofar as they cannot be obeyed or applied by the same individual at the same time; only one can be valid."[169] "Two legal norms are contradictory and can therefore not both be valid at the same time, if the two rules of law that describe them are contradictory...."[170] In so far as the law of the excluded middle is relevant, Kelsen's concept of "law" requires doing the possible.

Kelsen also notes that "every community must have organs...because a community can only function...through individuals"[171] called to perform the

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164. *Id.* at 8. Also, under the principle of legitimacy "[t]he norms of a legal order are valid until their validity is terminated according to the rules of this legal order." *Id.* at 209. "[T]he constitution prescribes for its abolition or amendment a procedure different from and more difficult than the procedure provided for ordinary legislation...." *Id.* at 224. Two exceptions to the procedurally provided changes in either the constitution or ordinary legislation are: (1) revolution; and (2) the law's losing its validity by never being applied or obeyed. *See id.* at 208–214.

165. "A norm belongs to an order founded on...a basic norm, because it was created in a fashion determined by the basic norm." *Id.* at 197. "A legal norm is not valid because it has a certain content...but because it is created in a certain way—ultimately in a way determined by a presupposed basic norm...." *Id.* at 198. "The basic norm is the presupposed starting point of a procedure: the procedure of positive law creation." *Id.* at 199.

166. KELSEN, PURE THEORY, *supra* note 3 at 47–48.

167. As Kelsen puts it: "The basic norm delegates the first constitution to prescribe the procedure by which the norms stipulating coercive acts are to be created. To be interpreted objectively as a legal norm, a norm must be the subjective meaning of an act performed in this procedure...." *Id.* at 50.

Also, "'[i]t is the task of the science of law to represent the law of a community, i.e. the material produced by the legal authority in the law-making procedure, in the form of statements' of a certain structure." RAZ, LEGAL SYSTEM, *supra* note 5, at 72 (quoting KELSEN, LAW AND STATE, *supra* note 3, at 45).

Raz summarizes Kelsen's procedural hierarchy as follows:

> The existence of every positive norm presupposes the existence of another norm authorizing its creation. Kelsen thinks that an infinite regress is avoided, and can only be avoided, by assuming the existence of a basic norm in each normative order which is not created at all, for it is a necessary norm.

Id. at 130.

168. RAZ, LEGAL SYSTEM, *supra* note 5, at 134 (quoting KELSEN, LAW AND STATE, *supra* note 3, at 437). Raz explicates this point by asserting that for Kelsen "the only difference between laws created by certain acts of will and orders is in the relatively prolonged existence and the systematic interconnections of laws." *Id.*

169. KELSON, PURE THEORY, *supra* note 3, at 25.

170. *Id.* at 74. "[A] legal order may be described in rules of law that do not contradict each other." *Id.* 205. "'[T]he principle of non-contradiction must be posited in the idea of law, since without it the notion of legality would be destroyed.'" RAZ, LEGAL SYSTEM, *supra* note 5, at 78 (quoting KELSEN, LAW AND STATE, *supra* note 3, at 406).

171. KELSON, PURE THEORY, *supra* note 3, at 153.

particular function.[172] This leads to law courts.[173] One commentator has summarized Kelsen's view as, "Laws are norms addressed to courts."[174] Kelsen also explicates the decision making process of these law courts.[175] Although he allows for self-help as coming within the notion of a legal order, there is an evolution in the modern state toward an independent judiciary: "[c]ollective security...exists when at least the question of whether in a concrete situation the law was violated and of who is responsible for it, is not answered by the parties involved, but by a special organ,[176] an independent court...[where] a sanction, can be objectively decided."[177] "The theft has to be ascertained by a court authorized by the legal order in a procedure determined by the norms of the legal order; the court has to pronounce a punishment, determined by statute or custom...."[178] To the extent that a court in a particular case acts in accordance with the procedures creating it and determining what laws it is to apply, the court does not have total discretion to render its decision.[179]

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172. *See id.* at 155.

173. "The constitutions of modern states institute special legislative organs authorized to create the general norms to be applied by the courts and administrative organs." *Id.* at 224.

174. RAZ, AUTHORITY OF LAW, *supra* note 7, at 44, n.5.

175. There is also a need to have an organ authorized to determine whether the basic law (or constitution) was being observed in a concrete case:

> [T]he constitution has to authorize one specific legal organ to decide this question.... If the constitution contains no provision concerning the question who is authorized to examine the constitutionality of statutes, then the organs competent to apply statutes, that is, especially, the courts, have the power to perform this examination.

KELSEN, PURE THEORY, *supra* note 3, at 271-72.

176. *Id.* at 37.

> These law-applying organs have to be designated by the legal order, that is: it must be determined under which conditions a certain individual functions as a judge or administrative organ. Besides, the procedure has to be determined in which his function — the application of general legal norms — is to be exercised.... [T]he general norms to be applied by judicial or administrative organs have a double function: (1) determination of these organs and of the procedure to be observed by them; (2) determination of the content of the individual norms to be created in the judicial or administrative procedure.

Id. at 230.

177. *Id.* at 37.

178. *Id.* at 56.

179. "The legal order may authorize the organ to determine the procedure at his own discretion; but the organ and the procedure must be determined — directly or indirectly — by the legal order so that the general norm can be applied to the concrete case." *Id.* at 239.

> If an organ, whose nomination is determined by a general legal norm, has ascertained, in a procedure determined by a general legal norm, that facts are present to which a general legal norm attaches a certain sanction, then this organ ought to order a sanction determined in the earlier-mentioned norm, in a procedure determined by a general legal norm.

Id. at 231.

"The court has to answer the *quaestio juris* as well as the *quaestio facti*. After these two ascertainments have been made, the court has to order *in concreto* the sanctions prescribed by the general norm *in abstracto*." *Id.* at 237.

"The question of the legality of a judicial decision or the constitutionality of a statute, generally formulated, is the question whether an act that claims to be creating a legal norm conforms to the higher norm which regulates its creation or content." *Id.* at 276. "If... a general norm is not already created by legislation or custom, the organ must proceed in the same way as a legislator who is guided in formulating the general norms by a certain ideal of justice." *Id.* at 253.

> [T]he question why a certain decision is just is provoked by the need to justify the decision, to give a reason for the validity of the individual norm established by it.

In summary, Kelsen, who seeks to rigidly separate law from morality, describes the concept of law as containing various elements which also fit within procedural natural law: in the usual context law deals almost exclusively with behavior rather than status; except for the basic norm each law is authorized through a given procedure, that is, by a higher norm, rather than arbitrarily created ad hoc; and whether there has been a violation of the law is determined by an independent court where a sanction can be determined according to applicable norms.

C. H.L.A. Hart

Unlike Hans Kelsen, who seeks to completely separate law from other disciplines including ethics, the positivist H.L.A. Hart recognizes that there are some connections between law and ethics. Nonetheless, he denies that these are very helpful in developing a natural law position.[180] Rather, he devotes himself to developing a purely descriptive analysis of the concept "law." Still, even within this purely descriptive analysis one can find aspects of "law" which would give a person interacting with a government applying the concept some protection against possible government arbitrariness and irrationality. In short, even apart from Hart's own explicit version of natural procedural justice, which he finds inadequate for the development of a sufficient procedural natural law concept, there are elements in his theory which limit what a regime in compliance with it can do to those persons living within its control.

One of these features is that law regulates behavior. As Hart puts it, "the law of any modern country regulates the conduct of populations inhabiting territories with fairly well-defined geographical limits."[181]

Hart also accepts the notion of procedural requirements, beginning with the concept that in the modern legal state "[t]he rules are *constitutive* of the sovereign."[182] He divides legal rules into two types, which he calls primary and secondary.[183] It is the structure resulting from the combination of primary and

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> And such justification or foundation of the validity is only possible by showing that the individual norm conforms with a higher general norm presupposed to be just. The norm constituting the value of justice must, according to its nature, have a general character.

Id. at 253.

"To say that a judicial decision or an administrative decision is unlawful can only mean that the procedure in which the individual norm was created does not conform to the general norm determining this content." *Id.* at 268.

180. Hart recognizes that "law" contains both a substantive and a procedural element that could be used by someone making a natural law argument. The substantive natural law argument rests on the contingent fact that humans are vulnerable to attack and, therefore, need protection against murder and other forms of violence, theft, and deception. At least in primitive societies, "rules must contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other." HART, CONCEPT OF LAW, *supra* note 3, at 89. But he denies that what he calls this natural necessity leads to a very extensive overlap between legal rules and moral standards.

The procedural natural law argument (or what he calls natural procedural justice) consists of principles of objectivity and impartiality in the administration of the law (such as, treating like cases alike), but does not require justice in the law itself. *See* Hart, *Law and Morals*, *supra* note 4, at 75-76.

181. HART, CONCEPT OF LAW, *supra* note 3, at 24.

182. *Id.* at 75.

183. *Id.* at 78-79.

secondary rules which constitute the heart of a legal system.[184] Primary rules "impose duties" and "concern actions involving physical movement or changes,"[185] whereas secondary rules are about primary rules[186] and "confer powers, public or private."[187] He articulates three kinds of secondary rules. One of these constitutes rules of recognition. A rule of recognition authoritatively disposes of doubts and uncertainties as to the applicable primary rule.[188] The second of these constitutes rules of change. A rule of change determines the procedure by which primary rules are to be changed and a person or body of persons who are empowered to introduce new primary rules.[189] The third of these constitutes rules of adjudication. A rule of adjudication both identifies who is to adjudicate a dispute as to whether a primary rule has been broken and the procedures to be followed in deciding the dispute.[190] Hart's notion of legal procedure also includes the equivalent of Kelsen's basic norm: "[law involves] currently accepted fundamental rules specifying a class or line of persons whose word is to constitute a standard of behavior for the society, i.e. who have the *right* to legislate."[191]

Hart also asserts that the rules of a legal system must, for the most part, be general and that they must communicate general standards of conduct:

> In any large group general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately. If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, ...nothing that we now recognize as law could exist.[192]

Here, Hart seems to be asserting that in a mature legal system (at least one of a certain size), the institution of law will contain certain elements. Among these are the following: Law is an instrument of social control; it is designed to control conduct (rather than status?); to be an effective instrument

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184. *Id.* at 95.

> The main theme of [Hart's] book is that so many of the distinctive operations of the law, and so many of the ideas which constitute the framework of legal thought, require for their elucidation reference to one or both [primary rules of obligation or secondary rules of recognition, change, and adjudication], that their union may be justly regarded as the "essence" of law, though they may not always be found together wherever the word "law" is correctly used.

Id. at 151.

185. *Id.* at 79.

186. *Id.* at 92.

187. *Id.* at 79.

188. *Id.* at 92. The use of unstated rules of recognition by courts and others in identifying particular rules of the system is characteristic of the internal point of view. "[T]hose who use [the rules] in this way thereby manifest their own acceptance of them as guiding rules...." *Id.* at 99. The internal point of view, characterized by the "*use* [of] the rules as standards for the appraisal of their own and others' behavior," is to be distinguished from the external point of view, characterized by the use of rules by those who record and predict the behavior of others but do not themselves accept the rules. *Id.* at 96, 99.

189. *Id.* at 93.

190. *Id.* at 94.

191. *Id.* at 61. What Hart calls the ultimate rule of recognition "can neither be valid nor invalid but is simply accepted as appropriate for use." *Id.* at 105.

192. *Id.* at 121.

of social control, the legal institution will have to communicate (publish) its rules so that the population it seeks to control can follow them.[193]

On the issue of whether treating similars similarly is an aspect of the concept "law," Hart distinguishes between law and the administration of law. He asserts that there is a moral element which he calls "justice in the administration of law" which consists in a legal system's treating similar cases similarly. But this element of morality brought into an analysis of the administration of law does not apply to the law itself. A legal system can treat persons dissimilarly whom rational outsiders would regard as similar. Thus, Hart accepts the assertion that a justly administered legal system could still be unjust. For example, a legal system that consistently discriminates against African-Americans is treating similars similarly in the administration of the law. Nevertheless, it could still be regarded as an unjust legal system.[194]

But even though Hart explicitly rejects one of the arguments presented in this article, namely, that the very concept of "law" embodies a moral element that similars be treated similarly in relevant respects (and not just in the administration of the law), he also undercuts his rejection of this thesis. One way in which he undercuts his thesis is his admission, though grudging, that the concept "law" can be used in our language in the very way that he rejects. He states:

> The connexion between this aspect of justice [namely, that only those marked out by the law as relevantly alike are to be treated similarly] and the very notion of proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice. This close connexion between justice in the administration of the law and the very notion of a rule has tempted some famous thinkers to identify justice with conformity to law. Yet plainly this is an error *unless "law" is given some specially wide meaning*; for such an account of justice leaves unexplained the fact that criticism in the name of justice is not confined to the administration of the law in particular cases, but the laws themselves are often criticized as just or unjust. [195]

What is clear from this passage is that Hart does not equate justice with treating similars similarly in the administration of the law, for the law itself could be unjust. But if the concept "law" is given a wide meaning, then it could be equated with justice. Though not altogether clear, what he might be asserting is that only if the government's rule treats as similar those whom we regard as genuinely similar do we call it law in the wide sense of the term. If the government rule is law in the wide sense, then it is also just. Under this view of what he is saying, for Hart the difference between himself and the procedural natural law theorist as to whether the very concept of "law" (as distinct from how it is being administered) includes the notion that relevant similars are to be treated similarly is how broad the term "law" is being used. Hart obviously

193. Hart indicates that the communication can occur through the legislation of general standards of conduct in advance of their application or through precedent. *Id.* at 121.

194. *Id.* at 156-159. At one point he states: "Indeed there is no absurdity in conceding that an unjust law forbidding the access of coloured persons to the parks has been justly administered, in that only persons genuinely guilty of breaking the law were punished under it and then only after a fair trial." *Id.* at 157.

195. *Id.* at 156-7 (emphasis added).

prefers to use a narrow version of this language: he applies the requirement that similars be treated similarly within the administration of the laws of an existing legal system and does not apply the requirement of treating similars similarly to an examining whether the laws of the system are themselves consistent with the ideal of the rule of law. But he admits that the broader version could be used and indeed implies that he understands this use. At this point his disagreement with the procedural natural law position can be reduced to the fact that there is a version of language dealing with the concept "law" which he understands but does not himself use.

Hart also undercuts his thesis by implying that it is possible to engage in cross-cultural judgments of a particular regime's notion of what constitutes treating similars similarly. He states, for example, that "if...the law discriminated by reference to such obvious irrelevancies as height, weight, or beauty it would be...ludicrous."[196] On what basis could he assert that a regime's distinctions based on such criteria as height, weight and beauty would be ludicrous if cross-cultural judgments were not possible?[197] He also states that both law and morality are "permeated by the conception that in [certain] fundamentals...human beings are entitled to be treated alike and that differences of treatment require more to justify them than just an appeal to the interests of others."[198]

Indeed, Hart seems to concede the central point when he states: "[i]ndeed so deeply embedded in modern man is the principle that *prima facie* human beings are entitled to be treated alike that almost universally where the laws do discriminate by reference to such matters as colour and race, lip service at least is still widely paid to this principle."[199] What he appears to be asserting here is

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196. *Id.* at 157-58.

197. In Hart's defense, he is asserting that the criterion is ludicrous, not that what we would regard as ludicrousness cannot be a relevant criterion within a particular legal system. But my assertion is that it makes sense to provide cross-cultural judgments as to whether a regimes "laws" are rational and non-arbitrary. By asserting that some such distinctions are ludicrous, Hart seems to be accepting this sort of cross-cultural critique; that is, ludicrousness seems inconsistent with rationality.

Another point worth noting (though a minor one) is that (on further reflection) probably neither Hart nor I would want to assert that a criterion such as height is always legally irrelevant. Thus, it does not seem irrelevant for a legal system to apply a height requirement for joining the police force.

198. *Id.* at 195-96.

199. *Id.* at 158. He makes a related point even more strongly when he states:

> No doubt the contention that a legal system must treat all human beings within its scope as entitled to certain basic protections and freedoms, is now generally accepted as a statement of an ideal of obvious relevance in the criticism of law. Even where practice departs from it, lip service to this ideal is usually forthcoming. It may even be the case that a morality which does not take this view of the right of all men to equal consideration, can be shown by philosophy to be involved in some inner contradiction, dogmatism, or irrationality. If so, the enlightened morality which recognizes these rights has special credentials as the true morality, and is not just one among many possible moralities.

Id. at 201.

> Elsewhere, Hart makes the point using the language of natural rights:
> In 'Are There Any Natural Rights?'... Hart asserted the existence of the *equal right of all men to be free.* For Hart, the equal right to freedom ranked as a *natural right,* in the sense that it was based directly in the bare capacity of the human agent for rational choice and action. In its character as a natural right, he insisted, the equal right to freedom stood as the final ground of justification for the

that there is a general agreement among educated people ("modern man") about what are relevant characteristics for distinguishing among human beings on the ground that they are relevantly dissimilar, and this agreement includes the understanding that race and color are irrelevant characteristics. This is really the same assertion as is made in this article, namely, that a dispassionate outside observer (that is, one not connected to the regime) can judge whether the regime is making relevant distinctions between those it favors based on race or some other criterion and those it does not.[200] The outsider's judgment that the regime is applying an irrelevant basis to distinguish persons reflects her idea of how a legal system operates when it is functioning appropriately because in such a case well educated people cross-culturally would make similar judgments about the practical logic of determining what constitutes relevant similarity.[201] Given that people, regardless of their culture, who are educated in science and logic, develop similar understandings of how to apply practical rationality to the question of what constitutes treating similars similarly, this would generate general cross-cultural agreement as to whether a regime has rationally applied this concept.[202] When educated people not beholden to a regime intelligently

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enforcement of the conventional rules of law and social morality which defined the particular distribution of individual rights and liberties in any given society.

COVELL, THE DEFENCE OF NATURAL LAW, *supra* note 2, at 25.

Hart goes on to point out that legal systems have flouted these "principles of justice." HART, CONCEPT OF LAW, *supra* note 3, at 201. What much of this language indicates is that Hart recognizes is that there might well be a basis for a cross-cultural (or even objectively valid) judgment that a regime is violating a cross-cultural legal ideal when it irrationally discriminates in its treatment of seemingly similar persons. If a regime asserts that some humans are not worthy of equal treatment, then outsiders can judge that the regime is not correctly applying the legal criterion of similar treatment.

200. Hart would reject this argument. He emphasizes that a regime which treats people differently on the basis of their race, etc., is still a legal regime: "[I]t is plain that... the law... need [not] extend [its] minimal protections and benefits to all within [its] scope," such as, to slaves. HART, CONCEPT OF LAW, *supra* note 3, at 196.

But there is nothing inconsistent in making Hart's assertion and also taking the position developed in this article. For the article recognizes that we use language in two different ways. We understand using the language of law both from a positivist prospective such as Hart's ("this is a legal system that does not treat relevant similars similarly") and from a procedural natural law prospective ("a regime that does not attempt to treat relevant similars similarly is not acting in accord with the concept 'law'"). The point here is that while Hart does develop his positivist perspective, he also includes language that recognizes the ability of a disinterested outsider to judge whether a regime is treating relevant similars similarly and, if not, to assert that the regime is not acting in accordance with the cross-cultural concept "law."

201. Hart responds that "it is certainly possible to conceive of a morality which" treated people differently based on characteristics such as race. *Id.* at 158. He then refers the reader to Aristotle and Plato.

But his assertion is undone for me by his seeming admission that, unlike Aristotle and Plato, "modern man" (that is, humans educated with an awareness of the relevant factors involved) can be expected to reject this conceived morality. Thus, for Hart, a moral code repellent though it may be to *us*, "might forbid Barbarians to assault Greeks but allow Greeks to assault Barbarians." *Id.* at 161. Hart's assertion that this moral code might (would?) be repellent to us seems to reflect the view that we (moderns), regardless of who we are or what culture we are part of, would share the same method of analyzing the issue.

202. The language of practical rationality used here might appear to be similar to that used by John Finnis in his NATURAL LAW AND NATURAL RIGHTS. See FINNIS, NATURAL RIGHTS, *supra* note 11, at 88-89, 100-33. In one important respect, the appearance of similarity seems well founded. In both instances of the use of the term 'practical rationality' there is involved a person's ability to think logically and clearly about issues that come to the person's consciousness. But the appearance of similarity is also misleading. Finnis' analysis concerns intelligently choosing one's own life style, whereas here the concern is with a person's ability to

engage in the process of determining whether a regime has treated those persons whom it might disfavor relevantly similar to those persons whom it favors, then these persons are also engaged in making both a moral judgment about this regime and a judgement about the regime's lack of adherence to the idea of the rule of law.

Other aspects of procedural natural law that Hart recognizes include a judiciary which is limited in its discretion to decide cases. Hart asserts, for example, that courts which are applying rules in deciding cases are not free to ignore what the rules state. He likens a system where courts are free to disregard applicable rules to a game of scorer's discretion.[203] By contrast, like the scorer in the usual game, the court's role is "to apply [the rule] as best he can."[204] This would not preclude a court's making a mistake, even if it were the court of last resort. In the latter case, the court's decision would be final, but not infallible.[205]

Hart also refers to the "judicial virtues" of "impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision."[206] Why is it a judicial virtue to be impartial, neutral, empathetic and able to use reasoned general principles? If a legal system is viewed as incorporating whatever arbitrary and irrational use of power a regime decides to engage in, then the judicial virtues in such a state seemingly would reflect a spineless compliance with the regime's demands. Impartiality, neutrality, empathy, and reasoned general principles would have nothing to do with the judicial role. The fact that Hart, who is not limiting his analysis to the concept of "law" in benign democratic states, asserts that these are judicial virtues suggests that he believes that these are paradigmatic

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engage in the lawyer-like task of reasoning through what constitutes relevantly similarities in humans.

203. *Id.* at 139.

204. HART, CONCEPT OF LAW, *supra* note 3, at 139.

205. *Id.* at 139-40.

Hart goes on to assert that law, like a game, has a core of settled meaning which the judge "is not free to depart from." *Id.* at 140. *But see* Fuller, *Reply to Hart*, *supra* note 47, at 661-669.

As Hart puts it, if a judge of last resort were to misapply the law, it "would be treated by a preponderant majority as a subject of serious criticism and as wrong, even though the result of the consequent decision in a particular case cannot, because of the rule as to the finality of decisions, be counteracted except by legislation." HART, CONCEPT OF LAW, *supra* note 3, at 142-43.

In addition, Hart states:

> [T]here... remains a distinction between a constitution which, after setting up a system of courts, provides that the law shall be whatever the supreme court thinks fit, and the... constitution of any modern State. 'The constitution (or law) is whatever the judges say it is', if interpreted as denying this distinction, is false. At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of the authority to make those decisions which cannot be challenged within the system.

Id. at 141-42, n.3.

206. HART, CONCEPT OF LAW, *supra* note 3, at 200.

characteristics of a legal system. He is not just discussing a more moral judiciary,[207] but a more lawlike judiciary as well.[208]

With one important exception,[209] Hart concedes the point. He indicates his acceptance of Fuller's inner morality of the law or what Hart calls "the principles of 'Natural Justice.'"[210] These include [1] intelligible [2] general rules [3] that control human behavior [4] which are publicly announced [5] and within the capacity of most to obey[211] and which are [6] impartially [7] judicially applied,[212] that is, are applied without reflecting "prejudice, interest, or caprice."[213] Further, the general rules must "in general...[8] not be retrospective, though exceptionally they may be."[214] Hart adds:

> Plainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality... . Again, if this is what the necessary connexion of law and morality means, we may accept it....
>
> However incautiously they may have formulated their general outlook, few legal theorists classed as positivists would have been concerned to deny the forms of connexion between law and morals discussed [here].[215]

Thus, Hart, acting on behalf of positivists generally and without obtaining their permission, seemingly concedes the point that there is a necessary connection between law and morality. Still, as far as one knows, he is the first positivist to do so. Further, his acceptance of the necessary connection between law and morality, has had very little impact on moving the discussion forward. This is because legal scholars continue to view the positivist and natural law positions, procedural as well as substantive, as largely inconsistent with each

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207. "Few would deny the importance of these elements, which may well be called 'moral'..." *Id.* at 200.

208. Hart asserts that "critics... have found that judicial law-making has often been blind to social values, 'automatic,' or inadequately reasoned." *Id.* at 201. But to assert that courts should, but often do not, apply these judicial virtues is to make a legal, as well as moral claim. The claim is that courts complying with these judicial virtues are acting more in accordance with the legal ideal than those that are not.

209. The exception mentioned in the text refers to Hart's belief that the procedural natural law position is "compatible with very great iniquity." *Id.* at 202. The reason for this view presumably is his belief that procedural natural law works toward treating similars similarly in the administration of the law but does not require that the law itself be just.

But this objection is partly met in this article by asserting that the neutral, outside observer is not governed by the regime's notion of who is similar to whom. The observer can and does ask, for example, whether the regime is distinguishing between persons based on what she considers relevant grounds, and whether the regime rationally justifies to her satisfaction the disparity in its treatment of those it favors as against those it does not. And rationality here cannot be equated simply with a means of a regime's keeping itself in power. Rather, it must also concern other ends rationally comprehensible to the outside observer. If the neutral observer cannot be persuaded of the rationality of the regime's distinctions between friends and others, then the regime is not perceived as treating similars similarly and is violating a principle of legality or procedural natural law. Under this analysis, the Nazi regime, for example, would have the burden of persuading a neutral, outside observer that its disparity in treating Nazis and Jews was rationally justified.

210. *Id.* at 202.

211. *Id.*

212. *Id.* at 126.

213. *Id.* at 202.

214. *Id.*

215. *Id.*

other.[216] It is also because Hart differentiates between applying procedural concepts within the administration of a single legal system, which he accepts, and uniformly applying these concepts to varying regimes, which he rejects. Thus, in his own view his version of procedural morality precludes it from having any cross-cultural scope. As one scholar put it: "[Hart] recognizes that no universal system of natural law or justice can be based upon the principle of impartiality, or that of treating like cases alike."[217]

In summary, here are some of the aspects of Hart's descriptive analysis of the concept of law that can be viewed as reflecting a procedural natural law perspective: law involves intelligible, publicly announced general rules; law regulates behavior within the capacity of most to obey; the judge's role is to apply the legal rule as best as she can using reason, impartiality and neutrality in doing so rather than to disregard the rule; and similars are to be treated similarly in the administration of the law without discriminating on the basis of obvious irrelevancies.

D. Joseph Raz

The fourth positivist to be discussed here, Joseph Raz, states that what he is doing is providing "a general study of legal systems" which "claims to be true of all legal systems."[218] Like Hart he also seems to acknowledge that he is testing what exists in a legal system against a theoretical model (concept) of what he would expect to find, that is, what ought to exist in a legal system regardless of culture:

> Th[e] requirement [that an individuated law not deviate too much from the ordinary concept of a law] is based...on the desire to make the theoretical concept of a law the starting point for the explanation of the common-sense concept of a law; the common-sense concept will be elucidated by an explanation of its deviations from the theoretical concept, which is in its turn justified as being the best (or a good) tool in the analysis of the law.[219]

Also, for Raz one of the "most general and important features of the law [is] that it is normative in that it serves, and is meant to serve as a guide for human behavior [rather than dealing with status]."[220] He puts this feature in various ways. "[Law provides] publicly ascertainable ways of guiding behavior"[221] "Law is universally regarded as a special social method of

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216. "Certainly one of the firmest tenets of the positivist jurists from Bentham and Austin onwards has been that positive law is quite distinct from and its validity in no way dependent upon morals." LLOYD AND FREEMAN, JURISPRUDENCE, *supra* note 112, at 61-62.

217. *Id.* at 135. (Hart also provides verbal support for the view that he does regard impartiality as a universal judicial principle. *Id.* at 136-37).

218. RAZ, LEGAL SYSTEM, *supra* note 5, at 1.

219. *Id.* at 142.

220. *Id.* at 3. Elsewhere, Raz states that: "[law] is a system for guiding behavior and for settling disputes..." RAZ, AUTHORITY OF LAW, *supra* note 7, at 121. And yet Raz allows for retroactive laws that perforce would not guide behavior: "I can... admit that retroactive laws are not (or not completely) norms and yet maintain that they are laws." RAZ, LEGAL SYSTEM, *supra* note 5, at 125 n.1. Still, this is not necessarily Raz's rejection of laws as governing behavior rather than status, for even retroactive "laws" can be confined to sanctioning behavior.

221. RAZ, AUTHORITY OF LAW, *supra* note 7, at 51. But, according to Raz, the publicly ascertainable aspect of law does not preclude secret laws providing they are not altogether secret, that is, they are publicly ascertainable by officials who are charged with their enforcement. *Id.* at 51 n.9.

regulating human behavior by guiding it in various ways and directions."[222] "Evaluating behavior according to standards set by legal norms is an essential part of the function of judges and other officials who are professionally concerned with treating people according to their behavior evaluated according to law."[223] "A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behavior through affecting the circumstances of their action. It thus presupposes that they are rational autonomous creatures."[224]

He also asserts that "the law must be capable of being obeyed."[225] This suggests that law must be promulgated in advance so that people can govern their lives in accordance with it: "It must be such that [the people] can find out what it is and act on it."[226] *"All laws should be prospective, open and clear."*[227] This precludes retroactivity (unless one can know in advance that a retroactive law will be enacted).[228] *"Laws should be relatively stable."*[229] *"The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules."*[230]

In addition, Raz allows for a distinction between a ruler's use of power and law. "Law," unlike the use of power, involves applying procedural formalities. In criticizing Austin he states:

> [I]t is usually the case even in states where sovereignty is in the hands of a single person, that laws are created only when the sovereign follows a certain accepted procedure of legislation. But according to Austin every expression of the sovereign's desire which is a command is law, so he does not allow for the fact that the sovereign can command in ways which differ from the accepted procedure, in which case his command is not law. When the sovereign is a body of persons, following the accepted procedure might be a defining characteristic of the sovereign body. When this happens the members of the sovereign body constitute a sovereign body and act as sovereign only when following the accepted procedure.[231]

As part of his procedural requirement, Raz stipulates that "the necessary internal relations existing in every legal system"[232] consists of a minimum content and minimum complexity together with the principles of individuation. Every proposed individuation principle can be tested by two requirements, the guiding requirements (mainly principles of selection) and the limiting

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222. RAZ, LEGAL SYSTEM, *supra* note 5, at 145.
223. *Id.* at 124.
224. RAZ, AUTHORITY OF LAW, *supra* note 7, at 222.
225. *Id.* at 213.
226. *Id.* at 214.
227. *Id.*
228. But Raz also hedges a bit on this view. *See supra* note 218 (quoting Raz as stating a retroactive law may not be a norm but still can be a law).
229. *Id.* at 214.
230. *Id.* at 215.
231. RAZ, AUTHORITY OF LAW, *supra* note 7, at 38. Elsewhere, Raz describes the procedure as follows: "The legal validity of a rule is established...by showing that it conforms to tests of validity laid down by some other rules of the system which can be called rules of recognition." *Id.* at 151-52. He also repeats Kelsen's statement that "Law regulates its own creation." Or as Raz puts it, using his own terminology, "every law has a source...[and] the validity of a law depends on its source." *Id.*, at 151-52.
232. *Id.* at 141.

requirements (mainly principles of exclusion).[233] Another aspect of legal procedure is what he calls the "law's [two] secondary social functions [which concern] the operation of the legal system itself."[234] The first of these regulates the law's own creation by instituting the organs and procedures for changing the law. The second of these regulates the operation of law-applying organs, such as, the courts, the police, the prison system and administrative agencies.

In addition, a legal system contains a structured relationship: "legal systems should be regarded as intricate webs of interconnected laws"[235] One feature of this structure is genetic: "[t]he fundamental relation of the genetic structure is the genetic relation, namely the relation between a law and another law authorizing its existence."[236] Thus, a legal system requires the application of laws in accordance with a procedure of authorization.[237]

In Raz's schema law has partial autonomy from the vicissitudes of the political system of which it is a part. "[Law] can and should be treated as an autonomous system for many purposes but ultimately its boundaries are dependent upon the nature and boundaries of the larger political system of which it is a part... [But] it is too easy to underestimate the importance of those autonomous considerations."[238] So, for Raz law is not altogether a mechanism available to the state's political elite to be used for its own aggrandizement, but rather occupies a quasi-independent status (semi-autonomy) within the government structure.

Further, every legal system must have courts to adjudicate disputes. "It is widely agreed...that a system of norms is not a legal system unless it sets up adjudicative institutions charged with regulating disputes arising out of the application of the norms of the system."[239] "A momentary legal system consists only of rules [and legal reasons][240] which a certain system of courts is bound to apply in accordance with [its] own customs and practices."[241] "[L]aw is a system of reasons recognized and enforced by authoritative law-applying institutions."[242] "Courts and tribunals have power to [to make an authoritative] determin[ation of] the rights and duties of individuals."[243] Judges are appointed "because of their supposed abilities, or because they deserve it, and not because

233. *Id.* at 141-42.
234. RAZ, AUTHORITY OF LAW, *supra* note 7, at 175.
235. *Id.* at 183.
236. *Id.* at 184.
237. Recent positivists, such as Kelsen, Hart and Raz, all provide for a basic law from which the other laws in the system obtain their ultimate authorization, but are themselves not authorized by any other laws. Kelsen calls this the basic norm. Hart refers to it as the ultimate rule of recognition. In Raz's terminology, it is called an original law. *Id.* at 188. Each of these positivists provide a procedural element to "law" by insisting on a proper method of law authorization.
237. *Id.* at 212.
239. RAZ, AUTHORITY OF LAW, *supra* note 7, at 43. Raz puts the same point using different words at several places in his writings. "[E]very legal system must regulate the existence and operations of some courts. RAZ, LEGAL SYSTEM, *supra* note 5, at 141. "[E]very legal system institutes law-applying organs [that is, courts] which recognize every law of the system." *Id.* at 191. (But Raz also qualifies this assertion by adding that there are borderline cases.) "[A] primary organ [court is] authorized to decide whether certain acts using force were a violation of a certain law... " *Id.* at 193.
240. RAZ, LEGAL SYSTEM, *supra* note 5, at 212.
241. *Id.* at 211.
242. *Id.* at 212.
243. RAZ, AUTHORITY OF LAW, *supra* note 7, at 108.

of their relations to the injured party or to the violator of the law." [244] *"The independence of the judiciary must be guaranteed."*[245] "Since the court's judgment establishes what is the law in the case before it, the litigants can be guided by law only if the judges apply the law correctly."[246] The court's function also includes providing open and fair hearings and deciding without bias. All of this suggests that for Raz legal disputes must be settled by independent judicial-like officials who have some patina of expertise and who make rational decisions according to rules, legal reasons, customs and practices.

In summary, here are some of the procedural natural law points enunciated by Raz: he has an idea of what a legal system ought to contain against which he measures the actual legal system; he views a legal system as a guide to behavior; law is distinguishable from power by virtue of its following certain accepted procedures; law is partially insulated from the vicissitudes of the political system of which it is a part; and disputes are adjudicated by independent judges applying rules and legal reasons.

VIII. RESPONDING TO RADICAL CRITICISM OF PROCEDURAL NATURAL LAW

This section provides a brief response to some of the questions that one would expect to be raised by deconstructionists[247] or other radical critics of a central thesis of this article to the effect that in one version of language use, there is a procedural element to the concept of "law". For the purpose of simplifying the analysis, an article by one radical deconstructionist critic, namely, Gary Peller's THE METAPHYSICS OF AMERICAN LAW[248] provides the basis for discussion.

Here are some of the points made in the Peller article. Language is indeterminate.[249] Language is always embedded in a socially determined context.[250] This socially determined context is itself determined by those

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244. RAZ, LEGAL SYSTEM, *supra* note 5, at 194.

245. RAZ, AUTHORITY OF LAW, *supra* note 7, at 216.

246. *Id.* at 217.

247. A deconstructionist approach would focus on the transcendental subject. The contention would be that no such pure source is available as a basis for representational activity. The source, instead, is always already differentiated by social practice and constructed by the representational practice itself.

Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1221 (1985) [hereinafter referred to as Peller, *Metaphysics*].

248. *Id.* Because of space constraints and, more importantly, a sense of its tangential relevance to the central thesis of this article, no effort is made here to provide more than a bare outline of some of the central points made in Peller's radical critique. An interested reader is invited to look at the Peller article.

249. "I will... argue that meaning is necessarily indeterminate." *Id.* at 1158.

250. "'Language,' as the form of communication, can never escape its own textuality. It is intertwined with the content of communication and contains its own substantive messages apart from that which it purports to represent." *Id.* at 1160.

"'Reality' is not carved up into categories that representational systems happen to match. Rather, 'reality' is constructed in the very process of description or representation." *Id.* at 1176.

> [T]he interpretive constructs of an ideology abstract from the thick texture of the world to provide a structure that determines which...aspects are seen. When particular representational categories for dividing up the world are reified and achieve a hegemony in a particular community, description is taken as 'fact' rather than "mere" opinion or ideology. In such a context, the social conventions for representing the world are viewed as flowing from the way the world really is.

elements within the political society who control the mechanisms of power.[251] The language that is used reinforces the dominance of the politically powerful.[252] There is no distinction between law and politics.[253] Thus, such terms as "legal procedure"[254] or "the rule of law"[255] can be used as a rhetorical

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> Their contingent and provisional status is suppressed. Fiction is presented as truth.

Id., at 1181.

"[I]t is impossible to translate exactly some concepts from one language to another." *Id.* at 1173, n. 34.

251. > [T]he search for...meaning leads back to contingent social practices rather than to objective "reality." These social practices embody contingent choices concerning how to organize the thick texture of the world in consciousness. "Knowledge" is not an adequation of consciousness to the world. What gets called "knowledge" is the produced effect of social power institutionalized in social representational conventions.

Id. at 1169-1170 (footnotes omitted).

"The social power that I am evoking in the explication of the metaphysics of discourse is external to the self and more diffuse than the formal power of the state." *Id.* at 1177.

Peller also quotes Barthes' assertion that "the exclusion of other meaning by the institution of structures of reference is a form of generalized and institutionalized violence." *Id.* at 1170, n. 26 (quoting Cohen, *Transcendedential Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 845 (1935).

252. "[Felix Cohen] was confident that 'dominant economic forces play a part in legal decisions, that judges usually reflect the attitudes of their own income class on social issues." *Id.* 1248.

"[T]his metaphysical infrastructure is not simply an aspect of intellectual discourse in liberal societies. It forms the infrastructure for reproductions of the status quo authority in everyday life as well." *Id.* 1274.

"[T]he discourse of reason and liberal authority...reflect collective motivations to reproduce existing forms of power and collective choices to side with institutionalized authority over social resistance." *Id.* at 1275.

253. "My aim is to demonstrate that legal reasoning is political and ideological." *Id.* at 1153.

"Legal thought differentiates itself from politics by suppressing the socially contingent metaphors upon which the legal representation of the social world depends." *Id.* at 1156.

"[The American legal realist, Felix Cohen], argued that all legal decisionmaking is political in that all decisionmaking requires moral and ethical judgments which are not dictated by any preexisting rule or case." *Id.* at 1230-1.

254. Despite the purported acceptance of the realist claim that law is political, something called legal reasoning continues to be used at judicial proceedings and taught in law schools. Legal reasoning is still perceived as a distinct way of thinking about (and being within) the social world. Boundaries segregate legal discourse from political, rhetoric, poetry, or late night conversations with friends. These boundaries are marked by signs at the borders of the discipline which announce what kinds of appeals will be taken as persuasive. *Id.* at 1152.

> [Henry Hart and Albert Sachs] contend that the processes for resolving disputes are separate from and "more fundamental" than disagreement about the content of social arrangements since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively.
>
> ....
>
> [I]mplicit in every such system of procedures is the central ideal of law — an idea which can be described as the *principle of institutional settlement*....
>
> ....
>
> In the process, the Hart and Sachs rhetoric implicitly delegitimates insubordination as it exalts subordination....
>
> ....
>
> This trace of the Hart and Sachs argument implicitly institutes a benign perspective on the status quo.

Id. at 1183-1185. (alteration in original) (citations omitted) (quoting H.M. HART & A. SACHS, THE LEGAL PROCESS (1958)).

devices to reinforce the dominance of the politically powerful, but otherwise have no value.[256] The effect of our understanding that "law" as an instrument of political power is to weaken the authority of law and the power of the political elites.[257]

Several points can be made in response to this radical attack against traditional legal concepts including the notion of legality, the rule of law and procedural natural law. One of these is to deal with the question of indeterminacy in language. A strong version, i. e., very radical understanding,

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255. "This deconstructive, debunking strand of realism seems inconsistent with any liberal notion of a rule of law distinct from politics, or indeed with any mode of rational thought distinct from ideology." *Id.* at 1223.

Seemingly subscribing to the view of Felix Cohen, Peller states: "Legal concepts...are supernatural entities which do not have a verifiable existence except to the eyes of faith.... Jurisprudence... is a special branch of the science of transcendental nonsense." *Id.* at 1226-7.

> Although the traditional concept of the rule of law requires that like cases be treated alike, in fact no two social events or cases are ever exactly alike. Every assertion that one case is dictated by a prior rule suppresses the fact that the treatment from case to case is based on rhetoric...

Id. at 1232. Again, Peller here seems to be both describing the view of Felix Cohen and subscribing to it.

"There could be no rational, as opposed to ideological, content to legal reasoning... [All legal] categories...were simply rhetorical; they were not determined by any objective reality." *Id.* at 1239.

"[The] claim to impersonal and impartial authority, whether made in the name of reason, knowledge, or law, is always false. It inevitably depends upon the repression of the socially created character of meaning in favor of a meaning imagined to be free from contingency and the mere conventionality of language." *Id.* at 1269-270.

256. The characterization [of the two experiences of being evicted and selling bonds,] as rational[ly coming under the single concept of property] as opposed to rhetorical, real as opposed to metaphoric, or legal as opposed to political, depends on a suppression of socially created and contingent metaphors upon which the connection rests. It is an act of social power to the extent it excludes as "merely" subjective, personal, or primitive all the ways that we experience the two events as different.

Id. at 1156.

> The [Critical Legal Studies] literature is united in rejecting the rule conception of society... . If rules cannot constrain and channel conduct, the rule of law must be a fiction. If rules are just instruments of manipulation, then liberal legal philosophy, by its stubborn insistence that legal rules protect us from the state and from one another, is responsible for helping to hide the manipulation of law by judges and other powerholders.

ALTMAN, CRITICAL LEGAL STUDIES, *supra* note 2, at 151-52.

257. From this perspective, critical realism contained the rhetoric for a broadly insurrectional movement.... Had this form of the realist struggle been pursued, it would have posed realism... against the metaphysics of legal authority itself.... The critical realist message...was that law could not be divorced from politics, nor reason from myth....

Peller, *Metaphysics*, *supra* note 247, at 1260-61.

"The social power exercised through the ideological grammar of social relations, constitutes a significant force. Moreover, it constitutes a threat to the liberal definition of freedom as the subject's independence from objective restraint." *Id.* at 1287.

> [T]he "problem" is not language... . Rather, the task is to face the inevitability of politics..., to recognize the extent to which we are inevitably thrown into social struggle as either reproducers or resisters of the reigning order and to face the prospect that we have no guarantees that any specific course is the correct one. We inevitably align with one group or another...

Id. at 1290.

"[T]he aim of Unger and his CLS colleagues is...to destroy the forces that currently block the potential of mass political mobilization to effect radical social transformation." ALTMAN, CRITICAL LEGAL STUDIES, *supra* note 2, at 172.

of this concept is to assert that no two humans ever understand each other. If this were so, it is difficult to understand how people would come to understand a language for there would be no successful way to communicate with another what one was expressing. Indeed, Peller himself agrees. "I am not arguing that we never communicate or understand each other when we speak or act. That would be absurd."[258]

But Peller does adhere to a weaker version of indeterminacy, namely, that language is always embedded in a political/social context and has no meaning outside of this context. As Peller puts it in a representative passage:

> In the terms of this deconstructive realism, when issues in legal argument were posed in terms of freedom, productivity, or regulation, they were not simply ideologically based; they were incoherent. The terms did not refer to anything except their relational play within the representational discourse. Thus neither political nor legal arguments could proceed by determining the absence or existence of one of these factors, because they did not "exist" independent from the social construction of their boundaries in the legal discourse.[259]

Under this version of the incoherence theory, any legal concept including that of procedural natural law seemingly has meaning only within a political/social context of a particular culture. Does not this version of the incoherence theory render the procedural natural law concept developed in this article useless as a cross-cultural verbal tool for attacking what governments do when they allegedly violate the procedural requirements?

How one deals with this question depends, in part, on how seriously one views the point being made. Linguistic terminology and concepts are often conventionally determined. As such, they would be subject to the patterns of analysis useful to the political/social power structure of a given community. But is this always the case? To believe this is to completely reject the view discussed above[260] that, just as regardless of culture humans have similar sense organs and physiological mechanisms for processing pain, etc., they also have brain/mind structures which enable them to process experiences and information in similar ways. For example, Peller asserts that "[t]here is nothing in the object tree that marks it off as an object separate from the woods and bushes surrounding it."[261] And "[f]rom this perspective, the language of social roles is projected to have positive content, just as the word 'tree' is projected to have positive content as its socially produced status is suppressed."[262] It seems more reasonable to me to assume that people, regardless of culture or the degree of their development, would be likely both to perceive trees as different from bushes and shrubs and to have terminology that reflects this difference. If humans did not adopt common ways of perceiving things how could one explain

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258. Peller, *Metaphysics*, *supra* note 247, 1170.

"Clearly, no one is challenging the idea that English speakers use words in similar ways." RAMBERG, PHILOSOPHY OF LANGUAGE, *supra* note 58, at 106.

259. *Id.* at 1238.

260. See the discussion of Kant and Chomsky. *See* note 128 (for discussion of Kant's views) *and see* notes 129 and 131 (for discussion of Chomsky's views). (But a word of caution is in order. It is important to recognize that a Kantian understanding of the commonality of how humans process experiences and information does not require a belief that what is being perceived is epistemologically an accurate rendition of what is out there if anything.)

261. Peller, *Metaphysics*, *supra* note 247, at 1165.

262. *Id.* at 1283.

the trans-cultural application of mathematical and scientific concepts? One suspects that basing language totally on the political/social context is barking up the wrong tree.

Further, the Peller assertion seemingly would deny that, regardless of culture, humans find certain concepts pragmatically useful, or would find them useful if made aware of them. An assumption of this article is that regardless of language, culture or government, people who do not belong to the power elites of their particular societies would find the terminology of procedural natural law a useful verbal tool by which to measure and gauge the regime's responsiveness to their need to plan their lives without being subject to certain forms of government irrationality and arbitrariness. The point made above is that even if the concept "the rule of law" is not indigenous to a particular culture, once they learn of it people within that culture would find it worthwhile concept to use.

It is only if one rejects both positions, namely, that humans possess similar mechanisms for processing experiences and information (the rationality basis for procedural natural law) and that a concept developed within one culture can have cross cultural usefulness (the pragmatic basis), that Peller's assertion seemingly has force. But even here Peller's position can be attacked. As Altman points out, his position is self-refuting. "...[T]he charge that the liberal rule of law is a theoretical impossibility makes no sense. For theoretical impossibilities can exist only when words have determinate meaning." [263] Also, to "suppose[] [as Peller does] that legal rules have no meaning at all when regarded in isolation from the body of legal rules and doctrines" leaves inexplicable "how a language...is learned or how communication occurs."[264]

Regardless of the weaknesses in Peller's view of indeterminacy, one can still take seriously his view that the concept of procedural natural law has no value other than to reinforce the status quo of the dominant political/social power structure.[265] Peller views the power struggle as inevitable and legal terminology (so far as it exists) as inevitably part of that struggle:

> [T]he "problem" is not language.... Rather, the task is to face the inevitability of politics in the fullest sense, to recognize the extent to which we are inevitably thrown into social struggle as either reproducers or resisters of the reigning order and to face the prospect that we have no guarantees that any specific course is the correct one. We inevitably align with one group or another; there is no place free from the play of social practice, where we could flee from the existential condition that we create our world on the basis of a prior context that we can never fully grasp.[266]

For Peller everything is political and there is no distinction between legal rationality and governmental arbitrariness.[267] Presumably, we side with the

263. ALTMAN, CRITICAL LEGAL STUDIES, *supra* note 2, at 93.

264. *Id.* at 96.

265. This view would require one to reject both the Kantian/Chomskyian approach that views central linguistic concepts as innate (the rationality basis) and the view that "the rule of law" approach has pragmatic cross-cultural value for subjects of various regimes (the pragmatic basis).

266. Peller, *Metaphysics*, *supra* note 247, at 1290.

267. But even Peller, however consistent he is, at several points seems unwilling to apply his radical conclusion in its most radical form. At one point, for example, he states, "I do not mean to deny the authenticity of the sensation that doing legal reasoning feels different from

status quo or those seeking to undermine and destroy it depending either on self-interest or some psychological preference. Some, probably including Peller, identify with the powerless, whereas others, presumably including anyone so benighted as to write an article defending procedural natural law, would identify with the ruling elite.

Taking Peller's argument seriously on its own terms, one has to defend the idea that legal process cannot be separated from politics broadly understood. The problem which I have with this approach is that legal process is something learned in law school whereas political theory is learned in political science departments or departments of philosophy. There is a separate discipline called legal procedure that is learned in law school that is not reducible to broader political values. This discipline can be applicable to states that adopt socialism or a strong social welfare system as well as *laissez-faire* capitalism.[268] While political values certainly play a role in every aspect of law including the procedural aspects discussed here, one can still separate out the legal processes for separate discussion.[269]

Assuming, however, that for the sake of discussion that Peller is right, one factor not so far mentioned mitigates the thrust of his assertion. From his perspective, he is attempting to make us aware that the legal terminology that we use reinforces the dominance of the power elite. But the justification for this article is just the opposite. Rather than using the terminology of the rule of law as a basis for maintaining a regime's power, its value is in providing the user with a verbal tool for undermining the status quo. It is used to attack what a government does as violating legality, not to reenforce government power. It is a verbal tool available to the underclass for promoting revolution.[270]

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writing poetry or participating in a riot." *Id.* at 1155. If legal concepts have no independent meaning, then why does it feel like they do? Elsewhere he states, "Of course, such a rule will seem absurd if the difference between the two cases is unimportant (e.g., in the names or heights of the two defendants)." *Id.* at 1231. On what basis can a difference be unimportant if there is no independent meaning to treating similar cases similarly.

268. [I]f interpreted in strictly *formal* terms, Fuller's principles of legal morality sufficed neither to confer a special normative status upon the individual rights to private property and economic choice which Hayek associated with the free market, nor to preclude the implementation by a government of legislative policies in matters of economic management and welfare provisions which gave concrete effect to the egalitarian rights central to the Rawlsian theory of distributive justice.

COVELL, THE DEFENCE OF NATURAL LAW, *supra* note 2, at 67.

269. A less radical understanding of the political nature of legal process would be easier to accept. The use of one scholar's effort to explain deconstructionist terminology, if applied to Peller's insistence that law and legal process always involve politics, might render it more explicable.

> To say that A and B form a nested opposition is not to say that A is identical with B, or that it is impossible to tell A and B apart in a particular context. Indeed, the concept of a nested opposition only makes sense if we assume that there are points of difference between A and B; otherwise we could not see these concepts as opposed. Therefore it is a misuse of deconstructive argument to claim that one can abolish all distinctions and demonstrate that all forms of intellectual endeavor lack coherence. For deconstructive argument itself rests upon the very possibility of those distinctions and those coherences.

J. M. Balkin, *Book Review: Nested Oppositions*, 99 YALE L. J. 1669, 1677 (1990).

270. Admittedly, if and when the revolution becomes successful and the new government then complies with the rule of law, the suggested legal terminology would then reenforce the status quo.

More importantly, one asks the radical critic of the rule of law, whether, given that she was raised in the Anglo-American legal culture but found herself in the clutches of a regime that she regarded as consistently acting arbitrarily and irrationally, she would refuse to use the rule of law concept as a verbal weapon to attack the regime? One suspects that she would agree with Mark Kelman who states:

> The contrast we typically learned to draw back in civics class is between a regime of impersonal rules and a regime of personal domination; a world of known duties and a world of surprise demands made by unreadable bureaucrats; formal equality against feudal status; formal equality and autonomy against Stalinist terror. At that level, the choice of the Rule of Law seems unexceptionable.[271]

The concept "the rule of law," as explicated here, does not carry us to perfect justice in general or in individual cases, but it is a useful verbal tool by which to judge and, if necessary, to attack what regimes do. Like the atheist who allegedly professes belief while being shot at in the foxhole, when needed the radical can benefit from using this tool even if, epistemologically, she does not believe it refers to something having cross-cultural value. If nothing else, it has rhetorical value. Referring to it as having rhetorical is not to denigrate it for it is not the language of sophistry designed to obfuscate the issue. For the person in extremis who uses the language of procedural natural law is using a concept both that she believes in and one she hopes will resonate with her hearers even if they belong to the bureaucracy of the oppressive regime.[272]

But if the new revolutionary government made up of members of the old underclass proved to be just as violative of the rule of law as the old government, then the new underclass (perhaps including members of the old ruling class) could assert that the rule of law had been violated.

The rule of law does not attempt to change human nature. If, as I believe, there is a human tendency for the strong to exploit and dominate the weak, economically and otherwise, the rule of law would not change the tendency. If there are lions, unless forced to do so they do not peaceably lie down with lambs. And assuming the existence of a capitalist state, there would be the economically and politically strong who would not be required by the rule of law to provide distributive justice to the weak. Even so, if the rule of law existed within a state, and sometimes it does exist within a state, it would limit the ability of the strong to exploit and oppress. This is all that is provided. But I suspect that almost everyone outside of the ruling class regards at preferable to its absence.

271. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 294 (1987).

272. Here are several observations suggesting that the rule of law does not always serve those in power. One observer points out the rhetorical value of use of legal terminology in British history.

> The law may be rhetoric, but it need not be empty rhetoric. [T]he rulers were, in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric; they played the games of power according to rules which suited them, but they could not break those rules or the whole game would be thrown away. And finally, so far from the ruled shrugging off this rhetoric as a hypocrisy, some part of it at least was taken over as part of the rhetoric of the plebeian crowd, of the 'free-born Englishman' with his inviolable privacy, his *habeas corpus*, his equality before the law. If the rhetoric was a mask, it was a mask which John Wilkes was to borrow, at the head of ten thousand masked supporters.... [T]here is a very large difference...between arbitrary extra-legal power and the rule of law. And not only were the rulers (indeed, the ruling class as a whole) inhibited by their own rules of law against the exercise of direct unmediated force (arbitrary imprisonment, the employment of troops against the crowd, torture, and those other conveniences of power with which we are all conversant), but they also believed enough in these rules, and in their accompanying ideological rhetoric, to

IX. CONCLUSION

This article attempts to fortify those who express their outrage at the atrocities committed by the leadership and trusted hench people of totalitarian, authoritarian and, on occasion, even democratic regimes. It seeks to provide these people with a verbal tool called "law" against which to judge the activates of these regimes. The suggestion here is that there is a there there in the concept of law. It is called legal procedure. Further, because this procedural element reduces a regime's potential for arbitrariness and irrationality, it provides some protection against the regime's possible excesses and enables people more easily to plan their lives without interference. From the perspective of those interacting with a regime which adheres to the concept of law, these procedural features of the concept constitute a morally desired dimension of the regime. Because the procedural element is part of the description of the concept of law itself rather than a prescriptive addition to the concept, there is no violation of the principle that an ought cannot be derived from an is (or that an is cannot be derived from an ought). In addition, this descriptive feature of the concept "law" is recognized not just by the exponents of procedural natural law, such as, Lon Fuller, but also (to some extent) implicitly by positivists who insist that law and morality are logically distinct concepts. This was demonstrated by an examination of some of the procedural elements embedded in the descriptive analyses of the law provided by J.L. Austin, Hans Kelsen, H.L.A. Hart and Joseph Raz. Finally, a radical deconstructionist critique proved not to be a barrier to the use of procedural natural law terminology as the basis for attacking regimes that violate it. Thus, as far as the concept of "law" is concerned, there is a there there.

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allow, in certain limited areas, the law itself to be a genuine forum within which certain kinds of class conflict were fought out.

E. P. Thompson, WHIGS AND HUNTERS, 263-5 (1975) (describing 18th Century British law).

Michael Foucault provides a cross-cultural observation along the same lines as Thompson:

> It will be said no doubt that law (*droit*) in Western societies has always served as a mask for power. This explanation does not seem wholly adequate. Law was an effective instrument for the constitution of monarchical forms of power in Europe, and political thought was ordered for centuries around the problem of Sovereignty and its rights. Moreover, law, particularly in the eighteenth century, was a weapon of the struggle against the same monarchical power, which had initially made use of it to impose itself.

MICHAEL FOUCAULT, POWER/KNOWLEDGE 140-1 (edited and translated by Colin Gordon, 1972).